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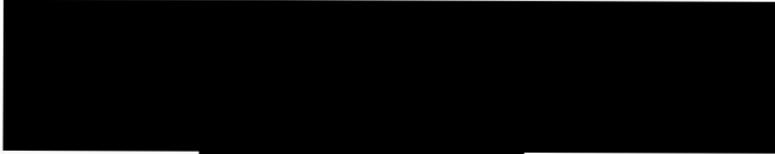
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date: FEB 01 2008

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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 F. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska 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 established in the State of Florida. It seeks to employ the beneficiary as its operations 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 establish eligibility for the benefit sought on three independent grounds: 1) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; 2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity; and 3) the petitioner failed to establish its ability to pay the beneficiary's proffered wage.

On appeal, counsel disputes the director's findings and submits a brief in support of her arguments. After a thorough review of the documents and information provided, the AAO concludes that the petitioner has met its burden of establishing that the beneficiary was employed abroad in a qualifying capacity. As such, this discussion will focus on the two remaining grounds of ineligibility cited in the director's decision.

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 first issue in this proceeding is whether the beneficiary's proposed job duties in his prospective position with the U.S. petitioner would be in a managerial or executive capacity.<sup>1</sup>

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 a copy of its organizational chart comprised of three tiers of personnel. The owner of the company is shown at the top of the hierarchy with the beneficiary shown

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<sup>1</sup> While the AAO acknowledges counsel's claim that the beneficiary would be employed in an executive capacity, the AAO will nevertheless consider the beneficiary's position in light of both statutory definitions.

as his direct subordinate. The lowest tier of employees is comprised of an administrative assistant, the owner's wife in charge of billing, and a driver whose responsibilities include the receipt and shipment of merchandise into and out of the warehouse. **The chart was accompanied by the following percentage breakdown of duties and responsibilities assigned to the beneficiary in his proposed U.S. position:**

- Confer with [the] company [p]resident to plan business objectives and decide on additional funding for new or continuing operations, as needed[.] (15%)
- Review invoices sent by billing department for receiving/import of merchandise[.] (10%)
- Review regulatory changes affecting company in regards to receipt of international merchandise[.] (10%)
- Confer with contractor providing shipping services regarding schedules and pricing[.] (15%)
- Review statements in order to reconcile items received with payments made and items delivered[.] (5%)
- Review productivity reports for receiving department and determine improvements to be made[.] (5%)
- Provide information to employees regarding objectives and goals of receiving department[.] (2%)
- Prepare expansion/improvement proposals for review by [the] company owner[.] (5%)
- Review activity reports and income statements to determine progress and status in attaining corporate objectives[.] (10%)
- Review competitor/market conditions and recommend changes based thereon[.] (10%)
- Confer with major clients regarding suggestions for improvement of services, [sic] and suggests [sic] additional services to be used[.] (8%)
- Resolve customer complaints/shipments delayed or not received[.] (3%)
- Plan and develop customer relations policies[.] (2%)

On May 18, 2006, the director issued a notice of intent to deny (NOID) informing the petitioner of adverse findings that would preclude the approval of the petitioner's Form I-140. With regard to the beneficiary's employment capacity, the director stated that the information submitted was insufficient. Accordingly, the director instructed the petitioner to provide a more detailed description of the specific day-to-day tasks required for the completion of the beneficiary's assigned duties. The director instructed the petitioner to provide the W-2 statements issued in 2005 to all of its employees.

In response, the petitioner resubmitted the percentage breakdown initially provided in support of the Form I-140 and also provided the requested W-2 statements for 2005. While the AAO acknowledges that the 2006 W-2 statements were not available at the time of the response, the 2005 statements suggest that the beneficiary, the administrative assistant, and the driver/warehouse employee were all employed on a full-time basis. The record shows that neither the owner nor his wife received a salary commensurate with that of a full-time employee.

In a decision dated October 18, 2006, the director denied the petition concluding that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity. The director commented on the petitioner's failure to identify specific job duties, concluding that the information provided was vague and failed to establish exactly what the beneficiary would do in the course of his employment with the petitioner on a daily basis. The director also noted the petitioner's failure to explain how the beneficiary can be expected to oversee a receiving department, which was not identified on the organizational chart.

