

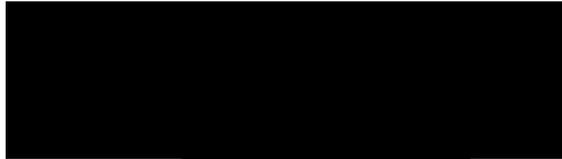
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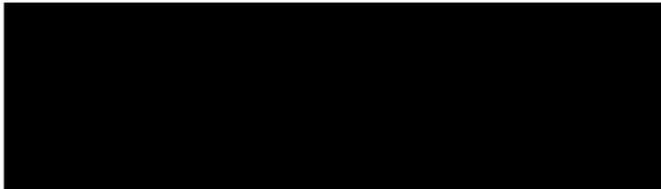
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IN RE: Petitioner:  
Beneficiary:



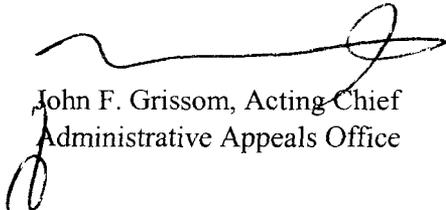
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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.

  
John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The employment based immigrant visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner was incorporated in the State of Florida in 2002 and claims to be engaged in wood sales. It seeks to employ the beneficiary as its president 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 petitioner claims to be the subsidiary of Nova Kostur Cambio e Turismo Ltda., located in Rio de Janeiro, Brazil.

The director denied the petition, determining that the beneficiary will not be employed in a primarily managerial or executive capacity in the United States. On appeal, newly-retained counsel for the petitioner claims that due to ineffective assistance of former counsel, critical evidence in support of the petition was not submitted for consideration. In a separate letter of support, the petitioner contends that the beneficiary qualifies for the benefit sought and submits additional documentary evidence in support of this claim.

Prior to addressing the grounds for denial in this matter, the AAO will address counsel's claim of ineffective assistance of counsel. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The petitioner has not complied with these provisions; therefore, this basis for reconsideration will not be considered by the AAO on appeal.

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.

Prior to addressing the issues, the AAO must emphasize that the critical facts to be examined are those that were in existence at the actual time of filing the petition. It is a long-established rule in visa petition proceedings that a petitioner must establish eligibility as of the time of filing. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971); *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). If the petitioner or beneficiary become eligible under a new set of facts, the proper course of action is to file a new petition.

The issue in this matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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.

On Form I-140, which was filed on June 4, 2007, the petitioner claimed that it currently employed the beneficiary as its executive director, and proposed to continue this employment at an annual salary of \$48,000. It further claimed to employ four persons. In a letter of support dated May 15, 2007, the petitioner provided a description of the beneficiary's role in the company and duties performed. In relevant part, the petitioner provided the following overview of the beneficiary's duties in the United States:

As the Executive Director for the Petitioner, the Beneficiary has and will continue to be responsible for, but not limited to, the following:

1. Decisions, direction and budgets;
2. Formulating and implementing administrative and financial policies and procedures;
3. Directing the activities of all employees;
4. Engaging in long-range planning and identifying business opportunities in the U.S.;
5. Cash management;
6. Acquisition of new clients and business relationships;
7. Hiring and training professionals to work in the company and establishing their duties and responsibilities;
8. Analyzing financial information, such as price, future trends, and investment risks, making investment decisions, estimating forecast of business and preparing plans of action;
9. Supervising employees and reviewing records, policies and procedures;
10. Evaluating the performance of the company and staff and to determine areas of cost reduction and program improvement;
11. Maintaining and reviewing account records; and
12. Overlooking the shipment operations.

The Beneficiary, in the position of Executive Director at the Petitioner, will continue to be in charge of all management and financial activities. He will ensure that the Petitioner's database meets the parent company's managing practices and policies.

