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FILE:

Office: CALIFORNIA SERVICE CENTER

Date: MAY 02 2008

WAC 00 261 54426

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 initially approved by the Director, California Service Center. On further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with a notice of his intention to revoke the approval of the preference visa petition and his reasons therefore. The director ultimately revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a California corporation claiming to be a hotel business. It seeks to employ the beneficiary as its general 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. Upon further review of the record, the director determined that the petitioner failed to establish that the beneficiary would be employed in a managerial or executive capacity and revoked 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 petitioner would employ the beneficiary in a 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 July 5, 2000 in which the following job responsibilities were assigned to the beneficiary's proposed position:

- Planning, developing and establishing, and implementing policies and objective[s] of the [petitioner] in accordance with [b]oard directives and [the corporate] charter[.]
- Conferring with [the] head[s] of departments to coordinate functions and operations between divisions and departments, and establishing responsibilities and procedures for attaining objectives[.]

- Reviewing reports and financial position to determine [the] progress and status of the company and for use as guidelines for policy direction/recommendation[.]
- Supervising employees such as the [d]irector of [h]ousekeeping, [d]ay and [n]ight [a]uditors, [c]ashiers, [a]ccountants, [h]ead of [m]aintenance, and [f]ood and [b]everage [m]anager[.]
- Directing and [c]oordinating the formulation of financial programs to provide funding for new or continuing operations to maximize returns on investment[s] and to increase profitability[.]
- Overseeing the day-to-day operations of the business[.]
- Supervising the training of employees and the hiring and firing of employees[.]

It is noted that the statements provided by the petitioner suggest that the beneficiary has been overseeing the work of a largely non-professional staff who purportedly run the petitioner's hospitality business. However, the record lacks sufficient documentation establishing whom the petitioner employed at the time the Form I-140 was filed. Despite these significant deficiencies, the director approved the petition.

Upon further review, the director determined that a revocation of the prior approval may be warranted. Accordingly, on December 7, 2005, the director issued a notice of his intent to revoke the prior approval of the petition (NOIR) based on the determination that the petitioner failed to adequately establish the ability to employ the beneficiary in a managerial or executive capacity.¹ The director also noted that the tax documentation submitted suggests that the petitioner's employees were not employed on a full-time basis. The petitioner was given 30 days in which to respond to the director's adverse findings.

In response, the petitioner provided a letter from counsel dated January 5, 2005 in which counsel stated the following with regard to the beneficiary's employment in the United States:²

[The beneficiary] continues [to] function as an executive of the company. He is solely responsible for formulating financial policy decision[s] affecting sources and utilization funds, lines of credit, costing[,] and budgeting. He has discretionary authority over marketing policies (including decision[s] on market development, pricing, streamlining of services, [and] discounts) and personnel matters such as employee benefits and compensation.

¹ The wording in the director's analysis suggests that the petitioner may have been unduly burdened with the responsibility of having to establish that it was, in fact, employing the beneficiary in a managerial or executive capacity as of the petition's date of approval. However, the AAO hereby clarifies that, while the petitioner must establish its *ability* to employ the beneficiary in a qualifying capacity as of the date the Form I-140 is filed, there is no requirement that the petitioner actually employ the beneficiary in the proposed managerial or executive capacity until an immigrant visa is issued or the beneficiary has adjusted his status to that of a permanent resident.

² The date on counsel's letter appears to be a typographical error, as the NOIR was not issued until December 7, 2005. Based on the due date of the response, or January 6, 2006, it appears that counsel intended to date his response letter January 5, 2006, rather than 2005. This error is merely noted for the record and has no bearing on the AAO's decision.

On March 23, 2006, the director issued a final decision revoking the prior approval of the petitioner's Form I-140. The director commented on the low amount paid in salaries and questioned whether the petitioner had full-time employees, particularly in light of Part 5 of the Form I-140 where the petitioner claimed to have 12 employees. The director concluded that the petitioner failed to establish that the beneficiary has been performing primarily managerial or executive level duties.

