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FILE:

EAC 05 169 51333

Office: VERMONT SERVICE CENTER

Date: SEP 06 2007

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:

SELF-REPRESENTED

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 Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a New York corporation seeking to employ the beneficiary as its general manager. 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 determined that the petitioner failed to provide sufficient credible evidence to support the claim that the beneficiary would be employed in a managerial or executive capacity.

On appeal, the petitioner disputes the director's conclusions and submits a statement and additional documentation in support of its claims.

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 a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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 primary issue in this proceeding is whether the beneficiary would be employed in a 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 submitted a letter dated April 1, 2005, which contained the following description of the beneficiary's proposed employment within the petitioning organization:

a. Corporate Planning:

[The beneficiary] will analyze the present position of this company in light of present financial, economic and business conditions, evaluate the potential strengths and weaknesses of this company in light thereof, forecast and plan the future business activities of the company, setting [sic] forth goals for the progress, growth and expansion for the company's future.

b. General Administration:

[The beneficiary] will oversee, in the further growth of this company's operations, such matters as accounting, taxation, personnel and other related matters of the company, to see that the same are conducted in an orderly manner with due and proper compliance with the statutory requirements and to ensure smooth and efficient company operations.

c. Business Development:

[The beneficiary], in promoting the marketing of this company's jewelry products, will plan and implement both the vertical and horizontal expansion of the company. [He] will direct his activities to the expansion of transactions, the aim and purpose of which is to secure progressively increasing development of business and thereby, net revenues of the company.

d. Marketing-Sales:

[The beneficiary], in the continuation of this company's development, will establish and direct the marketing policies of this company. Initially, [he] will survey present and potential new markets, assess the requirements of groups, evaluate and analyze the market potential at various different geographical locations, as well as with specific segments. With this information, [the beneficiary] will develop and oversee the implementation of a marketing strategy and oversee the organization of effective sales and marketing of this company's jewelry products. In order to achieve this goal, [the beneficiary], on behalf of this company, will have to resort to advertising, marketing, and other promotional activities so as to promote transactions of this company's jewelry products and attract potential customers. This activity will be undertaken as may be required and justified by business prudence. One of the responsibilities of [the beneficiary] in this area will be pricing of jewelry products so as not only to attract potential customers, but also to retain a regular clientele for the services of this company over a sustained period of time.

e. Purchases:

[The beneficiary] will be responsible for overseeing the purchase of equipment, supplies, etc. that are required by this company. [He] will compare competitive financial services, compare catalogue listings, examine samples, attend demonstrations of products and conventions, call for quotations, negotiate prices and contract terms, evaluate alternative offers, and make choices between suppliers.

f. Personnel:

[The beneficiary] will be fully authorized to hire and appoint staff, prescribe their job duties, approve their compensation and promotions, supervise their functions, and, if necessary, terminate their employment with this company.

The petitioner also provided an organizational chart illustrating the company's staffing structure. The president was shown at the top of the hierarchy with a general manager as his direct subordinate. The general manager's direct subordinates are shown to be the heads of the following departments: accounting, diamond setting, polishing, washing and rhodium, quality control, repair, and work control. With the exception of the accounting department, whose department head is an accountant, the remaining departments have a department manager who oversees his/her own subordinates. It is noted that the quality control department was shown as having one employee and two vacant positions and the work control department was shown as having two vacant positions. As the chart is undated, it is unclear whether it was submitted to show the staffing structure at the time the Form I-140 was filed. The petitioner also provided a separate list naming the employees in each department and his/her respective salary. A note at the end of the list indicates that the position of general manager was also vacant.

Among other supporting documents, the petitioner provided a photocopy of an office lease as well as its 2003 tax return, its Form W-3, and the Form W-2s and Form 1099s it claims to have issued to its employees during the 2003 tax year.

