



U.S. Citizenship
and Immigration
Services

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FILE:

[REDACTED]
EAC 06 023 50192

Office: VERMONT SERVICE CENTER

Date: AUG 06 2007

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:

[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, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a New York corporation claiming to be a jewelry wholesaler and distributor. 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 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 her 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 primary issue addressed by the director in this proceeding is whether the petitioner 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 submitted a letter dated September 29, 2005 containing the following description of the beneficiary's proposed employment, which the petitioner claimed would be within an executive capacity:

1. Directs the management of the organization or a major component or function:

As [p]resident, [the beneficiary] will has [sic] full executive and managerial control for [sic] *all* operations and activities of the United States company. The [p]resident controls all day-to-day operations of the entity and makes day-to-day decisions about the goals and management of the U.S. company. He approves contract negotiations for sales, directs the profession activities of the [v]ice [p]resident who supervises a sales person and accountant, formulates all business plans, short and long term, for the New York entity in coordination

with the activities of the parent company, and communicates with the parent company regarding the current financial status of the U.S. entity.

[The beneficiary] also possesses the sole responsibility for the selection of full-time staff. Additionally, he has sole discretion over all ancillary personnel decisions, including compensation, leave, discharge, vacation and training as well as the management and supervision of work performed. . . .

2. Establishes the goals and policies of the organization, component, or function:

[The beneficiary] establishes *all* goals and policies for the U.S. entity. He makes fundamental decisions regarding the types of customers which the company should target for sales and distribution and has full and ultimate responsibility for overall U.S. operations. This includes establishing all company policies regarding business strategies, personnel and operating policies. He is the *sole* individual in the U.S. entity qualified and authorized to make these critical [and] fundamental decisions.

3. Exercises wide latitude in discretionary decision-making:

As previously stated, [the beneficiary] possesses nearly unbridled discretion in rendering important and key decisions for the U.S. entity. He makes key decisions in terms of company policies (both internal and external), business strategies, policies and procedures. Additionally, he possesses sole responsibility for the selection of staff and sole discretion over all ancillary personnel decisions, including compensation, leave, discharge, vacation and training.

4. Receives only general supervision or direction from higher level executives:

Since [the beneficiary] possesses the central, highest level position in the U.S. entity, he receives no supervision or direction from any other person in the U.S. as stated above, he consults with the parent company to advise them of current business strategies and the financial status of the U.S. entity. He receives only *minimal* supervision and direction by the parent company.

On March 22, 2006, Citizenship and Immigration Services (CIS) issued a request for additional evidence (RFE) instructing the petitioner to provide the following documentation regarding the beneficiary's proposed employment capacity in the United States: 1) a detailed description of the beneficiary's proposed day-to-day duties with an hourly breakdown of time assigned to each duty on a weekly basis; 2) evidence of the petitioner's management and personnel structures identifying the beneficiary's subordinates, and their respective position titles and job duties; and 3) the Form W-2s and W-3s issued by the petitioner in 2004 and 2005, as well as the petitioner's quarterly tax returns for the first three quarters of 2005.

The petitioner's response included a letter from counsel dated June 15, 2006 asserting that the beneficiary's proposed employment fits the definition of a function manager whose role does not include overseeing the work of other employees. Counsel also listed and described the exhibits that addressed issues raised in the

RFE. The petitioner's submissions include the following hourly breakdown of the beneficiary's proposed job responsibilities:

1. [A]pproximately 13 hours/week researching, developing and overseeing the implementation of corporate marketing and sales programs. This entails overseeing the staff and analyzing the performance of sales associates with respect to sales and marketing strategies.
2. [A]pproximately 8 hours/week developing the U.S. market by continuing to explore new customer bases and establishing local sales networks. This includes initiating high-level sales negotiations with major clients and cultivating and maintaining relationship with clients.
3. [A]pproximately 8 hours/week formulating mid- and long-term business plans; budgeting and monitoring corporate cash flow and liquidity; and issuing final approval on budgets, expenditures, sales, purchasing, and personnel decisions.
4. [A]pproximately 2 hours/week building and maintaining relationships with selected professionals. This includes evaluating options and making decisions on who to contact to develop future business for the company.
5. [A]pproximately 8 hours/week making executive decisions concerning inventory and pricing[.]
6. [A]pproximately 1 hour/week contracting with [sic] necessary services[.]