On appeal, counsel repeats the percentage breakdown previously submitted and vehemently argues that the petitioner provided sufficiently detailed statements to describe the beneficiary's proposed U.S. employment. Counsel provides the statutory definition for executive capacity and goes through each of the four prongs in an attempt to establish that the beneficiary's position satisfied the legal requirements. *See* section 101(a)(44)(B) of the Act. However, pursuant to a thorough review of the information and documents provided, the AAO concludes that counsel's arguments are not persuasive.

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, a review of the petitioner's percentage breakdown indicates that a majority of the beneficiary's time is either attributed to broad job responsibilities or job duties that are not within a qualifying capacity. More specifically, the petitioner indicates that the beneficiary would plan and develop customer relations policies and "confer" with the head of the company to plan funding and business objectives, which cumulatively comprise 17% of the beneficiary's time. However, the petitioner fails to identify the specific tasks performed, i.e., the means by which the beneficiary meets these general responsibilities; nor did the petitioner specifically identify any policies or objectives. 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). The actual duties themselves reveal the true nature of the employment. *Id.*

The description further states that the beneficiary would spend another 10% of his time reviewing activity reports. However, no one among the petitioner's support staff has been charged with generating these activity reports, thereby suggesting that the beneficiary would be engaged in this non-qualifying operational task. That being said, the percentage breakdown also shows that the beneficiary would: maintain direct contact with the shipping company regarding shipping schedules, prepare expansion and improvement proposals, conduct market research to determine market conditions, and confer with major clients and resolve customer complaints. These are all non-qualifying daily operational tasks that cumulatively would consume another 41% of the beneficiary's time. While alone, these duties would not preclude the beneficiary from qualifying as a multinational manager or executive, when combined with the 17% of unspecified duties and the likelihood that the beneficiary would generate the activity reports discussed above, which would consume another 10% of the beneficiary's time, the petitioner has failed to formulate a basis upon which to conclude that a majority of the beneficiary's time would be allotted to the performance of qualifying tasks. It is noted

that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In the instant matter, the record suggests that a majority of the beneficiary's duties would be spent performing non-qualifying tasks. For this reason, the petition may not be approved.

The other issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary's proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the present matter, the petitioner provided its tax returns and unaudited financial statements for 2003 and 2004. Based on the petitioner's net income loss and the asset to liability comparison showing liabilities outnumbering assets, the petitioner did not show an ability to pay in 2004. Regardless, as properly pointed out by counsel, the petitioner's 2004 tax return and unaudited financial statement would not be appropriate documents to establish the petitioner's ability to pay at the time the Form I-140 was filed. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).<sup>2</sup> It is noted that neither the statute nor regulations specify a minimum compensation package for a multinational manager or executive.<sup>3</sup> Nevertheless, the petitioner indicated that the beneficiary would be compensated \$30,000, or \$5,300 more than the amount indicated in the beneficiary's W-2 statements on record. Thus, while the petitioner has provided sufficient documentation to establish its ability to pay the beneficiary a salary of \$24,700, the record lacks documentation to establish its ability to pay the beneficiary \$30,000. Despite counsel's focus on the petitioner's bank statements, this documentation is not generally a recognized form of evidence used to establish an ability to pay in light of the bank accounts changing balance and the petitioner's ability, at any time, to withdraw some or all of the funds for any purpose. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The documentation submitted by the petitioner in the present matter is not

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<sup>2</sup> The regulatory definition of ability to pay clearly instructs the submission of audited financial statements. The statements submitted by the petitioner have not been audited and would be inappropriate for that additional reason.

<sup>3</sup> While the regulations specific to multinational managers or executives do not specify a minimum income requirement, the law requires that any immigrant establish that he or she, at the time of application for admission or adjustment of status, will not likely at any time become a public charge. § 212(a)(4)(A) of the Act. For purposes of what constitutes a public charge, an employment-based immigrant must generally establish that his or her income will exceed the current Federal Poverty Line. *See* 22 C.F.R. § 40.41(f).

sufficient to establish that, at the time the Form I-140 was filed, the petitioner was able to compensate the beneficiary \$30,000 per year.

Accordingly, 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.