In addition, the petitioner submitted an organizational chart for the petitioner, showing that the beneficiary oversaw a warehouse manager, [REDACTED], and an operational manager, [REDACTED]. The chart further indicated that the operational manager oversaw unidentified subcontractors. The petitioner also submitted payroll records for March 2007, indicating that the beneficiary, the warehouse manager, the operational manager and a fourth person, [REDACTED] received wages during this period. Finally, the petitioner submitted copies of the beneficiary's Form W-2, Wage and Tax Statement, for 2006.

In a request for evidence issued on August 22, 2007, the director requested detailed information pertaining to all aspects of the beneficiary's role in the petitioner's business, including a more detailed overview of his duties and a specific explanation with regard to his interaction with subordinate employees. The director further requested that the petitioner provide an organizational chart and list all employees under the beneficiary's supervision, along with a more detailed description of their duties and educational backgrounds.

Former counsel for the petitioner responded in a letter dated October 2, 2007. In this letter, counsel presented an organizational chart, which demonstrated that the beneficiary oversaw a secretary, [REDACTED], a warehouse manager, [REDACTED], and an operational manager, [REDACTED]. The chart indicates that the operational manager allegedly oversaw subcontractors, however, no evidence of the employment of such persons was submitted.

With regard to the beneficiary's duties, counsel restated the list of duties set forth above. In a separate letter dated October 1, 2007, the petitioner also restated the above list of duties, but provided the following additional descriptions:

The [Beneficiary's] title at the Petitioner will continue to be **Executive Director**, and he will continue to be responsible for, but not limited to, the following:

In this position the Beneficiary primarily:

- (1) Directs the management of the organization or a major component or function of the organization.
- (2) Establishes the goals and policies of the organization, component, or function;
- (3) Exercises wide latitude in discretionary decision-making; and
- (4) Receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

He has been and will continue to be responsible for the entire company's operations, managing, delegating and taking responsibility for core elements such as:

- Drafting and executing business strategy,
- Staff management[;] defining and monitoring roles and tasks[;] hiring,
- Establishing and monitoring operational processes,
- Financial Management[;] working with book-keeper, accountant, etc

\* \* \*

The Beneficiary, in the position of Executive Director of the Petitioner, will continue to be in charge of the Petitioner's overall activities.

He will continue to manage managerial and professional employees, who will perform the day to day tasks necessary to provide the Petitioner's products and services. The Beneficiary will not perform the day to day activities.

The petitioner also submitted wage and payroll records for 2004, 2005 and 2006. The most recent records for 2006 demonstrated that the petitioner employed 8 persons during that year.

On January 15, 2008, the director denied the petition, finding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director found that the petitioner did not establish that the beneficiary would be primarily directing the management of the organization, or supervising professional employees.

On appeal, the petitioner contends that the beneficiary is in fact operating in a primary managerial or executive capacity, and submits additional documentary evidence in support of this claim.

Upon review, the AAO concurs with the director's findings. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Although the petitioner provided a lengthy overview of the beneficiary's duties in both the initial letter of support and the response to the request for evidence, the descriptions provided are nondescript and merely paraphrase the regulatory definitions. Based upon the evidence submitted, it cannot be determined that the beneficiary would be primarily engaged in qualifying managerial or executive duties. The AAO, therefore, agrees with the director's conclusions.

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not

spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

In both the initial letter of support and in response to the request for evidence, the description of duties provided simply adopts many of the key phrases used in the statutory definitions of managerial and executive capacity. See sections 101(a)(44)(A) and (B) of the Act. In fact, the petitioner's letter dated October 1, 2007 uses the definition of executive capacity in the beneficiary's list of stated duties. These general statements do little to clarify the exact nature of the beneficiary's duties. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Although the director requested additional detail regarding the beneficiary's position in the request for evidence, the petitioner failed to submit such documentation. In fact, the petitioner merely repeated the list of duties set forth in the initial letter of support which had been deemed insufficient by the director. And, as stated above, the petitioner merely copied the definition of "executive capacity" in its response to the request for evidence pertaining to the exact nature of the beneficiary's tasks. 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).

