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and Immigration
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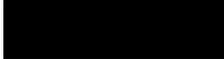
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FILE:



Office: TEXAS SERVICE CENTER

Date:

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IN RE:

Petitioner:



Beneficiary:

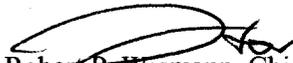
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was incorporated in the State of California in April 2002 and seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), as a multinational executive or manager. The director denied the petition based on three independent grounds of ineligibility: 1) the petitioner failed to establish that it had been doing business in the United States for one year prior to filing the petition as required by 8 C.F.R. § 204.5(j)(3)(i)(D); 2) the petitioner failed to establish that the beneficiary's foreign employer was doing business as of the date the Form I-140 was filed and continues to do business; and 3) the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity.

On appeal, counsel submits a brief disputing the director's findings.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The first issue in this proceeding is whether the petitioner had been doing business for at least one year prior to the date the instant Form I-140 was filed.

The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

The record shows that the petitioner's completed Form I-140 was received by Citizenship and Immigration Services (CIS) on February 17, 2006. Therefore, pursuant to the regulatory requirement specified in 8 C.F.R. § 204.5(j)(3)(i)(D), the petitioner must establish that it has been engaged in the "the regular, systematic, and continuous" course of business since February 17, 2005. 8 C.F.R. § 204.5(j)(2). The petitioner's supporting documents, which were submitted along with the most recently filed Form I-140, included various tax documents for 2003 and 2004, various bank deposit receipts dated 2004 and earlier, random purchase invoices from 2002, and utility bills and payroll documents for various months during the time period at issue.

As implied by the director's subsequent issuance of a request for additional evidence (RFE) dated June 29, 2006, the director deemed the submitted documentation insufficient for the purpose of establishing that the petitioner was doing business on a "regular, systematic, and continuous" basis from February 2005 to February 2006. 8 C.F.R. § 204.5(j)(2). The initial documentation either did not address the issue of whether the petitioner was doing business or was dated during a time period that is not in question in the present proceeding. Accordingly, in an attempt to illicit the necessary relevant information, the director explicitly instructed the petitioner to provide copies of sales receipts showing that the petitioner was consistently engaged in selling its products from February 17, 2005 to February 17, 2006.

In response, the petitioner provided the following: 1) sales invoices for May through July of 2006; 2) bank statements from April through July of 2006; 3) corporate tax returns for 2004 and 2005; and 4) several of the petitioner's utility bills from June through August of 2006. The AAO notes that while the director did in fact instruct the petitioner to provide its 2004 and 2005 corporate tax returns, it did so in an effort to determine whether the petitioner established its ability to pay the beneficiary's proffered wage. The director did not suggest that the requested tax documents are indicative of the petitioner's on-going business transactions.

Consequently, based on a thorough review of the petitioner's submissions, the director issued a decision dated November 2, 2006 denying the Form I-140. In his decision, the director properly stated that bank statements and utility bills are not evidence of business transactions. The director further stated that despite the gross sales reported in the petitioner's tax returns, such documentation is not sufficient for the purpose of determining that the petitioner is doing business as defined in 8 C.F.R. § 204.5(j)(2).

On appeal, counsel asserts that the director previously requested the petitioner's bank statements and bills only to find such documents inadequate. Counsel's assertion, however, is erroneous and suggests only a cursory review of the director's decision and the RFE. Both the final denial and the RFE that preceded the denial clearly discussed the relevant period during which the petitioner would have to establish ongoing business transactions. In an effort to clarify the type of documentation needed, the director provided explicit instructions in No. 3(a) of the RFE, which specifically stated that the petitioner's sales invoices from February 2005 to February 2006 were the preferred documents that would indicate whether or not the petitioner was doing business in the manner and frequency prescribed in 8 C.F.R. § 204.5(j)(2). The fact that the petitioner did manage to submit some sales invoices clearly establishes that documents of this type do exist. As such, it is unclear why the petitioner ignored the director's specific request that the documents provided must address the relevant time period. While the more recent sales invoices suggest that the petitioner was doing business since the filing of the Form I-140, the same cannot be determined with regard to the relevant one-year time period prior to the filing of the Form I-140. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Counsel's unsupported arguments on appeal have been preempted by the director's decision, which addressed the documentation submitted in response to the RFE and

explained exactly why such documentation was insufficient. The AAO can do little more than reiterate the director's conclusion and the sound analysis upon which his findings were based.

