



U.S. Citizenship
and Immigration
Services

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Bv

FILE:

[REDACTED]

Office: TEXAS SERVICE CENTER

Date:

JUN 01 2006

SRC 04 098 52581

IN RE:

Petitioner:

[REDACTED]

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:

[REDACTED]

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 matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Texas entity operating as a dry cleaners and laundry service. It seeks to employ the beneficiary as its director and president. 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 denied the petition on the following independent grounds of ineligibility: 1) the beneficiary would not be employed in the United States in a managerial or executive capacity; and 2) the petitioner failed to establish that the foreign entity, which is owned by the beneficiary, continues to do business in the beneficiary's absence.

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 first two issues concern the beneficiary's employment capacity during his tenure with the foreign entity and his proposed position in the United States. The AAO seeks to determine whether the beneficiary has been employed abroad and would be employed by the U.S. petitioner in a qualifying 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 petition, the petitioner submitted a letter dated February 19, 2004, which provided the following description of the beneficiary foreign and proposed U.S. job responsibilities:

Foreign job responsibilities:

- Directed and coordinated business development activities of the company in the commercial construction industry;
- Marketed the company vision to the outside world and established new client accounts;

- Provided strategic direction with respect to market positioning, sales, partnerships/alliances, and products and services in the commercial construction industry;
- Prepared proposals and performed financial analysis for new business development projects;
- Directed activities of the managers and employees in the construction departments for which responsibility was delegated to further attainment of goals and objectives;
- Discussed with management and employees to review achievements and discuss required changes in projects and marketing strategies of the company;
- Formulated and administered the company policies relating to all business areas such as marketing, business development, finance, accounting, operations, development of new markets[,] etc[.];
- Developed long[-]range goals and objectives of the company in the commercial construction industry;
- Reviewed and analyzed activities, costs, operations, and forecasted data to determine progress toward stated goals and objectives;
- Discussed required changes in goals or objectives of the company resulting from current business status and conditions.

Proposed U.S. job responsibilities:

- Directs and coordinates marketing and business development activities of the dry cleaning and laundry services;
- Formulates and administers subsidiary policies;
- In consultation with the management and the parent company in Pakistan[,] develops long-range goals and objectives in the construction of commercial and residential apartments and shops in Pakistan and exploring similar and diversified investments in the U[.]S[.];
- Responsible for corporate planning, general administration, marketing-sales and purchasing activities for the subsidiary;
- Oversee new investment activities, including reviewing proposals and exploring other retail, commercial construction, and investment opportunities in the U[.]S[.];
- Directs and coordinates activities of employees in the operation of the dry cleaning and laundry services;

- Oversees the financial and accounting activities of the subsidiary, including budgeting, tax and regulatory matters;
- Reviews and analyzes activities, costs, operations, and forecast data to determine progress toward stated goals and objectives of the investments and future investments;
- Discusses with employees achievements and discuss required changes in goals or objectives of the subsidiary; [sic]

On March 11, 2005, the director issued a request for additional evidence (RFE) instructing the petitioner to submit a detailed description of the beneficiary's daily job duties during his employment abroad and for his proposed employment in the United States. With regard to the beneficiary's proposed duties, the director asked the petitioner to provide a percentage breakdown of time to be spent on each of his listed duties.

The petitioner responded with a letter from counsel dated June 3, 2005. With regard to the beneficiary's duties abroad, counsel referred to the petitioner's organizational structure, which was comprised of three tiers of employees with the beneficiary depicted at the top of the hierarchy. With regard to the U.S. entity, counsel referred to the petitioner's organizational chart, stating that lower-level personnel would relieve the beneficiary from having to carry out nonqualifying tasks. Counsel further stated that the beneficiary would carry out the role of function manager, claiming that his essential function would be "[d]irectorship/[p]residency." Although counsel reference a case discussed a prior AAO case included in the *Immigration Reporter*, this case is unpublished and, therefore does not serve as binding precedent. *See* 8 C.F.R. § 103.3(c). As part of the supporting evidence, the petitioner provided an organizational chart for each entity, illustrating each company's purported organizational hierarchy and the beneficiary's position in relation to other's within the hierarchy.

Although the petitioner provided a percentage breakdown for the beneficiary's proposed duties in the U.S., the list provided in response to the RFE is the identical list of responsibilities initially provided in the petitioner's support letter dated February 19, 2004. Despite the director's specific request in the RFE, the petitioner failed to expand on the beneficiary's broad list of responsibilities by providing a list of the beneficiary's projected daily tasks. It is noted that merely assigning a percentage of time to a list of general job responsibilities does not by itself answer the director's request as to the nature of duties the beneficiary would perform on a daily basis.

On July 14, 2005, the director denied the petition, noting that the petitioner's limited staffing leads to the conclusion that the beneficiary would be primarily involved in performing daily operational tasks and managing a staff of nonsupervisory, nonmanagerial, and nonprofessional personnel.

On appeal, counsel asserts that the director made a "key legal error" in his assessment of the beneficiary's duties by disregarding the possibility that the beneficiary would be employed in the capacity of function manager and asserts that the concept of function manager is analogous to that of a multinational executive in that neither requires the direct management of personnel. Accordingly, counsel argues that by law the beneficiary is not required to have a substantial number of subordinates.

Counsel is partly correct in that 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 does not identify the function with specificity, as required, nor does he provide sufficient detail regarding the beneficiary's daily activity to establish that his specific tasks primarily relate to the essential function he purportedly manages. In fact, according to the petitioner, only 20% of the beneficiary's job responsibilities would be directly related to finance.

