

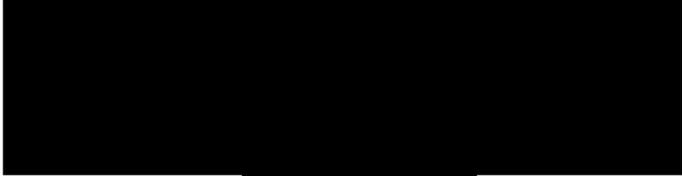
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U.S. Citizenship
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Services

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FILE: [REDACTED]
EAC 05 244 50419

Office: VERMONT SERVICE CENTER

Date: FEB 28 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, Vermont Service Center. The petitioner subsequently filed a motion, which the director granted. Nevertheless, in a full analysis of the submitted documentation, the director determined that approval of the petition was not warranted and, therefore, affirmed his prior decision and denied the Form I-140. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation operating as a construction developer. It seeks to employ the beneficiary as its president and chief executive officer. 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 would not employ the beneficiary in a managerial or executive capacity and denied the petition.

On appeal, counsel disputes the director's conclusions and submits a statement from the petitioner further discussing the beneficiary's proposed position with the U.S. entity.

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 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.

In support of the Form I-140, the petitioner submitted a letter dated June 28, 2005, which contained the following description of the beneficiary's proposed employment:

[The beneficiary] will continue to direct and coordinate all activities and operations of the economical [sic] of our construction operation and maximize profits; he will plan and develop organizational policies and goals, and implements [sic] goals through subordinate administrative personnel; he will coordinate the activities of construction, maintenance and developments departments to effect operational efficiency, [and] he will direct and coordinate promotion of services and products performed to develop new markets, increase market share and obtain [a] competitive position in the industry. [The beneficiary] will also analyze

company budgets, identify areas in which reductions could be made, confer with administrative personnel and review daily activities.

He is expected to enhance [the petitioner's] profitability and market edge. [He] will delegate to subordinates administering activities and operations under their control and[,] through technology transfer, [the beneficiary] will develop local expertise of this unique technology.

On March 16, 2006, the director issued a request for additional evidence (RFE) instructing the petitioner to provide the following documentation to assist Citizenship and Immigration Services (CIS) in determining the beneficiary's employment capacity in the proposed position in the United States: 1) a detailed description of the beneficiary's proposed day-to-day duties with a percentage of time indicating how much of the beneficiary's time would be devoted to each of the listed duties; 2) evidence of the petitioner's management and personnel structure; 3) copies of the petitioner's payroll roster for 2005 as well as the W-2s issued by the petitioner in 2004 and 2005; and 4) the petitioner's 2004 and 2005 tax returns. The petitioner was specifically instructed to indicate whether contractors are hired to perform any of the petitioner's daily functions.

In response, the petitioner provided a copy of the letter initially submitted in support of the Form I-140. The petitioner also provided a copy of its 2004 tax return, Form 1120S. The petitioner failed to provide the requested payroll information, its 2005 tax documents, the percentage breakdown of the beneficiary's job duties, or any documentation illustrating the petitioner's personnel and management structure. It is noted that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Accordingly, on September 18, 2006, the director issued a decision denying the petition. In light of the documentation submitted, the director properly determined that the petitioner failed to establish that the beneficiary's prospective employment would be within a qualifying managerial or executive capacity. It is noted, however, that a number of the comments and observations underlying the director's conclusion were inaccurate and failed to accurately address the deficiencies that warranted a denial in the present matter.

First, the director erroneously notes that the petitioner's failure to submit the W-2 statements issued in 2005 precludes an assessment of the petitioner's full-time personnel. While the requested W-2 statements may have provided insight as to who the petitioner employed during the year the Form I-140 was filed, these documents should not be relied upon to determine the full- or part-time employment status of employees, as they do not indicate the specific dates of hire or the length of employment. Second, the director improperly determined that the petitioner failed to comply with the director's request to provide an hourly breakdown of the job duties performed by the petitioner's employees. While the director suggested that providing a description of each employee's job duties may assist in determining the beneficiary's employment capacity, this was only a suggestion, not a direct request. Moreover, the RFE made no mention of an hourly breakdown for each employee. Third, the director made note of the apparent lack of sales people within the petitioner's organization. However, based on the lack of documentation provided to describe the petitioner's personnel structure, it would be difficult, if not impossible, to determine whom the petitioner employed and what position such employee(s) occupied. While the question of who is producing the petitioner's products and/or providing its services is germane to the issue of the beneficiary's employment capacity, focusing on the lack of a sales staff does not adequately address the relevant subject matter. Accordingly, the director's inaccurate statements are hereby withdrawn.