On April 21, 2006, the director issued a request for additional evidence (RFE) instructing the petitioner to provide further documentation to establish that the beneficiary's proposed position in the United States would involve primarily managerial or executive duties. The director further discussed his observations of evidence previously submitted, noting that the petitioner may have submitted fraudulent tax documents. Specifically, the director stated that the petitioner's 2003 tax return, its Form W-3, and the Form W-2s issued by the petitioner are inconsistent as far as the total amount paid by the petitioner in employee salaries in 2003. The director also questioned the authenticity of the rental lease submitted in support of the Form I-140, noting that the lease was "covered with white-out and typed over."¹ Accordingly, the petitioner was instructed to provide certified copies of its 2004 and 2005 tax returns as well as copies of its payroll rosters for the same years and the W-2 statements the petitioner issued during the same time period. Additionally, the petitioner was asked to provide its quarterly wage statements for the first two quarters of 2005. The director offered the petitioner an opportunity to comment on his adverse findings.

In response, the petitioner provided a letter dated June 22, 2006 from [REDACTED] Certified Public Accountant (CPA), claiming that he has been providing the petitioner's accounting service for over eight years. The petitioner also provided a management chart illustrating an organizational hierarchy that is considerably different from the one shown in the organizational chart submitted initially in support of the Form I-140. Specifically, the more recently submitted chart has the added position of vice president, who is positioned below the president, but directly above the general manager. Additionally, neither the work control nor the repair department is included in the more recently submitted organizational chart.

Discrepancies also exist among the tax documentation for 2005, the year during which the petitioner filed its Form I-140. Namely, the petitioner provided its tax return for 2005, which indicates that the petitioner paid \$201,169 in wages and salaries. However, the 2005 W-2s submitted in response to the RFE total in excess of \$218,530. Additionally, while the petitioner's tax return shows that the petitioner paid \$586,817 for the cost of labor, the miscellaneous income Form 1099s for 2005 total in excess of \$677,445, which is nearly \$100,000 more than the amount shown in the tax return. While the petitioner also provided numerous payroll documents for its employees, those are also confusing; each report is dated October 28, 2004 even though it

¹ See p. 2, paragraph 2 of the RFE.

purportedly provides information regarding the wages each reported employee earned from January through December 2005. The petitioner provided explanation for the discrepancies previously pointed out by the director or the discrepancies and anomalies within the documentation submitted in response to the RFE.

Further, while the director made valid comments regarding the authenticity of the lease previously provided in support of the Form I-140, the petitioner attempted to dispel the director's misgivings by merely submitting a totally different lease for a completely different time period. While the more recent lease appears to be a valid document, it does not address the director's concerns regarding the validity of the lease that was originally submitted.

Lastly, despite the director's comments suggesting that the petitioner failed to provide sufficient information establishing that the beneficiary would primarily perform managerial or executive duties, the petitioner provided no additional information describing the prospective employment.

In a decision dated September 11, 2006, the director denied the petition based on adverse findings regarding the documentation submitted. While the AAO concurs with the overall conclusion regarding the petitioner's eligibility, various comments included in the underlying analysis are erroneous and must be addressed. First, in determining that the petitioner's accountant is not a professional employee, the director relied entirely on the individual's salary as reported in the W-2 statement. However, section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term 'profession' includes, but is not limited to architects, engineers, lawyers, physicians, surgeons, and teacher of elementary or secondary schools, colleges, academies, or seminaries." Additionally, as provided in 8 C.F.R. § 204.5(k)(2), the term "profession" includes not only the occupations listed in section 101(a)(32) of the Act but also any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. In the present matter, there is no indication that the director considered anything other than the account's salary in concluding that she is not a professional. Additionally, all of the beneficiary's subordinates are shown with subordinates of their own. Thus, without further explanation, it is unclear why the director concluded that the beneficiary's subordinates would not be supervisory or managerial employees.

Next, while the AAO also found discrepancies in the 2005 tax documentation submitted, it appears that the director overlooked the separate amount shown on the second page of the petitioner's 2005 tax return, which shows the total cost of labor. This figure appears to represent the total amount of miscellaneous income, which is broken down into individual Form 1099s. Thus, while the AAO will review the petitioner's 2005 tax documents for discrepancies, the director's oversight suggests that his conclusion was based on an incomplete assessment of the documentation.