The petitioner also provided an organizational chart illustrating a three-tiered organizational hierarchy in which the beneficiary occupies the senior-most position. The chart indicates that the beneficiary's only direct subordinate is a vice president, whose two subordinates include a sales person and a sales person/accountant. In a separate submission, the petitioner provided a general overview of each employee's job responsibilities. While the petitioner also provided three of its quarterly tax returns for 2005, the quarterly tax return for the third quarter, during which the Form I-140 was filed, was not submitted. The AAO notes, however, that the petitioner filed the Form I-140 on September 30, 2005. According to the information provided in the 2005 fourth quarterly tax return, the petitioner had a total of three employees as of October 1, 2005, which is one day after the Form I-140 was filed. As such, even though the third quarterly wage report was technically the quarter during which the Form I-140 was filed, the fourth quarterly wage report is also reliable for the purpose of determining the petitioner's staffing composition during the relevant time period.

Regarding counsel's claim that the beneficiary's position fits the definition of function manager, the explanation provided suggests that this claim arose in reaction to CIS's concern over the petitioner's staffing structure. Specifically, counsel suggested that the lack of a large support staff within the petitioner's organizational hierarchy is justified if the beneficiary is not charged with the task of supervising subordinate employees. However, counsel's assertion is not valid, as it is primarily driven by her apparent attempt to explain the petitioner's inadequate staffing composition and fails to identify the beneficiary's essential function. 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 the present matter, the petitioner fails to identify the beneficiary's essential function, or the specific duties attributed to managing the purported function.

Upon considering the petitioner's claim and the various documents submitted in support thereof, the director denied the petition in a decision dated September 8, 2006. The director discussed the petitioner's organizational structure and the various tax documents submitted in response to the RFE and concluded that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity.

While the AAO concurs with the director's conclusion, various comments made in the supporting analysis were inappropriate and must be withdrawn. Specifically, the director discussed the petitioner's 2004 tax documentation. However, the instant petition was not filed in 2004. Rather, it was filed in September of 2005. As the petitioner is only required to establish eligibility at the time of filing its Form I-140, the petitioner's 2004 tax return is irrelevant to issues concerning the beneficiary's employment capacity within the U.S. entity. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The director also stated that the positions of the staff members within the petitioner's organization do not appear to be professional in nature. This comment suggests an oversight of various portions of section 101(a)(44)(A)(ii) of the Act, which specifically provides for individuals in a managerial capacity whose duties include overseeing the work of supervisory or managerial subordinates as well as professionals. Lastly, the director stated that the beneficiary's own job duties "will [not] be so complex that they could be considered professional in nature." There is no requirement, either in the relevant statutory or regulatory provisions, which suggests that a beneficiary's proposed employment must be of a professional nature. As such, the director's comments specifically discussed in this paragraph are hereby withdrawn.

Notwithstanding the inaccuracies in the director's various comments as discussed above, the AAO supports the director's finding that the petitioner failed to establish that the beneficiary's proposed employment would primarily entail duties within a managerial or executive capacity.

On appeal, counsel asserts that the beneficiary's prospective job duties would be within a managerial and an executive capacity. She states that the beneficiary's specific knowledge of the petitioner's business will increase the petitioner's marketing share in the United States. Counsel claims that the beneficiary's responsibilities would include evaluating marketing and analyzing reports from employees. However, based on the information provided thus far, the beneficiary would be the one performing the petitioner's marketing-related tasks. With regard to analyzing reports, it is unclear who would be providing the reports for the beneficiary's review. Counsel's latter claim on appeal becomes increasingly less valid when considered in light of prior statements in which she suggested that the beneficiary's prospective role with the U.S. entity