Nevertheless, a thorough analysis of the record suggests that the petition in the present matter does not merit approval for a number of reasons. First, 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). Precedent case law supports CIS's emphasis on the description of job duties, concluding that 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 petitioner failed to comply with the director's specific request for a detailed description of the beneficiary's proposed daily job duties accompanied by a percentage breakdown to indicate the amount of time allotted to each listed duty. The petitioner also failed to provide pertinent information regarding its organizational hierarchy and documentation establishing its personnel structure. While it is possible that various 2005 tax documents may not have been available at the time the petitioner provided its response to the director's RFE, the petitioner provided no explanation for its failure to provide the requested documentation. Moreover, the petitioner could have provided its payroll documents and copies of pay stubs to establish whom it employed at the time the Form I-140 was filed. However, with the exception of the beneficiary's pay stubs, such documentation was not provided at the time requested. Instead the petitioner attempts to rectify this deficiency on appeal by providing W-2 statements issued in 2005, pay stubs, a list of employees, and a separate letter (dated October 16, 2006) discussing the beneficiary's job duties. However, the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. Counsel offers no insight as to why the petitioner failed to comply with the director's request for information in a timely manner. Therefore, the AAO will not consider the newly submitted evidence (which had been previously requested) for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary would be employed in a primarily managerial or executive capacity. As properly determined by the director, the petitioner failed to provide a comprehensive list of the beneficiary's proposed job duties. Rather, the information provided consists of general job responsibilities, which suggest that the beneficiary would oversee and direct various activities. However, the petitioner did not specify the activities and operations that the beneficiary would coordinate or oversee, nor did the petitioner discuss the "subordinate administrative personnel" who would implement the undefined goals and policies the beneficiary would purportedly develop. Moreover, the petitioner has indicated that it is a construction-based business. However, it has failed to discuss or to provide supporting documentation to establish who would actually perform the services it offers to its clientele. 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). Although the petitioner makes general reference to staff members aside from the beneficiary, it has failed to provide documentary evidence to support its claim in a timely manner. 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)). Based on the evidence submitted in support of the Form I-140 and later in response to the RFE, the beneficiary was the petitioner's only paid employee at the time the Form I-140 was filed. This brings into question the petitioner's ability to relieve the beneficiary from having to primarily perform non-qualifying job duties.

Accordingly, in light of the deficient job description provided in support of the petitioner's claim and the lack of documentation establishing who, aside from the beneficiary, would perform the petitioner's daily functional tasks, the AAO cannot conclude that the beneficiary would be employed in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

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 director specifically addressed this issue in the RFE by instructing the petitioner to provide a detailed analysis of the beneficiary's daily activities during his employment abroad. However, the petitioner failed to provide the requested information and, instead, merely resubmitted the letter dated June 28, 2005, which was previously submitted in support of the petition when initially filed. Despite the director's valid concern with regard to an issue that is germane to the overall question of the petitioner's eligibility, the petitioner provided no additional information discussing the beneficiary's job duties abroad. Merely stating that the beneficiary supervised the work of six employees and coordinated various activities is not sufficient. 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. Thus, the petitioner failed to provide the information necessary to determine the beneficiary's employment capacity abroad.

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. Again, the RFE instructed the petitioner to provide evidence showing common ownership and control for the U.S. petitioner and the beneficiary's foreign employer. Specifically, the petitioner was instructed to submit copies of all issued share certificates and stock ledgers for both entities. Instead, the petitioner provided its 2004 corporate tax return in which Part II, Schedule K-1 identified the beneficiary as the shareholder with 100% of the petitioner's stock. No documentation was submitted to establish who owns and controls the foreign entity. Thus, based on these factors alone, the petitioner has failed to provide sufficient documentation establishing common ownership and control. *See Matter of Church Scientology International*, 19 I&N Dec. 593; *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). Additionally, in the petitioner's June 28, 2005 letter, the petitioner claimed to be an affiliate of the foreign entity with both entities purportedly owned 50/50 by the beneficiary and his wife. However, this claim is in direct conflict with the petitioner's tax return, which identifies the beneficiary as the petitioner's only shareholder. Thus, while the beneficiary's ownership of the petitioning entity would not disqualify the petitioner from being the foreign entity's affiliate, the question of credibility renders the applicant's claim dubious at best. *See* 8 C.F.R. § 204.5(j)(2) for the definition of *affiliate*. 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). In the present matter, the petitioner neither acknowledges nor attempts to reconcile this considerable inconsistency.

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." In the present matter, the Form I-140 was filed on September 6, 2005. Thus, based on the requirement set in 8 C.F.R. § 204.5(j)(3)(i)(D), the petitioner must establish that it has been doing business since September 2004. However, the earliest invoice for work completed by the petitioner goes back to January 20, 2005. The petitioner has therefore failed to establish that it was doing business from September to December 2004 and, as such, it is ineligible for the benefit sought.

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.