



U.S. Citizenship
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File:

EAC 06 046 52273

Office: VERMONT SERVICE CENTER

Date: SEP 06 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:

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 Director, Vermont Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will remand the matter to the director for further review and entry of a new decision.

The petitioner filed the instant petition seeking 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 petitioner, a New York partnership, states that it operates retail clothing stores. It seeks to employ the beneficiary as its manager, chief executive officer and senior partner.

The director denied the petition on September 30, 2006, concluding that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity for the United States company.

The petitioner subsequently filed an appeal on October 18, 2006. On appeal, counsel for the petitioner states that the director misrepresented the evidence submitted in support of the petition. Counsel asserts that the director did not request evidence pertaining to the beneficiary's role in the United States business, which constituted the sole grounds for denial of the petition. The petitioner submits an affidavit that seeks to clarify the beneficiary's employment capacity in the United States, and additional documentary evidence, in support of the appeal.

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 that 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. *See* 8 C.F.R. § 204.5(j)(5).

The sole issue addressed by the director is whether the petitioner established that the beneficiary would be employed in a managerial or executive capacity for the United States entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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.

The immigrant petition was filed on November 30, 2005. The petitioner stated on Form I-140 that the U.S. company has four employees and will employ the beneficiary as its manager, chief executive officer, and senior partner. The petitioner did not submit a job offer from the U.S. company clearly describing the

beneficiary's duties, as required by 8 C.F.R. § 204.5(j)(5). On the Form I-140, the petitioner stated that the beneficiary "operates retail clothing stores." The petitioner submitted evidence of wages paid to the U.S. company's employees in 2003 and 2004, but did not submit recent payroll records, a current organizational chart, or other evidence regarding its management and personnel structure.

The petitioner stated that the U.S. company leases an office and two retail stores and provided copies of three lease agreements. One lease agreement is for an office located in [REDACTED] signed in May 2001 and valid through May 2006. Another lease agreement is for a residence located at [REDACTED], valid from December 2001 through November 2002. The third lease agreement was for a retail store located in [REDACTED] with a term commencing on September 16, 2005. The petitioner indicated that it was submitting a lease agreement for a retail store located at [REDACTED] but no such agreement has been incorporated into the record.

The director issued a request for evidence on June 15, 2006. The evidence requested pertained to the claimed qualifying relationship between the U.S. entity and its foreign affiliate, and the beneficiary's employment capacity with the foreign entity. The director did not request, and the petitioner did not provide, additional evidence to establish that the beneficiary would be employed in a qualifying capacity with the U.S. entity.

On September 30, 2006, the director denied the petition on the sole ground that the petitioner failed to establish that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity. The director stated that the petitioner was requested "to submit additional evidence of the beneficiary's duties, the duties of the employees, and the time spent each week on managerial and non-managerial duties." The director stated that the petitioner failed to address this request and therefore concluded that the petitioner had not met its burden to establish that the beneficiary will be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director's decision "misrepresents the evidence submitted in support of the I-140." Counsel notes that the request for evidence issued on June 15, 2006 did not instruct the petitioner to provide evidence pertaining to the U.S. business. In support of the appeal, the petitioner submits an affidavit from the beneficiary who outlines his job duties and those of his two immediate subordinates in the United States company.

The beneficiary states that his duties as managing partner are as follows:

- Overall supervision of store operations.
- Arranging for tax and finance matters to be attended to, including working with our accountant/bookkeeper, [REDACTED]
- Attending trade shows, including two major trade shows in Las Vegas each year.
- Looking after banking operations.
- Dealing with, and visiting, suppliers and potential suppliers in the United States and overseas.

- Searching for suitable sites for additional stores and, when such a site is located, negotiating the lease, arranging for remodeling, and otherwise getting the new outlet ready to open.
- Reviewing reports from my store manager and purchasing manager.
- Making final decisions on personnel matters.

The beneficiary states that he supervises a store manager, who in turn supervises sales and "front desk personnel" in each store and shares responsibility for personnel matters with the beneficiary. The petitioner stated that the store manager assures that the stores are opened and closed on time; keeps track of sales, and assures that stores have necessary supplies. The beneficiary states that the purchase manager keeps track of sales, reports the need for additional merchandise, and ensures that store shelves and display areas are kept full.

The petitioner also submits a letter dated October 9, 2006 from [REDACTED], who identifies herself as the petitioner's tax preparer, and states that the beneficiary "operates two locations, employs five people and travels extensively to purchase his goods for resale."

Upon review, the AAO will withdraw the director's decision and remand the petition to the director for further consideration and entry of a new decision.

The regulation at 8 C.F.R. § 103.2(b)(8) states the following:

If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence [I]n other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Service shall request the missing initial evidence, and may request additional evidence

Contrary to statements made in the director's decision, the director did not in fact request additional evidence to establish that the beneficiary would be employed in a primarily managerial or executive capacity 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 otherwise consistent claim.

The director's decision was based solely on a finding that the petitioner did not submit sufficient documentation regarding the beneficiary's actual job duties and the U.S. company's organizational structure. However the director did not point to any evidence of clear ineligibility that would justify his decision to deny the petition without first requesting additional evidence or issuing a notice of intent to deny the petition on these grounds. *See* 8 C.F.R. § 103.2(b)(8); *see also* Memo. of William R. Yates, Associate Director, Operations, USCIS, to Regional Directors, et al, *Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)*, HQOPRD 70/2 (February 16, 2005).

