

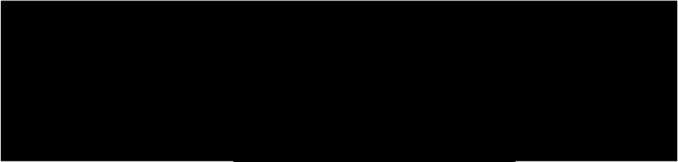
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B4



FILE: [REDACTED]
SRC 05 199 51279

OFFICE: TEXAS SERVICE CENTER Date: FEB 15 2008

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.¹ The petitioner appealed the director's adverse decision to the Administrative Appeals Office (AAO) where the denial was withdrawn and the matter was remanded back to the service center for further action. The director subsequently denied the petition and certified the decision to the AAO for review. The AAO will affirm the director's decision denying the petition.

The petitioner is a Florida corporation engaged in the business of real estate acquisition and property rentals. It 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. On remand, the AAO determined that the petitioner had overcome the single ground for ineligibility addressed in the director's denial. However, the AAO found other deficiencies, which the director was instructed to address by issuing another request for additional evidence (RFE). The director complied with the AAO's instructions and, upon reviewing the documentation provided by the petitioner in response to the RFE, issued another denial, which has been certified to the AAO. The director based the most recent adverse decision on the determination that the beneficiary would not be employed by the U.S. petitioner in a qualifying managerial or executive capacity.

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.

¹ The record indicates that two additional denials were issued on March 13, 2006. One denial was titled "Second Notice of Denial," and the other decision was titled "Third Notice of Denial." All three denials, including the initial denial dated December 29, 2005, were identical. Although the second denial appears to have been issued subsequent to the petitioner's notification of an address change, the record is unclear as to the reason for the issuance of the third denial. The AAO notes that the petitioner submitted a timely appeal in response to the initial denial dated December 29, 2005. As no action appears to have been taken in response to either of the subsequent denials, the AAO will issue its current decision with regard to the director's originally issued decision.

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 the United States in a capacity that is managerial or executive.

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.

The record does not show that the petitioner provided a description of the beneficiary's proposed job duties in support of the Form I-140. Therefore, the director issued the first RFE, dated September 15, 2005, instructing the petitioner to provide brief job descriptions for all of its employees. In response, the petitioner stated that in her capacity as the president of the petitioning organization, the beneficiary would be responsible for hiring, training, and scheduling marketing activities; forecasting cash flow and controlling inventory and payroll; and conducting real-estate research and contract negotiation.

Pursuant to the AAO's instructions in the decision dated September 8, 2006, the director issued another RFE dated January 25, 2007 instructing the petitioner to comply with the regulatory provisions specified in 8 C.F.R. § 204.5(j)(5). The director stated that the job description included in the record thus far merely conveys a broad overview of the beneficiary's responsibilities, thereby suggesting that the necessary level of specificity was lacking. Nevertheless, the director evaluated the job description and the petitioner's staffing composition. In light of these factors, the director determined that the beneficiary would primarily perform the petitioner's daily operational tasks. The petitioner was asked to respond to these and various other deficiencies.

In response, counsel provided a letter dated April 19, 2007 acknowledging the issues depicted in the RFE. The record was supplemented with a letter dated May 4, 2004, which included the following description of the duties to be performed by the beneficiary under an approved petition:

[The beneficiary's] role [sic] as president will be supervising and controlling the U[.]S[.]A[.] operations of [the petitioner's] Florida [o]ffice.

[The beneficiary's] duties and responsibilities will be as with an initial focus on to [sic] supervise [sic] the team of [sic] [the] Florida [o]ffice.

[His] responsibility will be to evaluate and review the current real estate market and acquire land for development and properties for short[-]term rentals, searches [sic] properties and land with the coordination of real estate brokers, finalize the deal after area study[;] [a]nd arrange financing through banks and other lenders.

[The beneficiary will] [m]anage finances and [h]uman [r]esources.

