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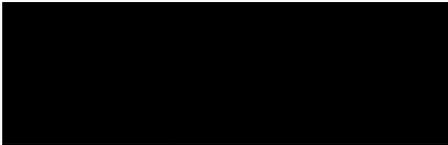
OFFICE: TEXAS SERVICE CENTER Date:

JUN 01 2005

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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Florida corporation engaged in the business of residential and commercial property development and construction. It seeks to employ the beneficiary as its president and chief operations officer (CEO). 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 beneficiary would not be employed in a managerial or executive capacity and denied 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 the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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 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 petition, the petitioner submitted the following description of the duties to be performed by the beneficiary under an approved petition:

[The beneficiary] is responsible for managing and directing our day-to-day operations, and for hiring, training, and supervising our employees and independent contractors [He] is also intimately involved in core development and construction operations, where he personally identifies, plans, and directs all projects. Specifically, [the beneficiary] is responsible for identifying new development opportunities, for negotiating land purchases, for arranging financing as required, for directing and approving the design of all projects, for securing appropriate permits, for negotiating and approving supplier prices and terms, for approving vendor and supplier disbursements, and for inspecting projects daily to initiate remedial steps as necessary.

The petitioner also provided an organizational chart reflecting its personnel structure at the time the petition was filed. The chart identified the beneficiary and his wife as the petitioner's only employees, and indicated that the company was now ready to hire an additional secretary, a machine operator, a superintendent/manager, and a general laborer.

On January 16, 2004, the director issued a request for additional evidence instructing the petitioner to describe the beneficiary's duties and the duties of the beneficiary's subordinates.

The petitioner responded with a letter dated March 29, 2004. The petitioner divided the beneficiary's duties into two categories—daily duties and weekly duties. The following is the description provided:

Daily Duties

- Check mail and respond to any enquiries and authorise [sic] payments of invoices and dues for vendors 1-2 hours every morning
- Drives to all job sites daily to check on progress, make sure material deliveries have arrived and are in correct quantities[;] if any problems have arisen on site[,] it is [the beneficiary's] duty to get them sorted ie[,] building section failure, architectural plan needs adjustment etc[.] 3-4 hours daily
- Meet with material suppliers 1-2 hours depending on size of order
- Reply to any emails or correspondence 1 hours [sic] (back in office)
- Answering constant phone calls from vendors and potential customers 1-2 hours

Weekly/As and When Duties

- Authorise [sic] employee wages
- Contact customers to check that they are happy with progress
- Contact realtors [sic] for prospective land purchasement [sic]—scout for new business oportunities [sic]
- Arrange construction contractors
- Provide estimates for new construction
- Make sure adequate cash flow is maintained, visit bank managers to arrange loans[,] etc[.] provide lending banks with financial forecasts for each project
- Check invoices from vendors are correct before authorising [sic] payments
- Meet with representatives for vendors negotiating prices and quantities
- Pull permits—building licence [sic] is in the name of [the petitioner]

- Meeting with planning designers and architects both at office and on site
- Inspect quality of works for individual sub[-]contractors before releasing payments
- Market properties with realtor [sic]—negociate [sic] fees
- Ensure insurances are in place for all sub[-]contractors and health and safety regulations are maintained

On April 19, 2004, the director denied the petition concluding that the beneficiary's job description suggests that the beneficiary performs the petitioner's daily operational tasks.

On appeal, counsel asserts that the beneficiary acts as a first-line supervisor whose subordinates consist of professional employees. In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by the subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary, for example, to perform the work of the sub-contractors who do the actual building. While the AAO does not dispute that these individuals are highly skilled, there is no indication or evidence that would suggest that a bachelor's degree is a prerequisite for obtaining and practicing this skill. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Therefore, the record lacks evidence to suggest that the beneficiary supervises professional employees.

Despite the petitioner's inability to show that the beneficiary supervises professional employees, the petitioner can still establish the beneficiary's eligibility by providing evidence that the beneficiary is a function manager. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function.

An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, counsel states that the beneficiary does not perform any construction-related duties and, therefore, asserts that the beneficiary is relieved from performing non-qualifying functions. However, merely establishing that the beneficiary does not perform the petitioner's most essential function does not mean that the beneficiary is relieved from performing many of the other types of non-qualifying functions associated with the petitioner's business. According to the description of the beneficiary's daily tasks, the beneficiary personally visits all of the worksites, communicates and negotiates with the vendors and suppliers, and addresses all customer-related issues. While these duties may be crucial to the proper functioning of the petitioner's business, they are also the daily operational tasks that cannot be deemed qualifying. This conclusion is corroborated by the petitioner's organizational chart, which shows plans to hire additional personnel to relieve the beneficiary from some of the duties he is currently performing, including visits to the various work sites, a task that currently consumes a significant portion of the beneficiary's day.

Counsel further refers to an unpublished decision involving an employee of the Irish Dairy Board. In the unpublished decision, the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the Irish Dairy Board matter. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190. Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Similarly, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, however the analysis does not have to be followed as a matter of law. *Id.* at 719. Therefore, the district court case of *Mars Jewelers, Inc., v. I.N.S.*, 702 F. Supp. 1570 (N.D. Ga. Atlanta Div. 1988), will not serve as precedent in the instant matter.

On review, the evidence of record in this case does not establish that the beneficiary would be employed in a managerial or executive capacity. While the AAO does not dispute the heightened degree of authority imparted upon the beneficiary, 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 instant case, the beneficiary's day is primarily comprised of non-qualifying duties of which the beneficiary cannot be relieved because it does not have a sufficient support staff to provide that relief. While counsel places great emphasis on the fact that the petitioner has hired a number of independent sub-contractors to carry out one of its essential functions, the fact remains that the beneficiary continues to perform other daily operational tasks, which are equally as non-qualifying as the actual building function. The petitioner has indicated its intention to hire additional employees who would likely relieve the beneficiary of some the mundane tasks he currently performs. However, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, employees that were not in place at the time the petition was filed cannot be considered in determining the beneficiary's eligibility.

Based on the evidence of record, the AAO cannot conclude that the beneficiary primarily performs managerial or executive duties. For this reason, the petition cannot be approved.

Beyond the decision of the director, the petitioner has not established that the beneficiary's duties abroad were primarily of a managerial or executive capacity. In response to the director's request for evidence, the petitioner submitted a description of the beneficiary's duties, which indicates that the beneficiary's duties abroad were nearly identical to the duties performed by the beneficiary at the time of the filing of the petition. The above discussion explains that the duties performed by the beneficiary in the United States cannot be deemed qualifying. As such, the AAO cannot establish that the beneficiary was employed abroad in a qualifying capacity.

Additionally, the petitioner indicated in Item 9, Part 6 of the I-140 petition that the beneficiary would be paid by the foreign entity. This indication raises doubt as to the petitioner's ability to pay the beneficiary's proffered wage, which the petitioner has not specified. *See* 8 C.F.R. § 204.5(g)(2).

Finally, the record contains evidence showing that the foreign entity issued one share to the beneficiary and one share to his wife. However, it appears that the company is authorized to issue a total of 1,000 shares of its stock. The record contains no evidence to show that only two shares have been issued, therefore eliminating the possible existence of other owners aside from the beneficiary and his wife. As previously noted, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N 190.

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 reasons provided in the paragraphs above this petition cannot 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 appeal is dismissed.