Accordingly, as the evidence of record does not directly reflect that the petitioner or beneficiary is ineligible, the director should not have denied the petition based on a lack of evidence without first requesting additional explanation and documentation with respect to the issue of the beneficiary's employment capacity in the United States. *See* 8 C.F.R. § 103.2(b)(8); 8 C.F.R. § 204.5(j)(3)(ii). The AAO agrees that the evidence of record raises underlying questions regarding eligibility. The petition will be remanded to the director, who is instructed to request additional evidence consistent with the discussion below.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

While the petitioner has provided a description of the beneficiary's job duties on appeal, the description is insufficient to establish that the beneficiary's duties would be primarily managerial or executive in nature. The description suggests that the beneficiary is directly involved in non-qualifying tasks related to the company's purchasing, administrative and financial operations. For example, the petitioner indicates that the beneficiary is responsible for "looking after banking operations," "dealing with, and visiting, suppliers and potential suppliers," attending trade shows, and "arranging for tax and finance matters." The record as presently constituted does not establish that the beneficiary would be relieved from performing routine banking, finance, administrative and purchasing tasks associated with operating the business. Thus, while the beneficiary is responsible for "overall supervision of store operations," personnel decisions and finalizing negotiations for new store locations, based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The director is instructed to request a comprehensive, specific description of the duties performed by the beneficiary, including a breakdown of the percentage of time he will devote to those duties on a weekly basis, and a description of the duties he performs on a "typical day." The description should reflect the beneficiary's actual duties as of November 30, 2005.

When examining the managerial or executive capacity of a beneficiary, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The record as presently constituted does not contain documentary evidence establishing the number of employees working for the petitioner as of the date the petition was filed, their job titles, or their job duties.

As such, it is not possible to determine that the lower-level staff would relieve the beneficiary from performing the non-qualifying duties associated with operating two retail stores.

Accordingly, the petitioner should provide an organizational chart for the U.S. entity, job titles and complete job descriptions for all subordinate employees working for the petitioner as of November 30, 2005, as well as information regarding the number of hours they work, and their educational background, if it is claimed that any of the employees are professionals. The petitioner should also submit documentary evidence of wages paid to employees for all four quarters of 2005, including IRS Forms 941, Employer's Quarterly Federal Tax Returns, and New York State quarterly wage reports. The petitioner should also provide: (1) a valid commercial lease agreement for its Albany, New York store; (2) the operating hours of both stores as of the date of filing; and (3) sample employee work schedules for both stores.

If the petitioner utilized outside contractors to perform any functions as of the date of filing, it should submit documentary evidence to substantiate the employment of these individuals, and describe the scope and nature of services they provide. The petitioner should specifically explain how the subordinate employees relieve the beneficiary from primarily engaging in the day-to-day operations of the company.

It is emphasized that the petitioner must 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). Evidence and explanation that the petitioner submits must show eligibility as of the filing date, November 30, 2005. Documentation of business activity and hiring that occurred after the date of filing is not probative of the petitioner's eligibility and will not be considered.

Although not specifically addressed by the director, the AAO also finds insufficient evidence to establish that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. See 8 C.F.R. § 204.5(j)(3)(i)(A). The petitioner has not adequately described the beneficiary's duties while employed by the foreign entity. For example, the petitioner stated that the beneficiary consulted with sales managers, dealt with the heads of customer and supplier companies, hired and fired personnel, reviewed financial matters and performed other "similar duties." 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 should be instructed to submit a detailed comprehensive description of the duties performed by the beneficiary with the foreign entity, as well as the percentage of time he spent on each duty on a weekly basis.

The petitioner was also requested to provide evidence of the foreign entity's management and personnel structure, including the job titles and duties of the employees supervised by the beneficiary. In response the petitioner submitted a letter from an Indian accountant who stated that the beneficiary supervised two sales managers, who in turn supervised a sales force of four employees. The petitioner did not describe the duties of the beneficiary's subordinates as requested by the director, nor did it provide documentary evidence establishing the number of employees. The record is also devoid of any description of the type of business operated by the foreign entity, and it is therefore not possible to determine that the described staff, which consisted of solely sales staff, could reasonably relieve the beneficiary from primarily performing routine

operational tasks for the company. The director should request additional evidence to establish the type and scope of the business operated by the foreign entity, the number of employees working for the foreign entity prior to the beneficiary's transfer to the United States, whether they worked on a full-time or part-time basis, and their job titles and duties.

Finally, although not addressed by the director, the record as presently constituted does not contain evidence that the foreign entity continues to do business in India. The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

While the evidence submitted suggests that the petitioner and the foreign entity have an affiliate relationship, the petitioner must also establish that the qualifying foreign entity continues to conduct business. The petitioner has submitted a partnership deed for the foreign entity, executed in 1995, but no evidence that the foreign entity continues to exist and do business in India. Accordingly, the director should request evidence establishing the current ownership of the foreign entity, as well as documentary evidence to establish that it was doing business as of November 2005 and continues to do business in India. Such evidence may include, but is not limited to, annual reports and/or tax filings, audited financial statements, company registration documents, recent bank statements, recent payroll records, invoices and receipts evidencing business transactions, photographs, current lease agreements, and any other evidence that would show an ongoing business concern.

Further evidence is required in order to establish that the petitioner and beneficiary meet the requirements for the requested immigrant visa classification as of the date of filing the petition. The director's decision will be withdrawn and the matter remanded for further consideration and a new decision. The director is instructed to issue a request for evidence addressing the issues discussed above, and any other evidence he deems necessary.

ORDER: The decision of the director dated September 30, 2006 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.