On appeal, counsel focuses on several confusing comments in the director's decision. Namely, counsel notes the director's request for additional documents and the 30-day time period suggested for the response. Counsel's complaint is valid. The director appears to have included language from the previously issued NOIR, erroneously suggesting that the petitioner had more than the time limit prescribed in 8 C.F.R. § 205.2(d) in which to submit evidence for further consideration on appeal. Counsel also disputes the relevance of the director's discussion of the petitioner's property value. Again, this language appears to have been mistakenly extracted from the NOIR. Accordingly, both of the director's questionable comments are hereby withdrawn.

Next, counsel addresses the director's repeated references to section 101(a)(44)(A) of the Act, which defines the term "managerial capacity." While counsel's observation is accurate, his further assertion, that the lack of any reference to section 101(a)(44)(B) of the Act suggests the director's failure to consider the beneficiary's employment within an executive capacity, is incorrect. Despite the director's failure to restate the statutory definition for the term "executive capacity," the director's numerous references to executive capacity suggests that the director's omission was inadvertent oversight and not intended to suggest that due consideration had not been given under both statutory definitions.

Lastly, counsel contends that the director erroneously relied on the petitioner's size in rendering the adverse decision, citing the case of *Mars Jewelers Inc. v. I.N.S.* in support of his argument. 702 F. Supp. 1570 (N.D. Ga. December 6, 1988). Upon review, counsel's reliance on *Mars Jewelers Inc. v. I.N.S.* is misplaced. The court clearly states in its decision that the error made by the legacy Immigration and Naturalization Service (INS) was applying the 1987 regulations instead of the 1983 regulations to a petition filed in 1986. *Id.* at 1575. Thus, while the court found that the beneficiary in that matter was not a first-line supervisor under the 1983 regulations, it implied that this would not have been the case had the 1987 regulations applied. *Id.* Specifically, the court in *Mars Jewelers Inc. v. I.N.S.* stated the following:

It is apparent that the INS was inappropriately applying its 1987 regulations to this factor. Under the 1987 regulations, one of the requirements of a manager is that he "supervises and controls the work of other supervisory, professional or managerial employees. . . ." 8 C.F.R. 214.2(l)(1)(ii)(B) (1988). This language is not in the 1983 regulations.

Id. (footnote omitted). Thus, contrary to the assertions of counsel, as the present petition was filed in 2000, it would have been legal error for the director to apply the obsolete 1983 regulations and the holding in *Mars Jewelers Inc. v. I.N.S.* to the present matter.

Furthermore, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that Citizenship and Immigration Services (CIS) "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with

approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). This is particularly true in the present matter, where the petitioner makes repeated references to the beneficiary's supervision of other employees and oversight of functions that are purportedly carried by others, not by the beneficiary himself. By virtue of making these references, the petitioner implies that it has a staff to carry out the functions that the beneficiary oversees. That being said, 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)). As such, the petitioner must provide adequate documentation to substantiate the 12 employees it claimed in the Form I-140 and its further reference to specific positions within the organization, including a director of housekeeping, auditors, cashiers, accountant, maintenance person, and a food and beverage manager. However, based on the total amount paid in employee salaries, as indicated in the petitioner's tax returns subsequent to the approval of the Form I-140, the petitioner either does not have the 12 employees claimed in the Form I-140 or it does not employ these individuals on a full-time basis. Regardless of which is true in the present matter, the AAO questions the petitioner's ability to employ the beneficiary in a managerial or executive capacity if it lacks a sufficient support staff to relieve him from having to primarily perform non-qualifying duties.

Additionally, 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). Counsel asserts that the petitioner has provided sufficient information to warrant a favorable conclusion. However, his underlying argument is not persuasive and places undue emphasis on the beneficiary's discretionary authority and his position within the petitioner's organizational hierarchy. While both components are relevant to a determination of the beneficiary's employment capacity, neither is outcome determinative, as 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). With regard to the beneficiary, the AAO is unable to determine the nature of his employment due to the petitioner's failure to provide a detailed statement delineating what specific duties the beneficiary carries out on a daily basis. 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. *Id.* In the matter at hand, the petitioner uses broad terminology to describe the beneficiary's U.S. employment, claiming that the beneficiary plans, develops, establishes, and implements policies and objectives; directs and coordinates the formulation of financial programs; and oversees daily business operations. However, none of these vague job responsibilities are defined in terms of actual job duties.

