

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B4



FILE:



SRC 05 250 51473

Office: TEXAS SERVICE CENTER Date:

OCT 19 2007

IN RE:

Petitioner:

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:

SELF-REPRESENTED

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 South Carolina corporation whose business is to act as a broker and an agent in transactions involving the sale of ingredients and machinery for the food industry.¹ It seeks to employ the beneficiary as its general manager. 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 petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity and denied the petition on that basis.

On appeal, the petitioner disputes the director's conclusion and submits a statement discussing its reasons therefore.

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.

¹ It should be noted that, according to the Office of South Carolina Secretary of State's Business Filings Division, the petitioner's corporate status was dissolved on February 22, 2005. Therefore, regardless of whether this forfeiture can be easily remedied or not, it raises the critical issue of the company's continued existence as a legal entity in the United States.

The primary issue in this proceeding is whether the beneficiary would be performing in a capacity that is managerial or executive.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the Form I-140, the petitioner submitted a letter dated September 8, 2005 in which it provided the following job description of the beneficiary's proposed U.S. employment within an executive capacity:

[The beneficiary] establishes the multinational business goals and projection of the company, manages the organization and provides all technical guidance as needed, has global latitude in

decision making, negotiates with potential suppliers for products and machinery; identifies potential users, in the U.S. and abroad, according with [sic] the characteristics of their plant operations and goods manufactured and decides on pricing policy.

The petitioner also provided the following percentage breakdown of the beneficiary's responsibilities:

- Through the managers of [s]ales and [e]xports departments of manufacturers and [the foreign entity], follows up with current situation[s] of portfolio of established customer[s,] domestic and overseas.
- Analyzes reports from [s]ales and [a]dministration managers of manufacturers and [the foreign entity] on new orders and arrival[s] in order of recent shipments to customers' operation plants.
- Analyzes reports and attends [sic] communications from [the s]ales manager of [the foreign entity], [t]ransit and [p]urchase [d]epartment managers of customers, [f]orwarding companies['] managers and [c]ustoms [s]ervice managers about new regulations on exports, paperwork and [the] issue of required documents for exports/imports worldwide.

Approximate percentage of time [spent on the above responsibilities]: 25%

- Attends meetings and communications with management executives of worldwide manufacturers with the production capacity and meeting quality requisites looking forward to establish representation agreements in order to offer their products to potential customers domestically and overseas.

Approximate percentage of time [spent on the above responsibilities]: 15%

- Analyzes reports and communication from [the t]echnical [s]ervices manager of [the foreign entity], [research and development and quality control] managers from manufacturers and customers related with [sic] technical matters involving the products been [sic] merchandised worldwide.
- As required, establishes contact with international government regulatory organizations . . . in order to ensure compliance with their requirements.

Approximate percentage of time [spent on the above responsibilities]: 15%

- Supervises and analyzes reports and communications of personnel in both final users['] and manufacturers['] departments . . . and managers of freight forwarders companies according with [sic] the day[-]to[-]day needs of customers.

Approximate percentage of time [spent on the above responsibilities]: 25%

- Keeps update [sic] with technical information and new trends and products in the [f]ood [i]ndustry, [p]harmaceutical [industry] and related field[s]. Assists to [sic] conferences and business meetings in order to maintain the necessary professional relations with the business community[.]

Approximate percentage of time [spent on the above responsibilities]: 20%

On June 23, 2006, the director issued a request for additional evidence (RFE) instructing the petitioner to provide the following documentation to assist Citizenship and Immigration Services (CIS) in determining the petitioner's eligibility for the immigration benefit sought: 1) the petitioner's organizational chart illustrating its staffing levels and identifying its employees by name and position title; 2) job descriptions for each employee included in the petitioner's organizational chart; and 3) the Form W-2s, quarterly tax returns, or Form 1099s to establish wages paid to the two employees claimed in the petitioner's Form I-140.

In response, the petitioner provided a letter dated August 31, 2006 explaining the nature of its business and its goal to cut production costs in an effort to cut pricing for its customers. The petitioner explained that it relies on contracted and part-time employees on a need basis. The petitioner further noted that the beneficiary "personally renders the professional services in food technology provided by this company and . . . manages an outsourced staff without which his company could not exist." Additionally, the petitioner stated that many of its functions overlap the functions of suppliers and purchases, i.e., the petitioner's clients, whose respective employees perform various functions that ultimately assist the petitioner in its business activities. Based on this reasoning, the petitioner stated that the beneficiary manages the employees from three different entities—the seller, the buyer, and the petitioner's claimed foreign affiliate.

As requested, the petitioner also provided an organizational flow chart, which identifies the beneficiary at the top of a hierarchy in which the essential functions are purportedly performed by employees of the companies with whom the petitioner deals in its capacity as the broker and agent of various sales and purchase transactions. The petitioner stated that the beneficiary coordinates and supervises each aspect of the sales and purchase transactions brokered by the petitioner. The beneficiary's responsibilities include communicating with regulatory personnel, customs agents, and forwarders, with the departments of the manufacturer whose services are being purchased, and the customer purchasing the raw materials or equipment that is manufactured. In essence, the petitioner is the liaison between the various participants of the purchase and sales transactions within the food industry.

