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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] OFFICE: NEBRASKA SERVICE CENTER Date: MAY 06 2010

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IN RE: Petitioner:
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.

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was initially denied by the Director, Nebraska Service Center. The petitioner then filed two motions. Both service decisions reaffirmed the initial adverse findings. The matter is now before the Administrative Appeals Office (AAO) on appeal from the director's latest decision dismissing the petitioner's motion to reconsider. The appeal will be dismissed in accordance with the AAO's findings pursuant to a *de novo* review of the decisions and evidence contained within the petitioner's record. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3rd Cir.2004).

The petitioner is a Florida corporation that seeks to employ the beneficiary as its chief executive officer/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 concluded 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, counsel disputes the director's conclusion, asserting that the director relied on the wrong job description, which resulted in an incorrect finding.

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 is whether the petitioner submitted sufficient evidence to establish that it would employ the beneficiary 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 from counsel dated August 23, 2006 in which counsel stated that the beneficiary "serves as a perfunctory general manager" of the petitioner's restaurant, which includes managing a chef, a head waiter, a cashier, and a head bus person, all of whom counsel

categorized as managerial employees. Counsel also stated that the beneficiary will serve as the key liaison to government authorities and provided examples of the ways in which the beneficiary has used his discretionary authority to make business decisions on behalf of the petitioner.

On August 23, 2007, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a supplemental description of the beneficiary's proposed position with the U.S. entity. Specifically, the petitioner was asked to list the beneficiary's specific day-to-day tasks and to provide an estimate of the percentage of time the beneficiary would spend performing each task. The director also instructed the petitioner to illustrate a description of its organizational hierarchy by providing and organizational chart naming all teams and departments and focusing on the beneficiary's immediate subordinates and their respective job duties.

In response, the petitioner provided a document titled "[redacted]" which indicates that the beneficiary would manage the petitioner's restaurant operation by focusing on guest services, employees, sales and marketing, property appearance, and profit/financial control. The petitioner provided a more detailed discussion of each of these five elements, stating that the beneficiary's responsibilities with regard to the petitioner's finances include maximizing revenues and cash flow, preparing budget and forecasts, managing expenses, reconciling financial accounts, managing collection of in-house guest balances and vendor commission payments, and monitoring supply inventory and equipment. With regard to sales, the beneficiary's responsibilities would include working with the restaurant and kitchen managers to meet revenue objectives by setting goals, completing surveys, taking reservations, and compiling reports; making sales calls; seeking out business in local markets; and coordinating sales and marketing activities. The beneficiary's role in guest satisfaction would include resolving guest-related issues consistent with the company's goals and objectives. Employee management would require the beneficiary to recruit qualified applicants, train employees according to company standards, manage restaurant staff on a daily basis, evaluate work performance of the employees, reward and discipline workers as necessary, and address complaints and problems. The beneficiary would also be responsible for inspecting and documenting necessary property repairs and cleanliness to ensure optimum property appearance. Lastly, the beneficiary would be responsible for miscellaneous tasks, including serving as the manager on duty and serving as back-up with regard to other duties as needed to ensure that the restaurant continues to operate smoothly.

The petitioner also provided a separate document titled "[redacted]" which provides the shift descriptions and daily checklist that the restaurant managers follow depending on the shift they work. Additionally, the petitioner provided a pie chart and graph to explain how the beneficiary's time is allocated. The chart indicates that 14% of the beneficiary's time is allocated to the checklists; 21% of the beneficiary's time is allocated to "showtime," which the shift check list shows as the portion of the day that the restaurant is open to the public for lunch; 7% of the beneficiary's time is allocated to interviewing job candidates; 34% of his time is allocated to the dinner shift; and another 7% of his time is allocated to the closing of the restaurant. In other words, both the pie chart and the graph indicate that the beneficiary spends the primary portion of his time performing duties specified in the check list, duties associated with "showtime" once the restaurant opens to the public, and duties associated with dinner time.

The petitioner also provided its organizational chart showing the beneficiary at the top of the hierarchy as the general manager. The restaurant and kitchen managers are depicted as the beneficiary's two subordinates. A

sous chef and head cook are shown as the kitchen manager's subordinates while the head server and cashier are shown as the restaurant manager's two subordinates. The bottom tier of the hierarchy is comprised of three cooks (line, prep, and pantry), one dishwasher, two servers, and a hostess/bus girl.

