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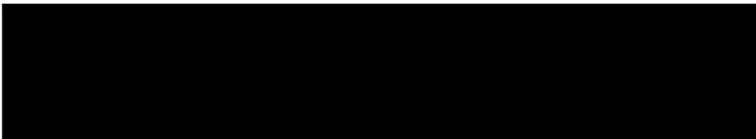


FILE: WAC 05 110 51612 Office: CALIFORNIA SERVICE CENTER Date: JUL 07 2006

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, Chief
Administrative Appeals Office

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

The petitioner is a Delaware corporation engaged in the design of electronic chips. It seeks to hire the beneficiary as its chief operating officer and vice president of engineering. 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 petitioner based on two separate grounds of ineligibility: 1) the petitioner failed to establish that it had been doing business in the United States for one year prior to filing this petition as required by 8 C.F.R. § 204.5(j)(3)(i)(D); and 2) the beneficiary would not be employed in the United States in a managerial or executive capacity.

On appeal, counsel submits a brief disputing the director's findings.

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 first issue in this proceeding is whether the petitioner had been doing business for at least one year prior to the date it filed 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."

The record shows that the service center received the petitioner's completed Form I-140 on March 10, 2005. Therefore, pursuant to the regulatory requirement specified in 8 C.F.R. § 204.5(j)(3)(i)(D), the petitioner must establish that it has been engaged in "the regular, systematic, and continuous" course of business since March 10, 2004. *See* 8 C.F.R. § 204.5(j)(2).

In support of the Form I-140, the petitioner submitted a statement dated February 28, 2005 stating that it was established in 2003. While the petitioner provided documentation regarding the stock transfer that gave the beneficiary's foreign employer controlling ownership of the petitioner's stock, the record lacked evidence to establish when the petitioner commenced doing business.

Accordingly, on July 2, 2005, the director issued a request for additional evidence (RFE) addressing, in part, the lack of sufficient evidence to establish that the petitioner has been doing business.

Although the petitioner acknowledged the director's request, it failed to provide any of the requested tax returns. Instead, the petitioner provided a Form 7004 indicating that it had requested an extension to file its tax return for 2004. No explanation was provided for its failure to provide a tax return for 2003, the year the petitioner was purportedly established. The petitioner also provided a number of account statements from 2005 describing the status of the petitioner's investments as well as the petitioner's unaudited financial statement from March through July of 2005. Lastly, the petitioner provided a licensing agreement effective December 1, 2004. Section 2.1 of the agreement gives the petitioner the legal right to manufacture and distribute the foreign entity's products.

On November 23, 2005, the director issued a decision denying the petitioner's Form I-140. The director specifically noted a letter from the Employment Development Department (EDD), which the petitioner provided in response to the RFE. The letter stated that the earliest of the petitioner's wage reports was for the first quarter of 2005. The letter explained that no earlier reports were available because the petitioner was not registered with the EDD prior to March of 2005. Based on this documentation, the director concluded that the petitioner had not been doing business for the requisite one-year period.

On appeal, counsel challenges the director's reliance on a single document in making the adverse finding with regard to the petitioner's ineligibility. Counsel states that the petitioner had been doing business since December 3, 2003, the date of its incorporation, and makes reference to the various business-related activities in which the petitioner has been involved since then. In support of the appeal, the petitioner provided the following documentation: 1) the petitioner's 2003 tax return showing no income or deductions; 2) the petitioner's 2004 tax return showing a gross income of \$4,510 and total deductions totaling \$27,451; 3) a number of invoices showing that the petitioner incurred various business expenses in 2004 by hiring an attorney who in turn provided the petitioner with professional services; 4) a variety of receipts showing hotel, food, and other expenses incurred by the petitioner's president in 2004; and 5) three invoices from the Ravix Group, Inc. dated August 31, September 15, and September 30, 2004 indicating that the petitioner used the Ravix Group's services to hire professional labor for a total of 16 hours. Counsel asserts that the expenses discussed in Nos. 3, 4, and 5 were incidental to the petitioner doing business and establish that the petitioner meets the requirement set out in 8 C.F.R. § 204.5(j)(3)(i)(D). Counsel's argument, however, is without merit. While the record clearly establishes that the petitioner incurred business expenses, these expenses were incurred as a byproduct of the petitioner's preparation to commence doing business. There is no indication that the petitioner had commenced the "the regular, systematic, and continuous" course of doing business as of March 10, 2004. *See* 8 C.F.R. § 204.5(j)(2).

