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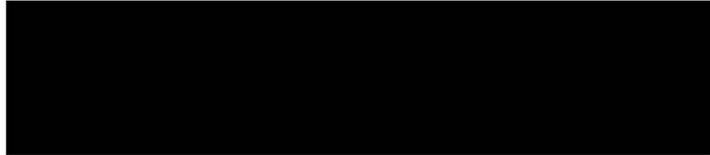


FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER Date: MAY 01 2009
LIN 08 066 52920

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska 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 that seeks to employ the beneficiary as its sales and service 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 denied the petition based on the conclusion that the beneficiary would not be employed by the U.S. petitioner in a managerial or executive capacity.

On appeal, counsel disputes the director's conclusions and submits a brief in support of his arguments.

Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The primary issue in this proceeding calls for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the beneficiary would be employed in the United States 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--

- (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 December 4, 2007, which included a description of the beneficiary's proposed employment with the U.S. entity. As the petitioner's description has been incorporated into the director's decision, the AAO need not repeat this information in the current decision.

On March 27, 2008, the director issued a notice of intent to deny (NOID) informing the petitioner that the beneficiary's job description, as offered in the letter dated December 4, 2007, failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The director noted that the earlier job description included a number of non-qualifying tasks, including sales visits, order writing, and personal handling of sales accounts. The petitioner was allowed 30 days in which to provide a rebuttal to the director's adverse finding.

In response, the petitioner provided a letter from counsel dated April 23, 2008 in which counsel asserted that the beneficiary manages an essential function within the petitioning organization. The petitioner also provided affidavits from the beneficiary and [REDACTED], the beneficiary's superior, both claiming that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial capacity.

In the beneficiary's affidavit, dated April 22, 2008, the beneficiary stated that he is the petitioner's only retail sales manager in charge of ordering, shipping European products, and arranging customer deliveries.

In the other affidavit, dated April 23, 2008, [REDACTED] stated that the beneficiary is the petitioner's sales and service manager for non-major accounts and further claimed that he is the beneficiary's direct superior. [REDACTED] also stated that the beneficiary communicates with the export manager on a daily basis in order to coordinate ordering and shipping logistics and further claimed that the beneficiary is responsible for retail customer contacts and merchandising.

In a decision dated May 22, 2008, the director denied the petition finding that the beneficiary's daily performance of non-qualifying tasks renders him ineligible for classification as a multinational manager or executive.

On appeal, counsel asserts that the petitioner has met its burden of proof through its submission of various documents, including the affidavits discussed above. Counsel focuses on the earlier claim that the beneficiary is solely responsible for an essential function, i.e., retail marketing and merchandising, with regard to which the beneficiary has the authority to make independent decisions.

The AAO finds that counsel's arguments are not persuasive and fail to address the significant deficiencies pointed out by the director in his earlier decision. Specifically, the director pointed out that to show that the beneficiary is a function manager, the petitioner must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function, 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). Counsel overlooked this key statutory requirement and instead focuses on the beneficiary's discretionary authority and minimal supervision. While the AAO acknowledges that both of these factors are considered in determining the beneficiary's managerial or executive capacity, the petitioner cannot establish eligibility for the benefit sought herein unless it can first

establish that the primary portion of the beneficiary's time would be allocated to qualifying managerial or executive-level tasks. The director pointed out this key requirement in both the NOID and in his final decision. However, neither counsel nor the petitioner has submitted documentation to effectively rebut the director's findings.

In summary, the petitioner does not dispute that the primary portion of the beneficiary's time has been and would be spent performing tasks associated with an essential function. Rather, the petitioner and counsel repeatedly state that the beneficiary would spend the primary portion of his time communicating with customers and making all necessary arrangements to ensure the successful merchandising and shipping of the petitioner's products. Therefore, the AAO cannot conclude that the beneficiary would be employed in a qualifying managerial or executive capacity. On this basis, this petition cannot 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.

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, the director specifically addressed this issue in the NOID, informing the petitioner that the beneficiary's job duties during his foreign employment could not be deemed as qualifying within a managerial or executive capacity. Although the petitioner's rebuttal to the NOID addressed this relevant issue, the petitioner did not provide any evidence to overcome the director's adverse finding. Rather, the information provided by the beneficiary and by [REDACTED] in response to the NOID established that the beneficiary was a first-line supervisor of non-professional employees and that he spent the primary portion of his time performing non-qualifying tasks. Therefore, the AAO cannot conclude that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

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.