Furthermore, 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). In the instant matter, the beneficiary's position description is primarily comprised of vague job responsibilities and broadly-cast business objectives with little indication as to the actual duties the beneficiary would perform on a daily basis given the particular nature of the petitioner's business. For instance, the petitioner indicated that the beneficiary would direct and coordinate marketing, formulate and administer policies, and be responsible for corporate planning and marketing aspects of the business. However, the petitioner did not define these broad concepts with actual duties that would be performed within the context of a dry cleaning and laundry service business. 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).

Additionally, the petitioner indicated that 20% of the beneficiary's job would be spent overseeing employees. However, the record is entirely unclear as to the number of full-time employees that were actually working for the petitioner at the time the petition was filed. Although the petitioner's organizational chart (provided initially in support of the petition) shows a hierarchy consisting of the beneficiary and four subordinate employees, the organizational chart submitted in response to the RFE shows an entirely different hierarchy consisting of the beneficiary, the four subordinates indicated in the first organizational chart, plus five additional employees. The petitioner submitted W-2 wage and tax statements for 2004 accounting for all but one of the employees listed on the latter organizational chart. However, based on the respective wages of the petitioner's employees, it is clear that no one was employed by the petitioner for all of 2004, or else they were employed on a limited part-time basis. While the petitioner provided a wage statement for the last quarter of 2003 identifying four of the employees listed in the petitioner's first and second organizational charts, a similar document was not provided to account for the first quarter of 2004 during which the petition was filed. As such, the AAO cannot determine with any degree of certainty whom the petitioner actually employed at the time the petition was filed. 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 counsel vehemently opposes the director's focus on the petitioner's personnel structure, the AAO finds that the director can and should consider the size of the petitioner's staff in order to determine who is

available to perform the business's daily operational tasks. In the instant matter, the petitioner was operating entirely as a dry cleaning business at the time the petition was filed. However, the record does not establish that the petitioner was adequately staffed to relieve the beneficiary from having to perform the nonqualifying tasks that are essential in order for the petitioner to function on a daily basis. Moreover, a critical analysis of the nature of the petitioner's business undermines the credibility of the organizational chart, which illustrates a complex hierarchy comprised of five total managers and supervisors whose positions are described using the same broad language used to describe the proposed position of the beneficiary.

Counsel attempts to support his argument by referring to an unpublished decision in which 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. However, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. 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. Additionally, despite the fact that there are no statutory or regulatory provisions requiring a petitioner to have a certain number of employees, it is unreasonable for counsel to claim that the petitioner can relieve the beneficiary from having to primarily perform nonqualifying tasks even though it lacks an adequate support staff to assume the burden of those nonqualifying tasks. Counsel's argument is simply without merit and is unsupported by the evidence of record. It is noted that the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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. The fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. Rather, the record indicates that a preponderance of the beneficiary's would be directly providing the services of the business. Contrary to claims stating otherwise, the petitioner has not demonstrated that it has reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization. Based on the evidence furnished, it cannot be found that the beneficiary would be employed primarily in a qualifying managerial or executive capacity.

Additionally, while not specifically addressed by the director, the description of the beneficiary's position abroad fails to identify the duties performed by the beneficiary on a daily basis. See 8 C.F.R. § 204.5(j)(3)(i)(B). 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. at 1103. As the petitioner failed to provide a detailed description of the beneficiary's duties with the foreign entity, it cannot be concluded that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

The other issue discussed by the director in this proceeding is whether the foreign entity continues to do business abroad. See 8 C.F.R. § 204.5(j)(2) for a definition of *multinational*.

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 RFE, the director instructed the petitioner to provide additional evidence to establish that the foreign entity continues to do business. The petitioner responded by providing a number of documents, including letters from people having business relations with the foreign entity, proof of the foreign entity's maintenance of a builder's license, and documentation indicating that the foreign entity continues to meet its tax obligations in Pakistan. While these documents indicate that the foreign entity maintains a business presence abroad, they do not indicate whether the foreign entity continues to engage in "the regular, systematic, and continuous" course of business as it had allegedly done under the beneficiary's direct supervision. *Id.* As the foreign entity was a builder, thereby making it a service provider, the most accurate indicator that the entity continues to do business would be copies of invoices consistently generated as a result of selling a service. Although the petitioner provided what appear to be purchase invoices belonging to the foreign entity, the dates on the invoices reflect transactions that took place well before the time the petition was filed. The petitioner also submitted a number of handwritten receipts suggesting that the foreign entity paid employee salaries in 2004 prior and subsequent to the filing of the petition. However, the handwritten receipts, which can be written by anyone at any time, are not corroborated with independent documentary evidence. In light of the petitioner's failure to provide any sales or purchase invoices to show that the foreign entity was engaged in "the regular, systematic, and continuous" course of business at or around the time the petition was filed, the AAO cannot deem the handwritten receipts as sufficient to show that the foreign entity was doing business during the relevant time period.

Also, beyond the decision of the director, the regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner is required to submit evidence that the prospective United States employer has been doing business for at least one year. Although the petitioner provided invoices showing that it had been doing business from June 2003 through the date the petition was filed, there are no sales invoices to show that the petitioner had been doing business from February 2003 up through May 2003. As such, the AAO cannot conclude that the petitioner had been doing business for one full year prior to filing the instant Form I-140.

Additionally, the regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Although the petitioner indicated its intent to pay the beneficiary approximately \$35,000 annually upon approval of the petition, the petitioner's tax return for 2004 shows the petitioner's taxable income as zero after having paid only \$21,711 in employee salaries and wages. As such, the petitioner has failed to provide sufficient evidence to establish its ability to pay the beneficiary's proffered wage.

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).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she 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 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.