Furthermore, counsel's reference to the "new office" provisions¹ that apply to a petitioner who files a Form I-129 to classify a beneficiary as a nonimmigrant intracompany transferee is entirely irrelevant to the matter at hand, where the petitioner's goal is to obtain an immigrant visa. Unlike those provisions that apply to L-1A nonimmigrants, none of the regulations that apply to multinational managers or executives have provisions for a new office. To the contrary, 8 C.F.R. § 204.5(j)(3)(i)(D) specifically requires that the petitioner of a Form I-140C clearly establish that it has been doing business for at least one year prior to filing the petition. Thus, not only are there no provisions for a new office within the regulations that pertain to multinational managers and executives, but the regulations clearly suggest that any petitioner that fits the definition of a new office as defined in 8 C.F.R. § 214.2(l)(1)(ii)(F) would be ineligible to classify a beneficiary as a multinational manager or executive. The fact that the petitioner in the instant matter has provided a licensing agreement effective December 1, 2004 gives rise to doubt as to what the petitioner was actually doing before the licensing agreement became effective. While the petitioner in the instant matter has provided sufficient evidence of the expenses incurred in preparation to do business, the record lacks evidence to establish that the petitioner provided products or services on a "regular, systematic, and continuous" basis as of March 10, 2004. *See* 8 C.F.R. § 204.5(j)(2).

The second issue in this proceeding is whether the petitioner would employ the beneficiary 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--

¹ *See* 214.2(l)(1)(ii)(F) for definition of "new office" within the context of Form I-129 for an L-1A nonimmigrant visa.

- (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 the letter submitted in support of the Form I-140, the petitioner provided the following description of the beneficiary's proposed position in the United States:

[The beneficiary] will be responsible for directing the overall management of [the petitioner]'s operation and he will ensure the execution of activities to achieve the company's set objectives in [the] U.S. marketplace and will direct and coordinate the growth of [the petitioner]'s activities and operations. [He] will direct the formulation of financial programs to provide a proper level of capitalization for the company's marketing and distribution activities in the U.S. and manage the development of market research information systems to survey the demand for our products and progress of our competitors. [The beneficiary] will report directly to the [c]hief [e]xecutive [o]fficer and will directly supervise four subordinates who are degreed and graduate degreed professionals and will have responsibility for employing additional professional subordinate personnel as business develops. [He] will have the authority to hire, advance or terminate subordinate personnel as appropriate.

[The beneficiary] will advise the [b]oard of [d]irectors with respect to general and specific marketing trends in conjunction with marketing activities, as well as the direction for engineering development, including newly developed products, specifications and end-uses for products. He will coordinate technical liaisons between subordinate personnel, production and sales departments and customers with respect to the firm's product lines. He will have further responsibility for reviewing and evaluating current operations through participation, consultation and receipt of reports from subordinate personnel. In addition, his duties will include exercising total discretionary authority over the operation of the corporate activity as agreed with the [b]oard of [d]irectors, developing and overseeing the implementation of all marketing programs, public relations, advertising campaigns, and trade show participation, establishing and monitoring product development programs, and defining and reviewing design specifications, performance features, reliability and overall profitability.

In furtherance of the operation of the business, he will be responsible for directing and managing planning activities, managing and overseeing cost monitoring including reviewing analyses of activities, costs, operations and forecast data to determine the division's progress toward stated goals and objectives. He will further formulate and administer company policies and develop long range goals and objectives, as well as monitor and enforce policies and procedures regarding electronic component development, design and production. [The beneficiary] will be responsible for analyzing and assessing engineering requirements for design and development of

new electronic components, as well as reviewing analyses of engineering activities, costs, operations, and forecast data to determine the company's progress toward engineering goals and objectives.

The director determined that the petitioner did not provide sufficient information regarding the beneficiary's proposed duties and issued an RFE instructing the petitioner to provide a description of the beneficiary's typical day of work. The petitioner was also asked to provide several of its quarterly wage reports as well as a description of duties of each of the beneficiary's claimed subordinates.

In response, the petitioner provided several organizational charts breaking down its organization into three categories: executive, non-executive, and engineering. The beneficiary's name and position as chief operating officer/executive vice president were included in the executive chart among three other executives, all identified as direct subordinates of the company's president. The beneficiary was also included in the engineering chart as executive vice president of engineering, the top position in that chart. The chart indicated that the beneficiary would have five direct subordinates, all of whom oversee the work of at least two subordinates. At least four of the beneficiary's direct subordinates are identified as having post graduate degrees. The petitioner also provided the following percentage breakdown of the beneficiary's executive and engineering positions:

I. Function as Chief Operation Officer

- 10% [The beneficiary] defines and controls the schedules of the entire [petitioning] operation, including external . . . and internal . . . schedules. He plans and controls the product release, quality assurance, and documentation needs for each product. He directs resource planning, staffing, and designation of tasks necessary for product development.
- 15% [The beneficiary] directs vendor selection, contracting, and execution of the outsourcing of all of [the petitioner]'s manufacturing. He is also responsible for the selection of external engineering services and development support.
- 10% [The beneficiary] plans and controls the manufacturing budget, including [the] cost of services, manufacturing, and materials.
- 10% [The beneficiary] provides internal resource and budget planning and oversees the demand of resources within different departments. He identifies critical paths and assigns appropriate manpower to achieve [the petitioner]'s operating milestones. With [h]uman [r]esources, he sets policies related to employee benefits and new hires. He interviews candidates for high-level positions that are direct reports to the company's [v]ice [p]resident and/or [d]irectors, and makes the final decision on which of these candidates should be made employment offers.
- 5% [the beneficiary] reports all operations-related issues at monthly board meetings. Reports include the presentation of detailed overall schedules, presentations of results and critical issues, and strategies regarding solutions and decisions.

