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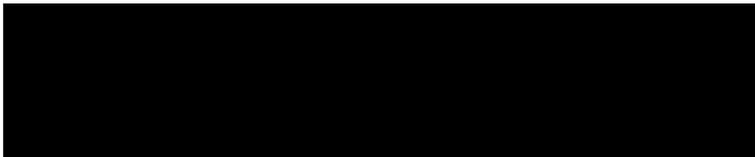
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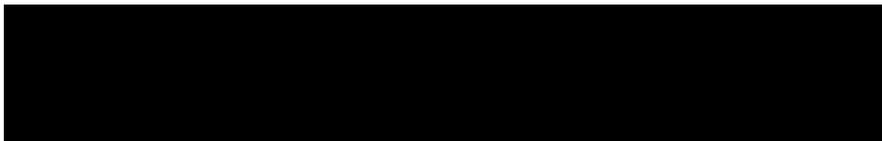


FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: FEB 01 2008
SRC 06 134 51227

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 Florida corporation claiming to operate as a wholesale merchant operation. It seeks to employ the beneficiary as its managing director. 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 it would employ the beneficiary in a managerial or executive capacity and denied the petition.

On appeal, counsel disputes the director's conclusions and submits a brief 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 beneficiary would primarily perform qualifying managerial or executive job duties during his proposed employment with the U.S. petitioner.

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 March 20, 2006, which contained the following description of the beneficiary's proposed U.S. employment:

[The beneficiary] will primarily continue to manage [the petitioner]'s operations, and critical components thereof [He] will continue to supervise the work of [the petitioner]'s other professional employees, while also managing [its] essential functions. As [m]anaging [d]irector, [the beneficiary] will continue to have full authority to hire and fire [the petitioner]'s employees, and to make those recommendations he may deem prudent regarding human resource matters. [He] will continue to function at [the petitioner]'s most senior managerial and executive level.

Accordingly, [the beneficiary] will continue to exercise discretion over [the petitioner]'s day-to-day operations by directing and managing [its] major divisions and activities As

such, he will continue to establish [the petitioner]'s financial objectives, and continue to develop and incorporate [its] operational policies and business goals. To achieve these goals, [the beneficiary] will continue to exercise wide latitude in discretionary decision-making, thereby receiving only general supervision, at most, from [the petitioner]'s board of directors.

The petitioner also provided a statement dated March 20, 2006 in which the petitioner's operations administrator asserted that the beneficiary would be employed as a manager and an executive. The letter contained the following additional information:

[The beneficiary's] position . . . is executive and managerial in nature, with the following primary duties and responsibilities: managing the organization in the United States on a long-term basis in accordance with directives received from the company's board of directors. The [m]anaging [d]irector function is a senior level position within [the petitioner]'s hierarchy and with regard to the functions that [the beneficiary] will manage on a permanent basis such as: financial, investments, marketing, leasing, developments, and major purchases within the organization. [The beneficiary] will also oversee all the investments of the American corporation and other financial and managerial related functions. [He] will manage and oversee the work of [the petitioner]'s other managerial and supervisory personnel, and will have the authority to recommend the hiring and firing, promotions or leave authorizations of the staff, and will exercise discretion over the day-to-day operations.

On October 11, 2006, the director issued a request for additional evidence (RFE) instructing the petitioner to provide its organizational chart with the names, job titles, and specific job duties of the beneficiary and the employees he would manage.

In response, the petitioner provided an organizational chart showing the board of directors at the top of the hierarchy and the beneficiary at the next level, directly below the board of directors. The three positions listed as the beneficiary's subordinates are a logistics manager, a sales manager, and an attorney. The chart also indicates that the petitioner will hire sales people on a contract basis and that it will use independent carriers and freight forwarders. The petitioner also provided the following undated description of the beneficiary's proposed employment:

[The beneficiary] will primarily continue to manage [the petitioner]'s operations, and critical components thereof, on a permanent basis. [He] will continue to supervise the work of [the petitioner]'s other professional employees, while also managing [the petitioner]'s essential functions. [The beneficiary] will continue to have full authority to hire and fire [the petitioner]'s employees, and to make those recommendations he may deem prudent regarding human resource matters. [He] will continue to function at [the petitioner]'s most senior managerial and executive level.

