

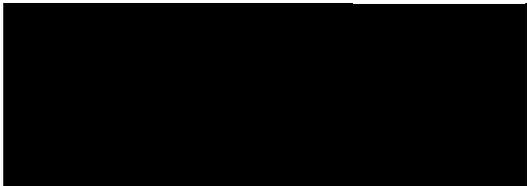


U.S. Citizenship
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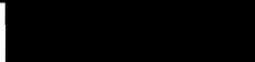
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FILE:



Office: TEXAS SERVICE CENTER

Date:

AUG 01 2008

SRC 06 098 52057

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

The petitioner is a limited liability company organized in the State of Florida. It offers residential and commercial cleaning services 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 determined that the petitioner failed to establish that the beneficiary would be employed in a managerial or executive capacity and denied the petition on that basis.

On appeal, counsel disputes the director's conclusions and submits a brief as well as an expert opinion in support of his arguments.

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 petitioner has provided sufficient evidence to establish that the beneficiary would be employed in the United States 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 submitted a letter dated February 2, 2006, which includes a description of the beneficiary's proposed employment. The petitioner also provided a supplement separating and assigning a numerical order to each job responsibility listed in the support letter. As the numerical list has been incorporated into the director's decision it need not be repeated in the AAO's discussion.

After reviewing the petitioner's submissions, the director issued a request for additional evidence (RFE), dated May 24, 2006, instructing the petitioner to list each of the beneficiary's proposed job duties and the percentage of time that would be allotted to each task. The petitioner was also asked to provide its organizational chart listing the position titles within its organization and the individuals who occupy them.

In response, the petitioner restated and attempted to expand on the 20 job responsibilities previously provided in support of the Form I-140:

- Item 1 discussed the beneficiary's responsibility in planning procedures, establishing responsibilities and coordinating all managerial functions among departments and sites. The petitioner stated that this set of responsibilities includes establishing the subcontractors' job responsibilities at the various cleaning sites. The petitioner explained that the beneficiary does not perform any of the cleaning herself and stated that this set of responsibilities would consume 3-5% of the beneficiary's time.
- Item 2 discussed the beneficiary's responsibility in analyzing operations to evaluate the performance of the petitioner's staff and determining areas for cost reduction and program improvement. The petitioner stated that these responsibilities are carried out by assessing profit margin and possibly redistributing job assignments among subcontractors based on the amounts they charge the petitioner for their respective services. The petitioner stated that this "evaluation" may consume 7-10% of the beneficiary's time.
- Item 3 discussed the beneficiary's broad discretionary authority in conferring with the petitioner's stakeholders, organization officials, and staff members to establish policies and formulate plans. The petitioner fails to identify who are the organization officials and staff members. As suggested by the organizational chart, the petitioner's staff appears to include three contractors who carry out the cleaning services. Moreover, according to the petitioner's Form 1065 tax return for 2005, the only "stakeholders" in the petitioning entity are the beneficiary and one other individual. Although the petitioner claimed that 2-3% of the beneficiary's time would be spent on this set of responsibilities, no clear explanation was provided with regard to the policies and plans that are formulated.
- Item 4 discussed the beneficiary's responsibility in reviewing financial statements and sales and activity reports to ensure that the company reaches its objectives. Although the petitioner claimed that 15% of the beneficiary's time would be allotted to financial oversight, no clarification has been provided to explain who generates the financial and sales reports.
- Item 5 discussed the beneficiary's responsibility in assigning and delegating duties to subordinates. The petitioner stated that no more than 2% of the beneficiary's time would be allotted to this responsibility.
- Item 6 discussed the beneficiary's responsibility in adjusting the petitioner's reactions to business and market trends, which would consume 10-15% of the beneficiary's time. The petitioner stated that the beneficiary has been vested with broad authority in making decisions regarding new business opportunities, the petitioner's pricing scheme, and hiring new subcontractors. The petitioner provided no clarification to indicate how new business opportunities are sought out and who generates the information regarding business and market trends, which apparently serve as the basis for the beneficiary's critical business decisions.
- Item 7 discussed the beneficiary's responsibility in assessing costs and benefits of potential actions, which the petitioner stated is "intertwined" with the item 6 above.