would be that of a function manager, which involves overseeing an essential function, not individuals. Counsel's claim is also contradicted by the petitioner's own job description, which was provided in response to the RFE and in which the petitioner stated that approximately 13 hours of the beneficiary's total 40-hour work week would involve overseeing staff and analyzing the performance of sales associates. Moreover, merely claiming that the beneficiary would control daily business operations and have the ultimate say in all business decisions is not synonymous with identifying a specific essential function. The beneficiary's heightened degree of discretion has been considered. However, it is only one of various factors that must be weighed in determining whether the beneficiary would primarily perform tasks of a qualifying nature. More specifically, 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). 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 present matter, neither the job description provided in support of the Form I-140, nor the one provided in response to the RFE specifically identifies the job duties to be performed by the beneficiary on a daily basis. Both descriptions are general and primarily convey the beneficiary's level of discretionary authority rather than specific tasks. 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. *Id.* Simply stating that 8 hours, or 20%, of the beneficiary's time would be spent formulating goals and using his discretionary authority regarding the petitioner's budget and that another 8 hours would be spent making decisions regarding inventory provides no insight as to the means by which these general responsibilities would be met. Similarly, the petitioner stated that two hours, or 5%, of the beneficiary's time would be spent building relationships with certain professionals. However, the petitioner failed to explain how the beneficiary would build such relationships or what exactly is meant by "selected professionals." While the petitioner further stated that the beneficiary would spend another one hour per week contracting for necessary services, no explanation was provided to clarify which services were sought and why the beneficiary was charged with seeking out these services even though he purportedly has a subordinate support staff. Thus, nearly half of the beneficiary's time at work would be spent performing tasks, which the petitioner has failed to specifically define.

While the petitioner was more specific in discussing the duties that would comprise the remaining portion of the beneficiary's time, performing market research, devising marketing strategies, and seeking out customers to expand the petitioner's client base cannot be deemed as qualifying tasks. Rather, these are daily operational tasks, which the beneficiary would perform due to the petitioner's lack of a sufficient support staff. Despite counsel's argument that the petitioner can function with its existing support staff, the fact that the beneficiary would be required to perform daily operational tasks for approximately 50% of his time suggests that the petitioner would be unable to employ the beneficiary in a managerial or executive capacity, which requires that the majority of the beneficiary's time be spent performing tasks of a managerial or executive nature. Thus, while the petitioner may be able to function with its current support staff, it is not yet able to support a managerial or executive position. As previously stated, an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *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. at 604.

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 employee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. Counsel has made a variety of inconsistent claims suggesting that the beneficiary would be employed in an executive capacity while at the same time managing an essential function as well as supervising subordinate employees within the organization. While these inconsistencies could have been resolved, or at least clarified, with a detailed description of the beneficiary's specific daily job duties, the petitioner described the beneficiary's prospective employment using general terms and primarily focused on the beneficiary's discretionary authority rather than identifying the specific tasks the beneficiary would perform on a daily basis. Furthermore, as discussed above, the record indicates that a preponderance of the beneficiary's duties have been and would continue to be dedicated to directly providing the services of the business. Thus, based on the evidence furnished, it cannot be found that the beneficiary would be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Furthermore, the record does not support a finding of eligibility based on additional grounds that were not previously addressed in the director's decision.

The first issue concerns the provisions of 8 C.F.R. § 204.5(j)(3)(i)(C), which states that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer. In the present matter, the petitioner claims that [REDACTED], the beneficiary's claimed foreign employer, wholly owns the petitioner. In support of this claim, the petitioner provides a stock certificate and a stock ledger, which appear to support the petitioner's claim. However, in order to fully meet the provisions of 8 C.F.R. § 204.5(j)(3)(i)(C), the petitioner must substantiate the claim that the beneficiary was actually employed by the foreign entity that is claimed to own the petitioner. In the present matter, the relevant documentation includes several of the foreign entity's bank statements showing that the foreign entity withdrew funds and attributed such withdrawals to someone named Sanjay. While the AAO acknowledges that the beneficiary's first name is Sanjay, and that the withdrawals may have been made for his benefit, the fact that a last name is not included in any of the bank statements precludes the AAO from concluding that the funds were withdrawn for and paid to the beneficiary.