Accordingly, [the beneficiary] will continue to exercise discretion over [the petitioner]'s day-to-day operations by directing and managing [the petitioner]'s major divisions and activities on a permanent basis. As such, he will continue to establish [the petitioner]'s financial objectives, and continue to develop and incorporate [the petitioner]'s operational policies and business goals. To achieve these goals, [the beneficiary] will continue to exercise wide latitude in discretionary decision-making . . .

As to specifics, in the area of human resources management, [the beneficiary] exercises authority in regard to hiring, firing, training, delegation of assignments according to capabilities, preferences and technical goals, discipline, promotions, and remuneration. He conducts performance reviews and ensures that his staff followed corporate procedures.

Furthermore, [the beneficiary] is responsible for managing and directing all development activities of the corporations as they pertain to our national and international operations. [The beneficiary] routinely meets with managers and employees to ensure that our corporate philosophy is understood and is being delivered accurately. He represents the unique concerns and requirements of our operations and provides significant contributions in the formulation of strategic product plans to ensure that the business and strategic policies are effectively incorporated into our business activities.

[The beneficiary] also establishes and promotes the standardization of services and operations based upon our corporate model. He meets regularly with managers and employees to review current policies and procedures and develop appropriate plans necessary to ensure consistency of development practice in accordance with corporate standards. [The beneficiary] enhances the level of direct development expertise available in all our markets. He formulates strategies and plans to improve the communication between the U.S. based company and our foreign affiliate, to establish and promote standardization in the delivery of our goods and services.

In [s]hort, [the beneficiary] has autonomous control over, and exercises wide latitude and discretionary decision-making in, establishing the most advantageous courses of action for the successful management and direction of our national and international development activities.

On April 24, 2007, the director denied the petition concluding that the evidence and information submitted by the petitioner fails to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. The director noted that the petitioner failed to provide descriptions of job duties for the beneficiary's subordinates, even though this information was specifically requested in the RFE. The director further noted that the petitioner has failed to establish that it is sufficiently staffed in order to relieve the beneficiary from having to primarily perform non-qualifying tasks.

On appeal, counsel maintains the claim that the beneficiary would be employed in a qualifying managerial and executive capacity. It is noted, therefore, that when a petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the respective statutory definitions of both capacities. *See* sections 101(a)(44)(A) and (B) of the Act. While there is some overlap in the individual components of these terms, they are not synonymous. In the present matter, the petitioner repeatedly refers to the beneficiary's employment capacity as both executive and managerial, but fails to exhibit an overall understanding of the fact that these terms are not interchangeable. While counsel seemingly attempts to distinguish between a manager and an executive by specifically expanding on the beneficiary's executive capacity, he offers no information to explain which portion of the beneficiary's proposed employment falls within the statutory definition of managerial capacity.

Regardless, the AAO finds counsel's arguments lacking in a more critical area. Namely, counsel fails to supplement the deficient job description provided by the petitioner. As properly noted by the director, in examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). In the instant matter, the petitioner repeatedly offers general statements that cover broad areas of responsibility, but fail to precisely define any specific duties to be performed by the petitioner. It is noted that 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. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). While the petitioner generally indicates that the beneficiary's discretionary authority fits part of the definitions of managerial and executive capacity, these definitions are meant to serve only as guidelines to be applied to a specific list of duties. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Where, as in the instant case, the petitioner fails to name specific duties to be performed by the beneficiary, a determination cannot be made with regard to the beneficiary's prospective employment capacity. For example, the petitioner stated that the beneficiary would manage the various components of the organization. However, the petitioner failed to explain the specific tasks the beneficiary would perform on a daily basis in connection with managing the company's finances and major purchases. Although the petitioner also stated that the beneficiary would manage the company's investments and developments, no information was offered to explain the types of investments and developments referenced. Additionally, while the petitioner also stated that the beneficiary would manage the marketing, it provided no explanation as to who would actually perform this key function and the non-qualifying tasks associated with it. On appeal, counsel merely repeats portions of the petitioner's statements adding no further information to the broad language already on record.