In a decision dated November 6, 2007, the director denied the petition, concluding that the petitioner failed to establish that the primary portion of the beneficiary's time would be spent performing tasks within a qualifying managerial or executive capacity. The director specifically restated the information conveyed in the pie and graph charts, which more precisely indicated how the beneficiary's time would allocated. The director also focused on a number of non-managerial tasks that were included in the checklist that accompanied the pie and graph charts that were submitted in response to the RFE. Finally, the director took into account the size and organizational complexity of the petitioning entity and concluded that neither element in the context of the petitioner's organization justifies the need to employ the beneficiary in a primarily managerial or executive capacity.

In the petitioner's first motion, filed on December 7, 2007, counsel submitted a statement contending that the director addressed the wrong job description. Counsel stated that the director focused on the job description that pertained to the petitioner's restaurant manager rather than the description that pertained to the beneficiary's proposed position of restaurant manager.

Although the director granted the motion in a decision dated March 10, 2008, he dismissed counsel's arguments and affirmed the prior denial, stating that the analysis in the prior decision was based on a document titled '[redacted]'" It therefore appears that while the director acknowledged counsel's argument, he maintained that it was reasonable for him to rely on a document that contained the beneficiary's position title in its heading. In other words, the underlying inference in the director's explanation is that the petitioner assumes the burden of providing relevant and reliable information to meet its burden of proof. In the present matter, the director had no reason to believe that a document titled '[redacted] would not actually pertain to the beneficiary's proposed position. Accordingly, the director affirmed his prior decision denying the petition.

Next, the petitioner filed a motion to reconsider on April 9, 2008. The motion to reconsider was premised on the same argument as the one used in the prior motion, i.e., that the director relied on the wrong job description when formulating the basis for denial. Counsel also explained the reason for the discrepancy between the number of IRS Form W-2s issued in 2006 and the considerably smaller number of employees identified in the organizational chart.

After reviewing counsel's brief, the director dismissed the motion to reconsider citing the provisions of 8 C.F.R. § 103.5(a)(3), which requires that a motion to reconsider be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy based on the evidence of record at the time of the initial decision. The director determined that the petitioner failed to meet these regulatory requirements and therefore did not address any of counsel's arguments.

On appeal, counsel again raises the earlier argument that the director's decision was erroneous because the director failed to take into account the correct job description. As indicated above, however, the petitioner clearly titled the document as [redacted]'" but now claims that it was

purportedly meant to describe the job duties of the restaurant manager. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Thus, if the petitioner intended to meet its burden of proof by ensuring that the director focused on a particular job description, the petitioner should have accurately titled its documents. Moreover, the AAO notes that the job description that was specifically attributed to the beneficiary indicates under the miscellaneous heading that the beneficiary is tasked with serving as "manager on duty." As the petitioner did not assign a specific percentage of time to this task, it is unclear exactly how much of the beneficiary's day would be attributed to serving as "manager on duty." Furthermore, the AAO notes that the organizational chart, which shows that the beneficiary employs only one restaurant manager, and the list of daily operating duties, which shows multiple restaurant shifts, both indicate that it was reasonable for the director to assume that the beneficiary would serve as restaurant manager for a considerable portion of the day. Therefore, the director's review of the job description contained in the document titled, "[redacted]" was not erroneous, as the beneficiary would actually carry out the job duties that are described in that document.

Notwithstanding the above, the AAO's appellate review is on a *de novo* basis. *See Dor v. INS*, 891 F.2d at 1002 n. 9 (noting that the AAO reviews appeals on a *de novo* basis). Therefore, the AAO has considered all relevant documents that have been submitted into the record thus far, including the job description that specifically names the beneficiary and is titled "General Manager." After reviewing the beneficiary's job description and the job description specifically addressed in the director's initial decision, the AAO observes a considerable degree of overlap between some of the non-qualifying job duties that are attributed to both the general manager and the restaurant manager. While the beneficiary's job description does not provide a detailed list of tasks that are entailed in "property appearance," it does indicate that the beneficiary's responsibilities include inspecting the property for cleanliness and documenting necessary repairs. The same tasks are described in greater detail in the document titled "[redacted]" which describes the job duties of the restaurant manager. Both job descriptions also include responsibilities regarding banking and deposits, and employee oversight.

Accordingly, the AAO finds the director's error to have been harmless. As indicated by proper review of the relevant job descriptions and the time allocations attributed to the beneficiary's proposed position, the beneficiary would primarily perform non-qualifying operational tasks rather than tasks within a qualifying managerial or executive capacity. It is noted that 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 instant matter, the beneficiary's job description indicates that meeting his financial responsibility will involve creating a budget, collecting balances from restaurant patrons and vendors, and monitoring inventory supply and equipment, all of which are daily operational tasks.

