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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave. N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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B4



DATE:

OFFICE: TEXAS SERVICE CENTER

FILE:   


**MAR 19 2012**

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:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
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 limited liability company organized in the State of Texas. 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 denied the petition based on the determination that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity. The director questioned the petitioner's ability to relieve the beneficiary from having to primarily perform non-qualifying operational tasks in light of the staffing reduction that the petitioner experienced since the filing of the Form I-140.

On appeal, counsel disputes the director's decision and explains that an office fire resulted in the petitioner having to provide requested information that was contained within lost or damaged documents. Additionally, the petitioner provides a separate statement explaining the reason for the staff reduction, which took place after the petition was filed.

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, [REDACTED] the CEO of the petitioner's parent company, submitted a letter dated December 8, 2008 in which he stated that the beneficiary will be responsible for the company's day-to-day operations. [REDACTED] further stated that the beneficiary will ensure that financial targets are met, determine the company's staffing needs and maintain hiring and firing authority, supervise project managers, develop and implement the company's expansion strategy, interact with decision-makers in the aluminum industry, identify new business opportunities, analyze project proposals to determine feasibility and profitability, negotiate large-scale contracts, review financial statements and sales reports, and work with the parent entity to develop long-range objectives for the petitioner.

On June 20, 2009, the director issued a request for additional evidence (RFE) instructing the petitioner to provide, in part, supplemental information regarding the petitioner's organizational hierarchy at the time of filing, including the job titles and job duties of the petitioner's employees and quarterly payroll documents for the last quarter in 2008 and all available quarters in 2009 showing the names and salaries of the petitioner's employees. In discussing the job duties of the company employees, the petitioner was asked to explain how the employees enable the beneficiary to be employed in a qualifying managerial or executive capacity.

The petitioner's response included the requested quarterly tax reports and the company's April 2009 organizational chart, which depicted a multi-tiered structure with the beneficiary at the top of the hierarchy followed by a chief engineer, a project manager, a secretary, a bookkeeper, a sales and service employee, and a purchasing manager. The chief engineer and project manager are both depicted in managerial roles with the former supervising three mechanical engineers and one electrical engineer and the latter supervising an installation supervisor and an assembly foreman. The lowest tier consists of a shipping and receiving clerk whose position is depicted as subordinate to the purchasing manager.

The petitioner's response also included job descriptions for the positions depicted in the organizational chart as well as the beneficiary's role with respect to each of his direct subordinates. With regard to the chief engineer, the beneficiary's role includes providing general instruction regarding performance goals and objectives for the engineering department, hiring and firing employees, and terminating services provided by contractors. With regard to the project manager, the beneficiary's role is one of oversight with the ultimate goal being to ensure that the petitioner's international goals are met through its international projects. The beneficiary also prepares budgets and oversees expenditures, and uses the project manager's feedback to evaluate the feasibility of future projects.

The beneficiary's role with respect to the purchasing and shipping functions includes providing budget guidelines for purchasing equipment, materials, and inventory. With regard to sales and services, the beneficiary's responsibilities include developing and implementing expansion strategies for international sales, maintaining relationships with key decision-makers in the aluminum industry to attract new clientele and expand the scope of the existing clients, helping to develop pricing for saw systems with the goal of retaining clients, determining the demographic and location to target as well as the size of the marketing investment, and resolving customer issues that cannot be resolved by the sales and service employee. Lastly, with regard to bookkeeping, the beneficiary will provide general instruction, review and analyze financial reports, budgets, and sales performance reports prepared by the bookkeeper, set sales goals, determine cost reduction needs, make investment decisions, and establish accounting procedures for sales invoices and receiving payments.

In a decision dated November 23, 2009, the director denied the petition concluding that the evidence of record does not establish that the beneficiary would be employed in a qualifying managerial or executive capacity. The director pointed to a discrepancy between the Form I-140, where the petitioner claimed fourteen employees, and the petitioner's 2009 first quarterly wage report, which indicated that the petitioner had only twelve employees in April 2009 when the petition was filed. The petitioner also discussed the staffing attrition the petitioner underwent since the filing of the petition and questioned the petitioner's ability to employ the beneficiary in a qualifying capacity after having experienced a considerable reduction in personnel.

On appeal, counsel disputes the director's decision and explains that the office fire that took place in June of 2009 at the petitioner's place of business resulted in the petitioner having to rely on incomplete and damaged records when providing a response to the RFE. The AAO notes, however, that no evidence was provided to support counsel's statements with regard to the office fire. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, the AAO notes that the office fire, which counsel claims took place in June 2009, would not account for the discrepancy between the Form I-140, which was filed in April 2009, and the relevant quarterly wage report with regard to the number of employees. As properly pointed out by the director, the petitioner did not provide the complete quarterly wage report for the second quarter of 2009 to enable a comparison of the individuals listed in the report and those identified in the organizational chart. Therefore, it is unclear which twelve employees the petitioner employed at the time of filing.