The petitioner also provided brief statements, signed by the beneficiary in his capacity as the petitioner's general manager, identifying individuals who have provided the petitioner with various services, including bookkeeping, legal services, general office work, and forwarding services, most of which are documented with service invoices. However, the documentation regarding the bookkeeping, legal, and computer-related services suggests that these services were only sporadically provided and are not key components of the petitioner's daily operations. The petitioner has not provided documentation to support its claimed employment of part-time administrative/office assistants. Additionally, the petitioner provided a number of email communications, which suggest that the beneficiary, himself, directly and actively carries out the duties underlying the petitioner's role as liaison between two business entities that are party to a sales/purchase transaction.

Upon reviewing the documentation submitted, the director determined that the petitioner failed to establish that the beneficiary's prospective employment would be within a managerial or executive capacity. Accordingly, the director issued a notice dated November 7, 2006 denying the petition. The director found that the petitioner's lack of a support staff indicates that the beneficiary actually provides the services that are sold to the petitioner's customers. While the AAO concurs with the director's overall findings, it is noted that the director erroneously stated that the petitioner failed to show payments made for outsourced services. However, the director's misstatement is not germane to the question of the petitioner's overall eligibility. As such, the AAO will withdraw the comment but affirm the director's decision to deny the petition for the reasons stated herein.

Furthermore, a thorough analysis of the record suggests that the director's comment regarding the existence of a support staff was generally accurate. Despite the petitioner's prior claim in Part 5, Item 2 of the Form I-140, the petitioner has not provided evidence to show that it has employed anyone other than the beneficiary to assist in the daily performance of tasks that are directly related to carrying out the services offered by the petitioner. While the AAO acknowledges the various contributions of other participants within the food manufacturing industry, the petitioner has identified itself as a service provider, its service specifically being that of an agent/broker. As such, the petitioner's burden is two-fold. First, the petitioner must comply with 8 C.F.R. § 204.5(j)(5), which requires that the petition provide a detailed description of the beneficiary's proposed job duties. This aspect of the petitioner's burden is crucial, as 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). Second, the petitioner must establish that the primary portion of the beneficiary's time would be spent performing job duties that are managerial or executive in nature, as 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. 593, 604 (Comm. 1988).

In the present matter, with regard to the description of the beneficiary's prospective job duties, the petitioner's percentage breakdown primarily focuses on the beneficiary's interactions with the various departments of other companies that participate in the food distribution industry. However, the job description does not indicate that anyone other than the beneficiary actually provides the services that generate the petitioner's revenue. In other words, while the AAO does not dispute that the petitioner utilizes information provided by other companies that are also participants in the food manufacturing industry, the record suggests that the beneficiary is solely responsible for providing the services of an agent or broker to various food manufacturers, i.e., the petitioner's customers. Despite the petitioner's earlier claims, no explanation has been provided to clarify how the beneficiary effectively manages employees who work for the companies with which the petitioner does business. That being said, the petitioner's statement on appeal suggests that the petitioner misinterpreted the director's discussion of a subordinate staff to mean that a subordinate staff is a necessary requirement. **This interpretation, however, is incorrect.** The director properly observed the petitioner's obvious lack of a subordinate staff and the petitioner's failure to adequately explain how the petitioner in its current state is able to relieve the beneficiary from having to perform primarily non-qualifying duties associated with providing the services of the organization. Contrary to the petitioner's misconception, the petitioner need only establish and properly document that the beneficiary would not primarily perform daily operational tasks. 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)). Here,

the petitioner has not adequately articulated the beneficiary's job duties or provided sufficient evidence to establish that someone other than the beneficiary would perform the necessary operational tasks. Therefore, the AAO cannot conclude that the petitioner has established that the primary portion of the beneficiary's time would be spent performing duties within a qualifying managerial or executive capacity.

The petitioner's resubmission of documents previously submitted does not overcome the grounds cited in the denial, as the director has indicated with sufficient clarity that she has reviewed the petitioner's submissions and has found that they were insufficient for the purpose of determining that the beneficiary would be employed in the United States entity in a qualifying managerial or executive capacity.

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

First, 8 C.F.R. § 204.5(j)(3)(i)(B) states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to his entry to the United States as a nonimmigrant to work for the same employer. In the instant matter, little reference is made with regard to the beneficiary's foreign employment and the beneficiary's job duties in particular. As such, it cannot be concluded that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

Second, 8 C.F.R. § 204.5(j)(3)(i)(C) states that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer. Although the petitioner claims to be a wholly owned subsidiary of Intrera, Inc., it provided no documentation to support this statement. 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)). It is further noted that in an earlier decision in which the AAO dismissed the petitioner's appeal of a revocation issued by the director, the AAO determined that the petitioner failed to resolve inconsistencies regarding the issue of who controlled the petitioning entity at the time of filing the prior Form I-140 petition (SRC0204155493). Based on the lack of documentation addressing the issue of a qualifying relationship, it appears that the inconsistencies cited earlier remain unresolved.

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 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.