[He] will be require[d] to work closely with [the] parent company and help in [the] development and growth of the business in the U[.]S[.] marketplace, evolve new strategies and programs to expand our lodging business and thus to contribute to [the] expansion of [the petitioner] in [the] U[.]S[.] [b]usiness market.

In a decision dated May 21, 2007, the director determined that the above job description failed to establish that the beneficiary's job duties with the U.S. petitioner would be primarily within a qualifying managerial or executive capacity and, therefore, recommended that the petitioner's Form I-140 be denied.

A comprehensive review of the information provided by the petitioner, suggests that the director's recommendation to deny the petition was warranted. In addition to the provisions of 8 C.F.R. § 204.5(j)(5), which explicitly instruct the petitioner to furnish a job offer that "clearly describe[s] the duties to be performed by the alien," the director, pursuant to the AAO's instruction, also informed the petitioner of the need to provide a detailed description of the beneficiary's proposed job duties.² Although afforded yet

² See no. 4 of the RFE dated January 25, 2007.

another opportunity to supplement the record, the petitioner did not provide further information regarding the beneficiary's proposed job duties. Instead, the petitioner provided a deficient and overly general statement, which failed to provide the necessary information specifically requested by the director. Accordingly, while the AAO acknowledges counsel's submission of a more illustrative job description on certification and in response to the director's latest decision, the additional information will not be considered. As articulated in precedent case law, where a petitioner is put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition is adjudicated, the petitioner will not be allowed an additional opportunity to provide previously requested evidence after a final adverse decision has been issued. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). As the petitioner failed to submit the requested evidence previously, the AAO will not consider the additional evidence submitted on certification for any purpose. The appeal will be adjudicated based on the record of proceeding before the director.

As properly pointed out in the director's latest decision, 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). In the present matter, the record strongly suggests that the beneficiary, despite her position at the top of the organizational hierarchy, primarily carries out the petitioner's daily operational tasks. More specifically, the petitioner operates as a real estate acquisition and property rental business. In order to meet the business goal of acquiring real estate, the petitioner must ensure that proper market research is conducted and that the available property is evaluated. Once both of these steps are completed, contracts are then negotiated and financing is arranged to enable the acquisition of property to take place. Within the petitioning organization, the beneficiary is the individual who carries out these essential operational tasks. While the petitioner employs two additional staff members, who also perform a variety of operational tasks, neither relieves the beneficiary from having to primarily perform her own set of non-qualifying duties that are necessary for the petitioner's continued existence and financial success. While there are no statutory or regulatory requirements with regard to a petitioner's staffing size, the petitioner has the burden of establishing that it is able to relieve the beneficiary from having to primarily perform non-qualifying tasks. In the present matter, the nature of the duties the beneficiary would be expected to perform suggests that the petitioner lacks the necessary support staff to enable the beneficiary to primarily focus on tasks of a qualifying nature. For this reason, the AAO finds that the petitioner is ineligible to classify the beneficiary as a multinational manager or executive and affirms the director's recommendation denying the petitioner's Form I-140.

Additionally, though not the basis for the director's adverse decision, the AAO finds that the petitioner has failed to establish eligibility on at least one additional ground that was addressed in the AAO's prior decision and subsequently in the director's RFE. Specifically, the AAO noted that the record does not establish that the beneficiary was employed abroad during the requisite time period in a qualifying managerial or executive capacity pursuant to the provisions specified in 8 C.F.R. § 204.5(j)(3)(i)(B). The AAO specifically commented on the lack of specific information on record with regard to the beneficiary's job duties during her employment abroad. The AAO stated that this deficiency precluded the conclusion that the beneficiary's position required the performance of primarily qualifying duties. In compliance with the AAO's instruction, the director asked the petitioner to provide a list of qualifying managerial or executive tasks performed by the beneficiary during her employment abroad. While the petitioner provided documentation showing that the

beneficiary was, in fact, employed abroad as previously claimed, the record was not supplemented with the requested information regarding the beneficiary's job duties during such employment.

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

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The director's decision is affirmed. The petition will be denied.