- Item 8 discussed the beneficiary's responsibility in determining how funds will be spent, which would consume 7-10% of the beneficiary's time. The petitioner stated that this responsibility requires that the beneficiary assess the clients' needs in order to match them with the appropriate service provider while incurring the least amount of cost.
- Item 9 discussed the beneficiary's responsibility in identifying measures or indicators of employee performance, which would consume 5% of the beneficiary's time. The petitioner stated that the beneficiary reviews performance evaluations and contacts clients directly to get feedback regarding the services provided.
- Item 10 discussed the beneficiary's responsibility in determining how operations should work and how changes in conditions, operations, and the environment will affect outcomes. The petitioner elaborated, stating that the beneficiary must read industry periodicals and attend relevant conferences in order to adapt to change and recognize business opportunities. These duties suggest that the beneficiary would conduct her own market research, which would consume 3% of her time.
- Item 11 discussed the beneficiary's responsibility in using logic and reasoning to identify the strengths and weaknesses of alternative solutions or approaches to problems. The petitioner explained, stating that this responsibility would require the beneficiary to reevaluate current contracts and possible new business opportunities. The petitioner stated that the beneficiary executes this cost benefit analysis 100% of the time.
- Item 12 discussed the beneficiary's responsibility in monitoring and assessing performance of the company's managerial and service staff. Although the petitioner stated that this responsibility would consume 7-10% of the beneficiary's time, it is unclear who, aside from the beneficiary herself, is an active managerial staff member within the petitioner's current organizational hierarchy. Moreover, item 9 has already identified the beneficiary's role in evaluating service providers' performances. It is unclear how the current task is different from the one cited in item 9.

Item 13 discussed the beneficiary's responsibility in motivating, developing, and overseeing the company's staff and work product and identifying the best people for the job. The petitioner suggests that a marketing component is involved in this responsibility, which would consume 3-5% of the beneficiary's time. As no employees have been identified as marketing staff, it is implied that the beneficiary performs this non-qualifying task.

- Item 14 discussed the beneficiary's responsibility in generally observing, receiving, and otherwise obtaining information from all sources.
- Item 15 discussed the beneficiary's responsibility in monitoring and controlling resources and overseeing spending, which the petitioner also referred to as fiscal management. Although an additional 5% of the beneficiary's time has been allocated to this general responsibility, it is unclear how it differs from item 8, which also discusses the beneficiary's role in monitoring the petitioner's budget and spending.

- Item 16 discussed the beneficiary's responsibility in providing information to subordinates via phone, mail, email, or in person, which would consume 1% of the beneficiary's time.
- Item 17 discussed the beneficiary's responsibility in establishing long-range goals and specifying ways to achieve them. The petitioner deemed this a critical function and stated that 10% of the beneficiary's time would be devoted to this responsibility.
- Item 18 discussed the beneficiary's responsibility in analyzing information and evaluating results to choose the best solution.

Item 19 discussed the beneficiary's responsibility in encouraging and building mutual trust, respect, and cooperation among the petitioner's staff and subcontractors. Again, aside from the beneficiary herself, it is unclear what other staff the petitioner actually employs. While the petitioner has identified subcontractors hired to carry out the janitorial and cleaning services, it is unclear what specific duties are employed to carry out this broad responsibility, which would consume 2-4% of the beneficiary's time.

- Item 20 discussed the beneficiary's responsibility in developing specific goals and plans to prioritize, organize, and accomplish the petitioner's objectives. The petitioner broadly spoke of emerging market conditions and business opportunities, but failed to explain any of its specific goals. It is entirely unclear what actual duties are entailed in this general set of job responsibilities, which would comprise 20% of the beneficiary's time. The petitioner also failed to distinguish this responsibility from item 17, which also deals with business goals.

While the petitioner has provided a lengthy list of responsibilities in an attempt to fit the beneficiary's employment into the statutory definition of managerial or executive capacity, the petitioner failed to explain who, if not the beneficiary carries out its administrative tasks, including the generating of service invoices, contacting customers, answering the office phone, etc. Furthermore, as previously indicated, a number of the above responsibilities are repetitive, assigning additional portions of time to responsibilities that have already been discussed in another portion of the job description.

With regard to the beneficiary's organizational chart, the petitioner lists its immigration attorney and its accountant among the beneficiary's subordinates and the petitioner's staff. However, the petitioner has not provided evidence to establish that either the immigration attorney or its accountant provide anything more than limited services on a need basis such that either individual would be considered an employee of the company rather than a mere service provider. As such, the petitioner's entire staff consists of the beneficiary and three subcontractors. As previously stated, no evidence has been provided to establish that the petitioner's administrative services, which are non-qualifying yet crucial to the company's daily operation, are provided by anyone other than the beneficiary herself. As these tasks have not been accounted for in the petitioner's lengthy job description, it is unclear how much of the beneficiary's time would actually be spent perform non-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).

After evaluating the documentation submitted, the director denied the petition in a decision dated September 13, 2006. The director noted that the petitioner failed to establish that the beneficiary would primarily perform duties within a qualifying capacity.