The second issue in this proceeding is whether the petitioner established that the beneficiary's foreign employer was still doing business at the time the Form I-140 was filed. As the petitioner filed the Form I-140 in February 2006, it must provide sufficient documentation to establish that it fit the definition of a multinational organization as of that filing date. Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States. 8 C.F.R. § 204.5(j)(2). In the present matter, the director addressed the various documents submitted by the petitioner with regard to the foreign entity and concluded that the documentation was only sufficient to establish that the foreign entity was active as of November 2005. However, the director further stated that these documents failed to establish that the foreign company was conducting business at the time the Form I-140 was filed or that it currently conducts business. Neither counsel nor the petitioner addresses this issue on appeal. Therefore, the AAO concludes that the petitioner has failed to overcome the director's adverse finding with regard to this second basis for the denial of the immigrant petition.

The third issue in this proceeding is whether the petitioner established, by submitting proper evidence and sufficient information, that it would employ the beneficiary in a qualifying managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the Form I-140, the petitioner provided an organizational chart showing the beneficiary at the top of the company's hierarchy, a production manager as the beneficiary's direct subordinate, and eleven production and operations hourly wage employees. The petitioner also provided the following undated and unsigned percentage breakdown discussing the beneficiary's proposed employment:

General Management—approximately 50% [of] the time will be spent engaged in activities involved in:

- Managing and overseeing the production of all materials of the company and supervising the personnel pursuant to the production goals of the company.
- Overseeing sales to buyers and wholesale companies in the U.S.

U.S. Sales Management—approximately 20% of the time will be spent engaged in activities involved in:

- Overseeing sales to local buyers and store owners[.]
- Managing and overseeing sales to wholesalers[.]

Production Control—approximately 15% of the time will be spent engaged in activities involved in:

- Overseeing orders and managing production schedules with vendors[.]
- Overseeing quality control for contractors and subcontractors[.]

Design Selections—approximately 10% of the time will be spent engaged in activities involved in:

- Managing the design of current and next season's product lines[.]
- Overseeing the purchase of fabrics, textiles and other materials[.]

Market research—approximately 5% of the time will be spent engaged in activities involved in:

- Managing the research for new product trends and emerging markets[.]
- Determining the viability of new products.

The petitioner also provided an internally generated payroll summary from December 2004 through May 2005. However, the director determined that the petitioner did not submit sufficient evidence and documentation to establish that the beneficiary's proposed employment would primarily consist of qualifying managerial or executive duties. Therefore, the director's RFE instructed the petitioner to provide a dated and signed statement describing the beneficiary's proposed job duties in greater detail, discussing the specific job duties to be performed. The director further instructed the petitioner to provide detailed job duties for all of its employees and to submit evidence of its staffing levels, including its quarterly wage report disclosing its employees during the fourth quarter of 2005 and during the first quarter of 2006, the latter being the time period during which the Form I-140 was filed.

In response, the petitioner provided a supplemental job description dated September 18, 2006. The petitioner attributed the following duties and responsibilities to the beneficiary's proposed position:

- Management and direction of business activities in the United States.
- Management and direction of manufacturing activities.
- Management and direction of business development and marketing strategies.
- Identification and acquisition of new accounts.
- Identification and acquisition of industry agreements and partnerships for sourcing and distribution of clothing items.
- Establishment of goals for company manufacturing and sales growth.
- Management and direction of business activities relating to the maintenance of current accounts, and the development of new accounts.
- Analyzing customer demand, and industry and competitive trends, to determine changes in product and manufacturing lines.
- Management and direction of manufacturing and distribution activities, and inventory control.
- Identification of new business development opportunities.
- Representation of [the] company in negotiations and at industry events.
- Recruitment and management of staff, including manufacturing and sales employees.
- Direction of contractual negotiations and legal matters.

