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U.S. Citizenship
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Services

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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: MAR 11 2008
SRC 04 193 51167

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: SELF-REPRESENTED

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. The petitioner subsequently appealed the director's decision to the Administrative Appeals Office (AAO), where the matter was remanded for further consideration. On remand, the director requested additional evidence. Upon review of the petitioner's response, the director reopened the matter and issued another adverse decision denying the petition. That matter has been certified to the AAO for review. The AAO will affirm the director's decision.

The petitioner was incorporated on April 3, 2001 in the State of Florida and is engaged in the business of operating child care and preschool facilities. It seeks to hire the beneficiary as its administration and marketing 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 its ability to pay the proffered wage of the beneficiary and denied the petition.

The AAO determined that the director's decision was erroneous and remanded the matter back to the director, instructing her to give further consideration to the AAO's adverse findings. The director complied with the AAO's instructions and ultimately determined that the petitioner is ineligible to classify the beneficiary in the category of a multinational manager or executive because it failed to establish that, at the time the Form I-140 was filed, the petitioner was able to employ the beneficiary in a qualifying managerial or executive capacity.

Therefore, the primary issue in this proceeding is whether the petitioner established, at the time the Form I-140 was filed, that it 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 provided the following percentage breakdown of the beneficiary's proposed duties and responsibilities:

- Directing the management and controlling the corporation's administration and marketing department[.] [100%]
- Establishing and implementing all departmental goals, policies and procedures[.] (10%)
- Managing the coproation's administration to ensure appropriate records, correspondence, billing[,] etc[.] are undertaken to present standards[.] (40%)
- Managing the departmental budget[.] (10%)
- Directing the development of a marketing program that projects the [c]ompany's [a]cademies and the benefits they offer [to] children[.] (15%)
- Establishing and implementing the corporation's sales and marketing goals[.] (5%)
- Implementing standards to ensure customer satisfaction[.] (5%)
- Exercising discretion over day-to-day operations of the department[.] (100% of the time)
- Authorized to hire and fire staff and of [sic] middle management, and to establish appropriate training[.] (10%)
- Directing continued compliance with required permits and adherence to and implementation of all safety regulations[.] (5%)

The petitioner also submitted an organizational chart showing the beneficiary at the top of the hierarchy as the company's administration and marketing manager/vice president. The beneficiary's direct subordinate was identified as a director, whose subordinates included seven teachers.

On April 4, 2005, 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 list of the beneficiary's proposed day-to-day duties on the petitioner's letterhead, including the percentage of time assigned to each duty; 2) brief job descriptions and educational levels of the beneficiary's subordinates; 3) each subordinate's place within the organizational hierarchy; and 4) financial documents, including the petitioner's 2004 tax return, evidence of quarterly wages paid for the three prior years, and W-2 statements issued to employees who worked for the petitioner during the time period in which the Form I-140 was filed.

In response, the petitioner provided a modified percentage breakdown, adding further information to the breakdown provided initially. As the director incorporated the list into her most recent decision, the AAO need not restate it for the record. **The petitioner also provided job descriptions for others within the organization, including that of the director, the beneficiary's direct subordinate.** Although the petitioner provided an updated list of its employees, including six who were hired in 2005, a petitioner 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). Therefore, for the purpose of determining the petitioner's eligibility, the AAO will not consider employees who were not part of the petitioner's organizational structure at the time the Form I-140 was filed. That being said, the organizational chart submitted to show the petitioner's staffing structure at the time of filing shows that the petitioner was staffed with only one director to oversee a total of seven teachers. However, the employee list submitted in response to the RFE shows two directors and a deputy director, thus indicating that the petitioner experienced additional hires since the time of filing. Regardless, as previously stated, the petitioner's eligibility will be determined, in part, on the basis of whether the petitioner's staffing at the time the Form I-140 was filed was sufficient to relieve the beneficiary from having to primarily perform non-qualifying duties.

The petitioner's response also included relevant tax documents. Namely, the petitioner submitted the W-2 statements it issued in 2004 as well as its corporate tax return. While the petitioner also submitted its quarterly tax returns, Forms 941, it did not submit any quarterly wage statements to establish exactly whom it employed during the quarter it filed its Form I-140. In a comparison of the petitioner's initially submitted organizational chart and its W-2 wage and tax statements for 2004, a significant number of the employees listed in the organizational chart, including three teachers and three assistant teachers, were not among those for whom W-2 statements were submitted. Similarly, a number of 2004 W-2 statements were issued to individuals whose names were not included in the petitioner's organizational chart. This discrepancy precludes the AAO from being able to determine exactly whom the petitioner employed at the time the Form I-140 was filed.