Furthermore, even if the petitioner were able to establish that the [REDACTED] named in the bank statements is actually the beneficiary, there is no indication that the withdrawn amounts represented remuneration drawn by the beneficiary as a result of his employment for [REDACTED]. If, indeed, the withdrawals represent the beneficiary's salary for employment abroad, it is unclear why the withdrawals were sporadic. For example, in January of 2004 there were two withdrawals with two weeks in between each withdrawal. However, there was only one withdrawal in February of 2004 and only one withdrawal in March of 2004. Additionally, the withdrawal amounts range drastically from 157 rupees in March of 2004 to 2,089 rupees on January 14, 2004. There is no explanation as to why the beneficiary did not draw a salary within a consistent time frame and why the amount of the salary ranged so drastically.

While the petitioner also provided a salary voucher from the foreign entity to account for the beneficiary's salary payments from October of 2003 to June of 2004, this document is inconsistent with the bank statements discussed above. Specifically, the salary voucher indicates that the beneficiary was paid 10,000 rupees during each of the nine months accounted for. However, according to [REDACTED] February 2004 bank statement, which accounts for all transactions made during January of 2004, withdrawals in the name of

only amounted to 3,784 rupees, which is far short of the 10,000 rupees claimed in the salary voucher. The validity of the salary voucher becomes even more suspect when noting the fact that this document was created on March 15, 2005 to account for salaries paid during a random nine-month period that predated the creation of the salary voucher by approximately 18 months. 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). The considerable inconsistencies presented in the documentation that was submitted to establish the beneficiary's foreign employment have neither been resolved nor acknowledged. As the petitioner has failed to establish the beneficiary's employment with the entity claiming to own the petitioner, the AAO concludes that the petitioner has failed to satisfy the provisions cited in 8 C.F.R. § 204.5(j)(3)(i)(C).

The second issue beyond the director's decision is another matter of credibility. Specifically, in Part I of the Form I-140 the petitioner indicated that its business address is [REDACTED], New York, NY 10036. The petitioner also provided a lease agreement, signed by the beneficiary, which identifies the same business address as the location of the leased premises. However, close review of the first page of the lease agreement shows that the document has been altered and the name of the business leasing the premises has been scratched out with the exception of the word "Inc.," signifying that a corporation has taken over the premises as of April 1, 2004. It is further noted that while the beneficiary signed the lease on the third page on behalf of the tenant, the first page, directly next to the redacted name of the entity, shows the name of the petitioner's vice president, [REDACTED] as part of the name of the entity leasing the premises.

Additionally, the petitioner has provided shipping documents and invoices that show at least one other company, with whom the petitioner claims to be doing business, has claimed the same address as its respective place of business as the address cited in the petitioner's purported lease. Specifically, shipping documents from January, February, and March of 2005, where the petitioner is identified as the buyer of goods, show that V [REDACTED] the seller of the goods, occupies the premises purportedly leased to the petitioner. Meanwhile, other shipping invoices for similar time periods show the same business address for the petitioner. The petitioner's credibility is further compromised by its submission of an undated letter from [REDACTED] which claims to be the leaseholder of [REDACTED], which is claimed to have been occupied by the petitioner "since April 1, 2004 to the present." This information contradicts information provided by the petitioner in Part I of the Form I-140, the petitioner's various tax documents, a significant number of its sales and shipping invoices, as well as the questionable lease itself, all of which indicate that the petitioner occupied suite no. [REDACTED], not suite no. [REDACTED].

With regard to all of the considerable inconsistencies cited above, the AAO notes that a few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003). However, anytime a petition includes numerous errors and discrepancies, and the petitioner fails to resolve those errors, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. In this case, the discrepancies and errors catalogued above lead the AAO to conclude that the evidence of the beneficiary's eligibility is not credible. Accordingly, the petitioner has not established the beneficiary's eligibility for the requested immigrant visa classification.

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 grounds of ineligibility as 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.