On appeal, counsel challenges the director's conclusion in an appellate brief, asserting that Citizenship and Immigration Services (CIS) has deviated from the preponderance of the evidence standard of proof that is discussed in *Matter of E- M-*, 20 I&N Dec. 77 (Comm. 1989). Counsel suggests that the inadequate description of the beneficiary's proposed employment, i.e., the petitioner's claim alone, is in itself evidence that the beneficiary would be relieved from having to primarily focus on performing the petitioner's daily operational tasks. Based on counsel's faulty argument, there would be no need for the submission of actual documentary evidence. However, this reasoning is directly contradicted by precedent case law, which specifically 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)).

Counsel also introduces the professional opinion of Professor [REDACTED]—who supported the petitioner's claim in a letter dated October 9, 2006, finding that the beneficiary would be employed as an executive or manager "based upon generally accepted management principles."¹ However, despite any expertise [REDACTED] may possess in understanding generally accepted management principles, no evidence has been provided to establish [REDACTED] expertise in immigration law and specifically sections 101(a)(44)(A) and (B) of the Act, which discuss the relevant statutory definitions of managerial and executive capacity, respectively. In fact, [REDACTED] reference to the beneficiary as a manager and an executive further suggests an overall lack of understanding of the distinctions between the two statutory definitions.

Additionally, counsel's reference to guidelines provided in the United States Department of Labor's (DOL) Occupational Information Network is of little to no relevance in the present discussion, as the guidelines do not incorporate the statutory and regulatory provisions that are relevant in the present matter. Thus, meeting the requirements set out by DOL is irrelevant. Rather, in order to classify a beneficiary as a multinational manager or executive, the petitioner must comply with the provisions in 8 C.F.R. § 204.5(j)(5), which are clear in requiring that every petitioner provide a detailed description of the position its beneficiary would occupy under an approved position. In the present matter, the job description provided was admittedly lengthy in its attempt to conform the beneficiary's proposed position to that of a manager or executive. However, the length of a job description has no bearing on the quality of its content.

Here, the petitioner stressed the beneficiary's discretionary authority, which CIS does not dispute, and the petitioner's hiring of subcontractors to perform the actual cleaning duties. However, neither factor eliminates the likelihood that the beneficiary would primarily perform daily operational tasks rather than tasks within a qualifying managerial or executive capacity. In order to establish employment in a managerial or executive capacity, the petitioner must specify the tasks performed by the beneficiary, establish who performs the daily operational tasks, and provide documentary evidence that the individuals who are purportedly performing the operational tasks were employed at the time the Form I-140 was filed such that the petitioner is ready and able to relieve the beneficiary from having to primarily perform those non-qualifying duties herself. In the present matter, these key elements were virtually absent. While the petitioner has established that the

¹ Page 1, paragraph 2 of Dr. Thaler's letter.

beneficiary would not perform the cleaning duties, it has failed to address the issue of administrative tasks, which are also non-qualifying. As previously stated, the petitioner's job description is also severely lacking. The petitioner suggested that 15% of the beneficiary's time would be consumed with overseeing the company's finances, requiring the review of sales and activity reports. However, the petitioner failed to specify who within its hierarchy would actually generate those reports. Another 40-45% of the beneficiary's time was allotted to exercising discretionary authority and strategic planning.² However, no actual or specific job duties can be derived from these general job responsibilities. Thus, based on these significant deficiencies, the AAO cannot conclude that the beneficiary would primarily perform duties of a qualifying nature. For this reason, the petition cannot be approved.

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. Specifically, 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 stated in the support letter dated February 2, 2006 that it is an affiliate of [REDACTED], located in Venezuela. However, in an unnamed and undated certified translated document, the petitioner was identified as the foreign entity's subsidiary, a claim that is furthered by a membership certificate issuing 30,000 units to the Venezuelan company. No other certificates were submitted to establish any other ownership interests aside from that of the foreign entity. The AAO further notes that the petitioner's Articles of Organization, Article V, indicate that the beneficiary and one other individual were named as the company's managers, without mentioning or referencing any other members or managers of the limited liability company. Therefore, these documents suggest that ownership and control in the U.S. petitioner are held by different parties.

² Refer to the total percentage points assigned to items 6, 17, and 20 of the petitioner's job description discussed earlier.

Furthermore, Schedule K-1 of the petitioner's Form 1065 tax return for 2005 identifies the beneficiary and the other individual as the petitioner's owners, each owning 50% of the company. This information is inconsistent with the petitioner's prior claim that it is owned directly by the foreign entity. 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). The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the present matter, the petitioner has not resolved this considerable inconsistency and, as such, has not provided sufficient documentation to establish that it and its claimed foreign counterpart are similarly owned and controlled as required for a qualifying relationship to exist.

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.