II. Function as Executive Vice President of Engineering

15% [The beneficiary] coordinates schedules and milestones and participates in weekly department meetings.

10% [The beneficiary] has individual discussions with direct reports, including the [v]ice [p]resident and [d]irectors of [the petitioner]'s five product development departments. [The beneficiary] communicates individually with direct reports about the status of projects within their departments, and provides guidance on any issues that may impact delivery schedules of various designs.

* * *

5% [The beneficiary] provides technical roadmaps and product planning. Together with [the] [c]hief [s]cientist . . . and CTO [chief technology officer] he defines and clarifies all technical key components and specifications of current and future . . . products [of the petitioner].

10% [The beneficiary] provides his opinions and guidance to the [v]ice [p]resident of [m]arketing of [s]ales . . . regarding [the petitioner]'s marketing efforts. He participates in discussions about specifications, sales volumes and schedules, as well as modification requirements of deliverables from [the beneficiary]'s direct reports. He represents [the petitioner] in all marketing meetings regarding technical issues with important customers and strategic partners. This includes international travel to visit [the petitioner]'s prospective clientele and strategic partners Additionally, [the beneficiary] negotiates with vendors and business partners regarding new business endeavors.

10% [The beneficiary] serves as the acting director of MEMS [d]esign. His duties include supervision and analysis of simulation, modeling, design, and layout of the MEMS structures. [The beneficiary] attends design reviews for MEMS and integrated circuits. Additional, [he] is highly involved with patent attorneys in the review of [the petitioner] and other patents. He communicates with the CEO and [CTO] about patent and intellectual property strategy.

The petitioner also included a list of five degreed professionals claimed to be the beneficiary's direct subordinates. However, only three of the five subordinates are named in the petitioner's first quarterly wage report for 2005 during which the Form I-140 was filed. Furthermore, the petitioner's organizational charts combined name a total of 22 individuals. However, only eight individuals are named in the relevant wage report. Therefore, the AAO questions whether the organizational charts submitted in response to the RFE accurately reflected the staffing levels that the petitioner had in place at the time the Form I-140 was filed. 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).

In denying the Form I-140, the director determined that it would therefore be "unreasonable to believe that the beneficiary . . . with the organizational structure provided, would not be assisting with the day[-]to[-]day non-supervisory duties." The director further stated, "The performance of those menial tasks precludes the beneficiary from being considered an executive or manager." However, the director did not clarify which particular tasks he

deemed "menial," nor did he provide a comprehensive explanation as to why he deemed the beneficiary's direct staff of subordinates to be insufficient. While it is appropriate to explore the petitioner's organizational structure to determine who would perform the daily non-qualifying tasks, there is little indication that the director's comments were the result of such comprehensive reasoning. In fact, there is no indication as to the facts the director took into account in reading his conclusion. Thus, the director's comments are hereby withdrawn.

Notwithstanding the director's errors, the AAO will concur in the director's ultimate determination that the petitioner did not establish that the beneficiary would be employed in a managerial or executive capacity. 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). In the instant matter, the description provided primarily addresses the beneficiary's general responsibilities using broad terminology such as "defines," "directs," "plans," "oversees," and "coordinates." While these terms convey a heightened degree of discretionary authority and overall significance within the petitioning organization, they fail to convey an understanding of the actual tasks the beneficiary would perform on a daily basis in an effort to carry out his overall responsibilities. 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). Thus, contrary to the director's comments, which suggest that the petitioner provided a detailed list of duties that does not meet the definitions of executive or managerial capacity, the AAO concludes that the record precludes any conclusion at all as to the nature of the duties to be primarily performed by the beneficiary.

On appeal, counsel disputes the director's conclusion, asserting that the size of the petitioning organization is not an appropriate determiner of whether a beneficiary would be employed in a qualifying managerial or executive capacity. Counsel also reiterates the list of responsibilities assigned to the beneficiary, focusing on the degree of control the beneficiary would have over various key aspects of the petitioner's business. However, as previously indicated, the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Counsel also states that CIS should take into account the petitioner's needs as a newly established business. However, as previously stated in this decision, the provisions for classifying a beneficiary as a multinational manager or executive do not distinguish between a business that has been operating for a relatively long period of time versus a business that has been in operation for a considerably shorter amount of time. All petitioners are equally required to establish that they have been doing business for at least one year pursuant to 8 C.F.R. § 204.4(j)(3)(i)(D). Similarly, all petitioners are required to 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). Thus, contrary to counsel's assertion, the petitioner must establish that the beneficiary would be employed in a managerial or executive capacity, regardless of its stage of development. In the instant matter, the petitioner has not provided sufficient information to enable the AAO to determine the nature of the duties the beneficiary would perform on a daily basis. As such, the AAO cannot render a favorable decision.

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