Furthermore, the petitioner claims that the beneficiary trains and supervises employees that are part of the hotel staff. However, the petitioner has not established that these subordinates are professional, supervisory, or managerial employees. As such, the training and supervision of such employees cannot be deemed as qualifying duties. See section 101(a)(44)(A)(ii) of the Act. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. See *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Lastly, the petitioner refers to departments and divisions, claiming that the beneficiary devotes a portion of his time to conferring with department heads. However, the petitioner has failed to provide an adequate description of its organizational structure naming these purported divisions and departments and showing

where the beneficiary's position is located with respect thereto. Similarly, the petitioner indicates that the beneficiary would review reports, but fails to identify who within the company's organizational hierarchy is responsible for generating these reports.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. While the beneficiary may oversee various functions and employees, whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that the beneficiary's duties will be "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner provides a deficient job description, which consists of general job responsibilities and the non-qualifying job duties of a first-line supervisor. Thus, the record does not establish that a majority of the beneficiary's duties are within a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

With regard to the propriety of revoking a previously approved Form I-140, section 205 of the Act, 8 U.S.C. § 1155, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The mere fact that the director put forth a valid basis for the revocation is sufficient to conclude that the prior decision to approve the petition was erroneous, as eligibility had not been established. Thus, counsel's suggestion that the director must explain the error made by initially approving the Form I-140 lacks merit.

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 petitioner's description of the beneficiary's employment abroad is as general and lacking in specific job duties as the description of his U.S. employment. Thus, for the same reasons stated above, the petitioner has failed to provide sufficient information to convey an adequate understanding of the nature of the job duties performed by the beneficiary 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. In the present matter, the petitioner claims to be a subsidiary of the company that employed the beneficiary abroad. In support of this claim, the petitioner provided its Minutes of First Organizational Meeting of Incorporator(s) dated January 2, 1994. Page 8 of the document indicates that the petitioner is authorized to issue 1,000 shares and further states that 150 shares were issued to the foreign entity in exchange for \$150,000, while another 100 shares were issued to the beneficiary and his wife in exchange for \$100,000. The petitioner also provided four stock certificates, including Nos. 1, 2, 4, and 5. Stock certificate Nos. 4 and 5, both of which were dated January 5, 1994, reflect the distribution provided in the Minutes of First Organizational Meeting document. However, certificate No. 1, issuing 420 shares to the foreign entity, and No. 2, issuing 280 shares to the beneficiary and his wife, indicate that additional shares were issued. Both of these stock certificates are dated March 1, 1994. The petitioner did not explain why stock certificate Nos. 4 and 5 predate Nos. 1 and 2, which are sequentially first in the series of certificates that were purportedly issued.

Furthermore, the petitioner values its stock at \$1,000 per share, thereby suggesting that \$950,000 would have been received by the petitioner in exchange for the 950 shares conveyed in stock certificate Nos. 1, 2, 4, and 5. However, Schedules L of the petitioner's corporate tax returns for 2002 and 2003 indicate that the petitioner's outstanding stock is worth only \$700,000. 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 does not provide evidence to document any changes that may have occurred in the petitioner's stock distribution, thereby suggesting an inconsistency between information provided in the petitioner's stock certificates and the petitioner's tax returns.

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 petitioner claims to operate a hotel. While the petitioner has provided a licensing document as well as several corporate tax returns, these documents are not evidence of on-going business transactions. As such, the AAO cannot conclude that the petitioner was doing business either during or subsequent to the statutory one-year time period specified above.

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, revocation of the approval of the petitioner's Form I-140 was warranted.

When the AAO revokes approval of a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows 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 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

The approval of the petition is revoked for the above stated reasons, with each considered as an independent and alternative basis for revocation. 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.