Notwithstanding the errors in the director's analysis, he properly concluded that the petitioner failed to establish its eligibility for the benefit sought. The director also commented again on the potentially fraudulent lease the petitioner submitted in support of the initial petition.

On appeal, the petitioner resubmits the rental lease previously provided in response to the RFE and provides a further explanation addressing that lease. However, as previously stated, the lease that was originally submitted was for an entirely different time period and named an entirely different landlord. Thus, while the lease submitted on appeal and previously in response to the RFE appears to have none of the anomalies of the lease that was initially submitted, the submission of a seemingly bona fide lease does not address the director's valid concerns. It is incumbent upon the petitioner to resolve any inconsistencies in the record by

independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Moreover, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

Additionally, while the petitioner provides numerous Form W-2s and Form 1099s, which support the organizational hierarchy illustrated in the petitioner's latest organizational chart, as previously discussed, the sum of all the W-2s issued by the petitioner in 2005 is greater than the salaries and wages amount indicated in the petitioner's 2005 tax return. Similarly, the sum of all salaries indicated in the 1099s is much greater than the total cost of labor indicated in the tax return. While the petitioner was given ample opportunity to address these apparent inconsistencies on appeal, it failed to do so.

Lastly, in examining the executive or managerial capacity of the beneficiary, CIS 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, while the petitioner has illustrated a considerable organizational hierarchy that seemingly consists of a large staff to carry out the daily operational tasks, the beneficiary's actual day-to-day duties have not been clarified. Rather, the petitioner has used general terms suggestive of the beneficiary's oversight responsibilities to describe his proposed employment. However, 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). In the present matter, the AAO cannot determine what actual tasks are involved in corporate planning, general administration, or business development, as all three general areas of concentration have been discussed in overly broad terminology. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Id.* While the petitioner provided more information in describing the beneficiary's marketing/sales and purchasing responsibilities, it appears that the tasks associated with these responsibilities would be largely of a non-qualifying nature. More specifically, conducting market analysis, developing market strategy, and engaging in advertising the petitioner's products, without further explanation, cannot be deemed as being qualifying tasks. Similarly, comparing services, calling for price quotes, negotiating prices and contract terms of suppliers also cannot be deemed as being qualifying tasks. 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). Since the petitioner has not clarified the amount of time that would be attributed to these seemingly non-qualifying tasks, the AAO cannot conclude that the beneficiary's proposed employment would primarily involve the performance of qualifying job duties.

Furthermore, the record does not support a finding of eligibility based on additional grounds that were not previously addressed in the director's decision.

First, 8 C.F.R. § 204.5(j)(3)(i)(C) states that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer. The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

* * *

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.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In the present matter, the petitioner claimed in its initial support letter that [REDACTED] is the majority holder of the shares of the petitioner and of [REDACTED], the beneficiary's foreign employer. In support of this claim, the petitioner provided foreign documents showing [REDACTED] to be the 55% holder of the shares of [REDACTED]. However, the record lacks documentation establishing that [REDACTED] and [REDACTED] are either the same company or that they are somehow related. Thus, there is no clear evidence establishing [REDACTED] as the majority owner of [REDACTED], the beneficiary's foreign employer. While the petitioner submitted a single stock certificate in support of its initial claim that 100 out of 200 authorized shares of the petitioner's stock were issued to [REDACTED] Schedule E of the petitioner's tax returns from 2003-2005 all indicate that [REDACTED] owns 100% of the petitioner's common stock. Thus, the petitioner submits documents and makes claims that are inconsistent with one another. As previously stated, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. As such, the petitioner has failed to establish that it has a qualifying relationship with the beneficiary's foreign employer, and the petition cannot be approved for this additional reason.

Second, 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner must establish that it has been doing business for at least one year prior to filing the Form I-140. 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." Although the petitioner indicates that it has been doing business in the United States since 1996, checking account statements and tax documentation is an insufficient means for establishing that the petitioner has sold its jewelry products on a "regular, systematic, and continuous" basis for the required one-year time period and, thus, the petition must be denied for this additional reason.

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 grounds 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 it is shown 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.