With regard to the decrease in the petitioner's staffing size after the filing of the petition, counsel states that the petitioner experienced a financial downturn, which ultimately resulted in the petitioner filing for Chapter Eleven reorganization. Counsel claims that the petitioner was required to take certain remedial actions, including substituting contract workers for a number of the petitioner's in-house employees. Again, the AAO reminds counsel that her statements alone are not deemed as evidence of the claims being made. If in fact contract workers have taken the place of various in-house employees, such claims must be documented to show that contract workers were hired. The petitioner must also provide further information to establish exactly which in-house employees have been replaced with contractors. As previously stated, the unsupported assertions of counsel do not constitute evidence. *Id.*

Although a separate statement was provided by the petitioner's CEO, who indicated that the petitioner retained the chief mechanical engineer, an electrical engineer, a project engineer, and a part-time bookkeeper, the updated organizational hierarchy that the petitioner provided in support of the appeal shows that the project engineer is actually paid by the parent company. It is therefore unclear how the petitioner can prove that an individual who is being compensated by an entirely separate entity is performing services for the petitioner and carrying out necessary operational tasks so that the beneficiary would be relieved from having to do so. USCIS cannot allow a petitioner to claim employees of a foreign affiliate as part of the U.S. entity's organization, because any petitioner could bolster its claim to eligibility merely by relying on artificial hierarchical tiers that are created when individuals who do not actually work for the petitioning entity are claimed as members of its staff. From a policy standpoint, this approach is unreasonable as it would preclude USCIS from being able to assess a petitioner's true staffing capability and, instead, would allow the petitioner to create the illusion of a complex organizational hierarchy by relying on the existing staff of the foreign affiliate.

The record lacks sufficient documentation to allow the AAO to conclude that the petitioner achieved and maintained a level of organizational complexity wherein the beneficiary would be relieved from having to allocate the primary portion of his time to tasks of a non-qualifying nature. Additionally, while the petitioner discussed the beneficiary's role in the company with respect to individuals who were included in the organizational chart that was initially submitted in support of the petition, it is clear that the beneficiary's role would have undoubtedly changed when it experienced more than a 50% reduction in its workforce. As discussed in the director's decision, although the petitioner was staffed with twelve employees at the time the petition was filed, the record lacks sufficient documentation establishing precisely which positions were

filled. Despite the beneficiary's role at the top of the petitioner's hierarchy, the fact that the petitioner has not clarified who was employed when the petition was filed precludes the AAO from being able to ascertain the extent to which the petitioner was able to sustain the beneficiary in a managerial or executive capacity at the time of filing the petition.

Moreover, regardless of what the petitioner's capabilities may have been at the time of filing, a significant workforce reduction that took place after the time of filing the petition would have undoubtedly led to a significant change to the beneficiary's job duties. It is important to note that while the petitioner has the initial burden of establishing eligibility at the time of filing, the petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305, 1308 (9th Cir. 1984). Thus, even if the petitioner were able to provide sufficient documentation to establish that its organizational hierarchy at the time of filing was adequate for the purpose of employing the beneficiary in a managerial or executive capacity, the petitioner's claim to eligibility would be significantly undermined by any change in circumstances where the change alters the beneficiary's role within the organization or otherwise renders the petitioner unable to relieve the beneficiary from having to primarily perform tasks within a qualifying managerial or executive capacity.

While the AAO acknowledges that no beneficiary is required to allocate 100% of his or her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would be required to perform are only incidental to his/her proposed position. 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).

The AAO finds that the petitioner has not met its burden of establishing that it was initially able to employ the beneficiary in a managerial or executive capacity at the time of filing. The significant organizational changes that resulted from the petitioner's financial difficulties make it even more unlikely that the petitioner was able to maintain eligibility. While it is possible that the petitioner's decision to reorganize under Chapter Eleven may lead to yet another change in circumstances such that the petitioner may ultimately gain the capability to employ the beneficiary in a qualifying managerial or executive capacity and thus become eligible at some future date, the fact remains that in order for the instant petition to be approved, the petitioner must establish that it was eligible for such immigrant classification at the time the petition was filed and continuing until the beneficiary's adjustment of status.

When examining the managerial or executive capacity of a beneficiary, USCIS reviews the totality of the record, including descriptions of a beneficiary's duties and 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. A review of the record does not establish that the petitioner was and continues to be able to employ the beneficiary in a primarily managerial or executive capacity.

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.