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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

B4

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUN 01 2006

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 Georgia corporation operating as an importer and exporter of used auto parts and automobiles. It seeks to employ the beneficiary as its 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 based on two separate grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and 2) the beneficiary would not be employed in the United States in a managerial or executive capacity.

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 two issues in this proceeding call for an analysis of the beneficiary's employment capacity. The first issue is whether the beneficiary was employed abroad in a primarily managerial or executive capacity, and the second issue is whether the petitioner established at the time it filed the Form I-140 that the beneficiary would be primarily employed 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 its business plan, which states that the beneficiary would select a qualified team of employees to assist in the implementation of the petitioner's business plan. The petitioner focused on the beneficiary's experience in the import and export arena. No additional information was provided with regard to the beneficiary's proposed duties in the United States or the duties he performed during his employment abroad.

Accordingly, on February 24, 2005, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a detailed description of the beneficiary's duties abroad as well as evidence documenting the beneficiary's foreign employment with a qualifying entity. The petitioner was also asked to describe all of the duties required for the beneficiary's proposed position in the United States and to assign a specific

percentage of time allotted to each of the listed duties. Additionally, the petitioner was asked to provide the names, job titles, and a brief description of job duties to be performed by any subordinates the beneficiary would directly supervise.

With regard to the beneficiary's employment abroad, the petitioner provided a letter from one of the foreign entity's partners[1] stating that the beneficiary was one of the company's managing partners from the date of its inception until the beneficiary's transfer to the United States. The partner stated that the beneficiary's responsibilities included overseeing personnel, all finances, and investment opportunities. The partner further stated that much of the foreign company's success can be attributed to the beneficiary's efforts.

With regard to the beneficiary's proposed employment with the U.S. petitioner, the following statement was provided:

> [The beneficiary] is [p]resident of the [petitioner] and thus has no supervisor. [He] is responsible for establishing policies and procedures for the U.S. subsidiary, as well as for all personnel decisions. He is responsible for negotiating contracts with suppliers and clients, as well as marketing and accounts. He reports back to the [b]oard of [the foreign entity] in Japan, but [he] makes all decisions for [the petitioner] taking into account the best interests of the [f]oreign and U.S. companies.
>
> The estimated time breakdown of [the beneficiary]'s activities is: [c]ontract-related work—25%; [v]endor [r]elations/[m]arketing—30%; [g]eneral [m]anagement—45%. [The beneficiary is currently assisted in his duties by four employees. One employee serves as an [a]ssistant [m]anager and oversees the day-to-day workings of the company, including, but not limited to, keeping a proper accounting of the daily transactions, inventory, and client relations. The additional three employees staff the import/export business, serving as clerks. They handle the phones, stocking, and front-end client [sic]. [The beneficiary] is not called upon to perform any nonmanagerial functions in the day-to-day running of the company, which leaves [him] free to pursue other business matters and opportunities.

On July 8, 2005, the director issued a notice denying the petition, concluding that the petitioner's failure to provide sufficient descriptions of the beneficiary's respective job duties abroad[2] and in the United States precludes an affirmative determination that the beneficiary was and would continue to perform job duties that are primarily with a qualifying capacity.

On appeal, counsel insisted, despite the director's conclusion, that the letter previously provided from one of the foreign entity's partners provided a detailed description of the beneficiary's duties abroad. However, 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,

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[1] Although the individual's signature appears on the letter, it is illegible and is not accompanied by a printed version. As such, the AAO cannot refer to the individual by name and must refer to him as the foreign entity's partner.

[2] The director noted that the petitioner failed to provide a percentage breakdown of time the beneficiary spent performing specific duties abroad. However, the AAO notes that the petitioner was only asked to provide a percentage breakdown for the beneficiary's proposed duties in the United States. The petitioner's failure to submit specific evidence that was never requested by the director cannot be used to discredit a petitioner's claim.

506 (BIA 1980). While the petitioner's appeal is a clear indication of counsel's general disagreement with the director's findings, counsel cannot overcome the director's conclusion merely by voicing his disagreement to the director's well-reasoned observations.

Contrary to counsel's apparent misconception, supervision over the foreign entity's personnel and key aspects of the foreign entity's business does not explain what duties the beneficiary performed on a daily basis during his employment abroad. 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. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The petitioner's failure to specify the beneficiary's daily activities precludes the AAO from concluding that he primarily performed duties of a qualifying nature.

With regard to the beneficiary's proposed duties in the United States, counsel again reiterates information that was previously provided in response to the RFE. However, the director clearly informed the petitioner that the information previously provided was insufficient due to its failure to state the beneficiary's specific job duties. The AAO notes that in examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient. The actual duties themselves will 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 matter, the petitioner categorized the beneficiary's proposed position into three key responsibilities. However, the petitioner failed to specify the actual job duties the beneficiary would carry out on a daily basis in meeting those three responsibilities. While the beneficiary's executive position title and position within the petitioner's organizational hierarchy indicate that the beneficiary would have broad decision-making power, the AAO cannot conclude that the beneficiary would be employed in a qualifying capacity without full disclosure of the beneficiary's proposed list of duties.

Furthermore, while counsel asserts that the petitioner has a sufficient support staff to relieve the beneficiary from having to perform nonqualifying operational tasks, CIS cannot make an affirmative finding in favor of the petitioner merely based on the implication that the company has employees aside from the beneficiary to carry out nonqualifying tasks. Such a finding cannot be made without a detailed job description of duties the importance of which was clearly spelled out in the RFE. As the petitioner has failed to provide this crucial information, the AAO cannot conclude that the beneficiary's proposed employment would be within a primarily managerial or executive capacity.

Beyond the director's decision, 8 C.F.R. § 204.5(j)(3)(i)(D) requires that the petitioner establish that it was doing business for 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 instant matter, while the petitioner has submitted various invoices documenting business transactions, they do not account for the full one-year period prior to the date the Form I-140 was filed.

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 ground of ineligibility discussed above, this petition cannot be approved.

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