Counsel also introduces the professional opinion of [REDACTED] who supported the petitioner's claim in a letter dated June 15, 2007, 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]'s 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]'s repeated joint references to the terms manager or executive further suggests an overall lack of understanding of the distinctions between the two statutory definitions.

Lastly, several references are made by counsel and by the petitioner to the beneficiary's personnel management responsibility. However, based on the claimed organizational hierarchy in place at the time the Form I-140 was filed and in light of the insufficient documentation submitted thereafter, it appears that only a small portion of the beneficiary's time would be attributed to managing personnel. 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)). While the existence or lack of personnel alone does not dispose of the issue in the present matter, the fact that the petitioner's sales-based entity appears to be entirely lacking in a sales staff gives rise to doubt as to whether the petitioner requires and is able to sustain the beneficiary in a primarily managerial or executive position. 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

¹ Discussed at pages 1-3 of [REDACTED]'s letter.

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). In the present matter, the petitioner has failed to explain and provide evidence to establish that someone other than the beneficiary would perform the non-qualifying tasks associated with its essential functions. While a portion of the beneficiary's time may indeed be devoted to qualifying managerial or executive level tasks, the evidence of record strongly suggests that the majority of the beneficiary's time would be spent performing the non-qualifying tasks that are necessary for the petitioner's daily operation. As such, the AAO cannot conclude that the beneficiary would primarily perform managerial or executive 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)(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 description of job duties initially provided lacked the necessary information to enable the director to determine whether the beneficiary was employed abroad in a qualifying capacity. The director specifically addressed this deficiency in the RFE by instructing the petitioner to provide the foreign entity's organizational chart accompanied by the names, job titles, and specific job duties of the beneficiary and his direct subordinates. While the petitioner provided the requested organizational chart with the names and job titles of the foreign entity's employees, this information was not accompanied by the requested description of job duties. As such, the AAO cannot conclude that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

Second, 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. In the present matter, the petitioner claims to be an affiliate of the foreign entity, which is described as a sole proprietorship owned by the beneficiary. Although the petitioner claims that it too is wholly owned by the beneficiary, the only documentation submitted to support that claim is a single photocopied stock certificate showing that 100 shares of the petitioner's stock were issued to the beneficiary. As the petitioner has not provided documentation establishing the amount of stock it is authorized to issue, the AAO cannot conclude that the beneficiary is the petitioner's sole owner. As previously stated, 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. at 165.

Third, 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." The petitioner's submission of tax documentation and bank statements does not establish "the regular, systematic, and continuous" wholesale of merchandise, which is the claimed nature of the petitioner's business. While the petitioner was able to provide purchase and/or sales receipts showing that the foreign entity was conducting business, similar documentation was not provided to show continuous business transactions conducted by the U.S. entity. As such, the petition cannot be approved for this additional reason.

Fourth, the documentation submitted to show the foreign entity's business transactions predates the filing of the Form I-140. In light of the beneficiary's sole ownership of the foreign entity and his current absence from his foreign employment, the fact that the petitioner has not provided documentation showing the foreign entity continuing to engage in "the regular, systematic, and continuous" provision of goods and/or services, the AAO cannot conclude that the foreign entity is currently doing business. It follows, therefore, that the AAO cannot conclude that the petitioner is a multinational entity that conducts business in two or more countries, one of which is the United States, via an affiliate or subsidiary. *See* 8 C.F.R. § 204.5(j)(2).

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.