In the notice dated January 11, 2007, the director observed that on appeal the petitioner stated that the beneficiary would be responsible for handling its administrative and marketing affairs. The director asked the petitioner to reconcile this statement with the fact that none of the petitioner's remaining employees at the time of filing were assigned any sales or marketing related duties. Thus, the director's question was geared towards establishing who was actually performing the sales and marketing tasks at the time the Form I-140 was filed and, more importantly, whether the petitioner was able to relieve the beneficiary from having to perform these non-qualifying tasks.

In response, the petitioner provided the following list of the beneficiary's responsibilities:

1. Direct, plan and implement business objectives by identifying locations for schools by studying area growth and developments[.]
2. Study market trends and industry specific business journals and adjust company offerings accordingly to remain competitive[.]

- Marketing
- Franchising
- Internet presence

3. Review financial data, reports, statements and sales data to establish whether the organization meets its goals[.]

- Oversee financial responsibilities of [the] company[:]
- Tax liabilities
- Present financial status of [the] company to [the] [b]oard
- IRS issues
- Fiscal policy
- Consult with tax attorney and CPA
- Budgets, revenue generation, loan commitments

4. Establish and implement internal control procedures

- Student enrollment
- Records are maintained according to requirements

5. Establish industry specific contacts within the community

- DCF
- Negotiating business contracts

6. Analyze and control all requirements of law pertaining to schools to insure compliance and evaluate overall company performance[.]

- FBI
- Local Law Enforcement

7. Assign and delegate responsibilities to staff and develop personnel structure for future growth of [the] company[.]

- Oversee personnel matters
- Hire and fire personnel
- Payroll
- Compliance with DCF requirements
- Approve background checks

The petitioner also provided the following additional list accompanied by a percentage breakdown:

1. 20% Direct, plan, and implement business objectives by identifying locations for schools by studying area growth and developments.
2. 15% Study market trends and industry specific business journals and adjust company offerings accordingly to remain competitive.
3. 15% Review financial data, reports, statements, and sales data to establish whether the organization meets its goals.
4. 5% Establish and implement internal control procedures[.]
5. 10% Establish industry specific contacts within the community[.]
6. 20% Analyze and control all requirements of law pertaining to schools to insure compliance and evaluate overall company performance[.]
7. 15% Assign and delegate responsibilities to staff and develop personnel structure for future growth of [the] U.S. [c]ompany.

The AAO notes that the job descriptions were accompanied by an employee list, which included four managerial positions and five director positions, which, with the exception of one directorial position, were not part of the petitioner's organizational hierarchy at the time the Form I-140 was filed. Furthermore, a comparison of the above job description with the description provided in support of the petition initially shows that the position breakdowns are considerably different, thereby suggesting that the more recent job description does not correspond to the petitioner's organizational hierarchy at the time of filing, but rather corresponds to the petitioner's current expanded organizational structure. When analyzing the job descriptions that correspond to the organizational hierarchy that was in place when the Form I-140 was filed, the AAO questions the petitioner's ability to employ the beneficiary in a qualifying capacity. More specifically, the petitioner initially stated that 40% of the beneficiary's time would be allotted to managing the corporation's administration, correspondence, and billing and another 10% to managing the budget. However, in light of the fact that the petitioner did not have an administration manager or an accounting manager at the time of filing, the AAO questions who, if not the beneficiary, would have actually performed the administrative and accounting related tasks. The job description also stated that the beneficiary would have allotted 15% of his time to directing the development of a marketing program. However, the corresponding organizational chart does not indicate that the petitioner had any employees to perform the marketing tasks that the beneficiary was supposed to oversee. Therefore, the petitioner has failed to establish how it would have enabled the beneficiary to manage and direct aspects of the organization when it did not have the necessary employees to perform the non-qualifying tasks.

In order to establish that the beneficiary is a managerial or executive employee, the petitioner must first sustain its burden of proving that the beneficiary's duties are "primarily" managerial or executive rather than tasks necessary to produce a product or to provide services. *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). While there are no specific statutory or regulatory requirements with regard to staffing size, in order to establish that the beneficiary would primarily perform duties within a qualifying managerial or executive capacity, the petitioner must establish that it has a sufficient staff in place to relieve the beneficiary from having to primarily engage in the performance of non-qualifying tasks. In the present matter, the petitioner may have ultimately expanded to a stage of development where the beneficiary may be employed in a qualifying managerial or executive capacity. However, at the time this Form I-140 was filed, the petitioner's organization lacked the necessary management structure to enable the beneficiary to primarily perform managerial or executive level tasks, regardless of the beneficiary's place within the organization's hierarchy or his high degree of discretionary authority over the petitioner's daily operations.

Accordingly, based on the evidence furnished with regard to the petitioner at the time the Form I-140 was filed, it cannot be found that the petitioner was ready to employ or had reached the level necessary to support the beneficiary in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

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 director's decision dated January 11, 2007 is affirmed.