- Liaison with counterparts at both domestic and overseas companies.

The following percentage breakdown was also provided:

- Management and direction of business development, including expansion of existing customer relationships and new customer acquisition[.] 25%
- Identification of strategic opportunities for sourcing, manufacturing and marketing of clothing items[.] 25%
- Management and direction of current customer accounts[.] 25%
- Management and direction of new product and clothing line analysis[.] 10%
- Management and direction of manufacturing and distribution[.] 10%
- Management of personnel and administrative functions[.] 5%

As properly noted in the director's denial, the petitioner failed to provide the requested quarterly wage reports and instead submitted internally generated payroll summaries from May through June 2006. Thus, even if the petitioner's description of the beneficiary's duties were deemed sufficient, the petitioner has failed to submit sufficient documentation to corroborate the staffing hierarchy illustrated in the organizational chart submitted in support of the petition. That being said, when examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the present matter, the broad overview of job duties provided by the petitioner fails to establish that the beneficiary would primarily perform duties of a qualifying nature. Specifically, the petitioner has not identified any employees who carry out its sales and marketing functions. Therefore, the AAO can only conclude that the management and direction of business development and marketing, acquisition of new accounts and industry agreements, analyzing customer demands, and identifying new business opportunities are sales and marketing related tasks, which are all attributed to the beneficiary's prospective employment. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Based on the above percentage breakdown, sales and marketing tasks consume more than 50% of the beneficiary's time. As such, it appears that the beneficiary spends the majority of his time providing sales and marketing services in an effort to increase the petitioner's revenue rather than performing qualifying managerial or executive tasks. While the petitioner's organizational chart suggests that the beneficiary does not directly manage the company's non-professional employees, who purportedly provide the products sold, the overview of the beneficiary's duties strongly suggests that the beneficiary would spend the majority of his time performing non-qualifying operational tasks.

Furthermore, contrary to counsel's assertions, the size of the petitioner's support staff is relevant, particularly when the nature of the petitioner's business calls for the provision of products and services. In the present matter, the petitioner claims that it manufactures products, which are then sold to retailers and wholesalers.

However, the petitioner has failed to provide the necessary documentation establishing its employment of an adequate support staff to produce the products and provide the necessary sales and marketing services. Counsel's suggestion that this lack of evidence should be overlooked is directly contradicted by established case law, which states that going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Moreover, even if the AAO overlooked the lack of sufficient documentary evidence of a support staff, the description of the beneficiary's proposed job duties coupled with the lack of any sales or marketing employees suggests that the beneficiary's primary focus would be to provide sales and marketing services, which can only be classified as non-qualifying functions. As such, the evidence and information furnished precludes the AAO from concluding that the petitioner would employ the beneficiary in a qualifying managerial or executive capacity.

Furthermore, the record does not support a finding of eligibility based on at least one additional ground that was not previously addressed in the director's decision. Namely, 8 C.F.R. § 204.5(j)(3)(i)(B) states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to his entry to the United States as a nonimmigrant to work for the same employer. In the instant matter, the director specifically addressed this issue in the RFE by instructing the petitioner to provide a detailed analysis of the beneficiary's daily activities during his employment abroad. The petitioner responded with a broad overview of the beneficiary's responsibilities, stating that the beneficiary's duties abroad were similar to those he would perform in the United States. If in fact that is the case, the above discussion provides a detailed explanation as to why the beneficiary's prior employment would also fail to qualify as a managerial or executive capacity position. As the petitioner provided an overly broad description of the beneficiary's foreign employment, the record lacks the necessary details regarding the beneficiary's actual daily job duties to enable the AAO to draw a distinction between the beneficiary's foreign employment and his proposed employment in the United States. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990). Although the petitioner suggests that the foreign entity's organizational hierarchy is more complex and includes more employees than are claimed to be part of the petitioner's organization, the lack of an adequate description of the duties performed abroad precludes the AAO from concluding that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional ground of ineligibility discussed above, this petition cannot be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit

sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.