The job description further shows that the beneficiary's sales responsibility will involve making marketing and sales calls to expose the petitioner's restaurant to different local markets. Such job duties are also outside of what is deemed to be within a managerial or executive capacity. The beneficiary's continued involvement

with restaurant patrons also extends to resolving customer-related issues, thus indicating that the beneficiary provides customer service, another non-qualifying task. Additionally, while the petitioner's organizational chart depicts the beneficiary's position at the top of the organizational hierarchy such that the restaurant's managers would separate the beneficiary from the remainder of the restaurant staff, the job description indicates that the beneficiary's managerial oversight would not be limited to only managing the kitchen and restaurant managers. Rather, the job description indicates that the beneficiary would recruit and train employees as well as evaluate their respective performances. As the petitioner has not established that the employees the beneficiary would recruit, train, and evaluate are supervisory, professional, or managerial, it cannot be concluded that any time spent performing these duties could be deemed as time spent working in a managerial or executive capacity.

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 is placed at the top of the petitioner's organizational hierarchy does not necessarily establish eligibility for classification as a multinational manager or executive within the meaning of section 101(a)(44) of the Act. As discussed above, the record does not establish that the primary portion of the beneficiary's time would be spent performing tasks within a qualifying managerial or executive capacity. To the contrary, the job descriptions and time allocations submitted in the present matter indicate that the primary portion of the beneficiary's time would be devoted to the performance of daily operational tasks that are necessary to provide services to the restaurant's patrons. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel or that he would otherwise be relieved from performing non-qualifying duties. 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.

Additionally, while not addressed in the director's decision, the AAO finds that the petitioner failed to establish that the beneficiary was employed abroad for one year during the relevant three-year period. The regulation at 8 C.F.R. § 204.5(j)(3)(i) states, in part, the following:

> A) If the alien is outside the United States, in the three years preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
>
> B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity[.]

The clear language of the statute indicates that the relevant three year period is that "preceding the time of the alien's application for classification and admission into the United States under this subparagraph." § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C). The statute, however, is silent with regard to aliens who have already been admitted to the United States in a nonimmigrant classification. In promulgating the

regulations on section 203(b)(1)(C) of the Act, the legacy Immigration and Naturalization Service (INS) concluded that it was not the intent of Congress to exclude L-1A multinational managers or executives who had already been transferred to the United States from this employment-based immigrant classification. Specifically, INS stated the following with regard to the interpretation of the Congressional intent behind the relevant statutory provisions:

> The Service does not feel that Congress intended that nonimmigrant managers or executives who have already been transferred to the United States should be excluded from this classification. Therefore, the regulation provides that an alien who has been a manager or executive for one year overseas, during the three years preceding admission as a nonimmigrant manager or executive for a qualifying entity, would qualify.

56 Fed. Reg. 30703, 30705 (July 5, 1991).

In other words, for those aliens who are currently in the United States in L-1A status, the relevant time period mentioned in the statute should be the three-year period preceding the time of the alien's application and admission as (or change of status to) an L-1A multinational managerial or executive classification.

In the instant matter, the record shows that the petitioner last entered the United States on December 15, 1999 as a B-2 nonimmigrant tourist. Thus he did not enter the United States for the purpose of "working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas." Accordingly, the beneficiary does not fit the criterion described in 8 C.F.R. § 204.5(j)(3)(i)(B) and must have his period of employment abroad analyzed under the criterion described at 8 C.F.R. § 204.5(j)(3)(i)(A), which states that the relevant three-year time period is that which falls within the three years prior to the filing of the instant petition. As the instant petition was filed in 2006 and it is well established that the beneficiary was present in the United States between 2003 and 2006, it cannot be concluded that the beneficiary was employed abroad during the relevant three-year time period, regardless of whether or not the petitioner is able to provide evidence of the beneficiary's qualifying employment abroad.

Furthermore, the AAO finds that even if the beneficiary had been employed abroad during the requisite period, the petitioner failed to establish that the beneficiary was employed in a qualifying managerial or executive capacity as 8 C.F.R. § 204.5(j)(3)(i)(A) requires. The job description provided in the document titled [redacted]" does not clearly convey what tasks the beneficiary performed on a daily basis. While the document defines various terms and vaguely states the focus of the beneficiary's responsibilities, the petitioner did not provide sufficient information to establish that the primary portion of the beneficiary's time was allocated to tasks within 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.

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.