Moreover, the organizational chart provided did little to establish that the beneficiary is relieved from performing non-qualifying duties. The record indicated that in 2006, the petitioner employed seven persons in addition to the beneficiary. As of the time of filing, it appears that the petitioner employed only three additional persons. It is unclear how the beneficiary is relieved from performing day-to-day duties by a secretary, a warehouse manager, and an operational manager. The petitioner simply stated:

*[The beneficiary] will continue to manage managerial and professional employees, who will perform the day to day tasks necessary to provide the Petitioner's products and services. The Beneficiary will not perform the day to day activities.*

The petitioner, however, failed to clearly indicate in what way the secretary, warehouse manager and operational manager would perform all of these essential day-to-day tasks, and likewise failed to clearly discuss the nature of the beneficiary's claimed managerial capacity. This omission creates a presumption, absent evidence to the contrary, that the beneficiary is merely a first-line supervisor. 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).

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

Though requested by the director, the petitioner did not provide the level of education required to perform the duties of the beneficiary's subordinate employees. Instead, the petitioner merely submitted an organizational chart and copies of W-2 forms for the beneficiary's three subordinate employees. Any 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). Thus, the petitioner has not established that these employees possess or require an advanced degree, such that they could be classified as professionals. Nor has the petitioner shown that either of these employees notwithstanding their job titles, supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. While the operational manager is listed as supervising subcontractors, no documentation of the use of subcontractors by the petitioner (such as Form 1099 (Miscellaneous Income)) has been submitted. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

It is noted that on appeal, the petitioner submits an abundance of evidence not previously submitted in support of the beneficiary's eligibility. For example, the petitioner for the first time discusses its new affiliate, USPLY, and claims that after realizing his limitations, the beneficiary founded this new company in 2006 in order to import unfinished wood materials. The petitioner claims that the beneficiary was responsible for establishing strategic relationships with mills in China, as well as overseeing a team of three independent sales representatives. The petitioner claims that the beneficiary incorporated this company on January 10, 2006.

These statements, however, are not persuasive. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The claim on appeal that the beneficiary has been allegedly running two different companies during adjudication of the instant petition further calls into question the legitimacy of the petitioner's claims pertaining to the extent of the beneficiary's role in the petitioning entity. 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).

Moreover, for the first time on appeal, the petitioner submits documentation in support of the petitioner's use of independent contractors outside of the organization. Specifically, the petitioner submitted copies of invoices from the [REDACTED] company, which indicate substantial payments to this company for various expenses, including labor. There are two problems with this evidence. First, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition

was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence 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. Second, the invoices cover the period from December 2007 to February 2008. A petitioner, however, must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In this matter, the petitioner should have established that the beneficiary oversaw a subordinate staff that would relieve him from non-qualifying duties at the time of filing, which in this matter was June 4, 2007.

The generic and nondescript overview of the beneficiary's position, coupled with the lack of detail regarding the organizational structure of the petitioner and the beneficiary's other employees, renders it impossible for the AAO to conclude that the beneficiary has satisfied the regulatory requirements. 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)). Although the petitioner submits an abundance of documentation on appeal, much of this evidence was previously submitted and is insufficient for the reasons outlined above. Moreover, while the petitioner submits recent payroll records reflecting the hiring of new staff and the use of independent contractors, this evidence is irrelevant to this proceeding. As discussed earlier in this decision, it is a long-established rule in visa petition proceedings that a petitioner must establish eligibility as of the time of filing. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248; *Matter of Katigbak*, 14 I&N Dec. at 49; *Matter of Izummi*, 22 I&N Dec. at 176. If the petitioner or beneficiary become eligible under a new set of facts, the proper course of action is to file a new petition.

For the reasons set forth above, the director correctly concluded that the beneficiary will not be employed in the United States in a primarily managerial or executive capacity.

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. Therefore, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.