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U.S. Citizenship  
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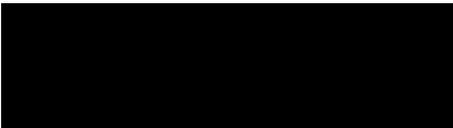
Petitioner:

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, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner subsequently appealed the director's decision. As the appeal was untimely filed, the matter was treated as a motion by the director, who considered the evidence but nevertheless issued a decision affirming the underlying denial. The petitioner appealed the director's decision. That matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Utah corporation operating as a therapeutic massage facility. It seeks to employ the beneficiary as its president and managing director. 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 beneficiary would not be employed in a managerial or executive capacity and denied the petition. That decision was affirmed by the director in response to the motion, which was filed by the petitioner in an effort to dispute the denial.

On appeal from the director's latest decision, 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 issue in this proceeding is whether the beneficiary would be employed in a 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 petition, the petitioner submitted an organizational chart, which shows the beneficiary at the top of the organization's hierarchy and his four subordinates, a massage therapist, an apprentice, two secretaries, and a translator. The petitioner also submitted the following description of the beneficiary's responsibilities:

As the [p]resident and [m]anaging [d]irector of [the petitioner], [the beneficiary] is responsible for formulating policies, business development, including negotiating deals and contracts, marketing, business expansion and overseeing and planning corporate strategies.

[The beneficiary] is also responsible for overseeing the staff in both the Utah and California clinics over which he has authority to hire and fire, recruiting for the current clinics and new clinics that are in the development stages, and training new staff in the specialized therapeutic massage for which the company is known. [The beneficiary] has sole discretion over the day-to-day operations of the United States company.

Between the two clinics, [the beneficiary] is responsible for overseeing two certified massage therapists specially trained in [the petitioner's] technique, an apprentice currently in the process of obtaining her license, and a clerical staff. Although the massage therapists are independent contractors, they carry out the work on the premises of [the petitioner] under the direction of [the beneficiary], who is responsible for ensuring that they properly apply the highly specialized Eastern therapeutic massage techniques for [sic] which the company has built its reputation. [The beneficiary] has the authority to terminate a massage therapist if he or she fails to meet the standards of [the petitioner]. . . .

Under [the beneficiary]'s direction, [the petitioner]'s clientele has increased by twenty percent (20%). In addition, [the beneficiary] is developing a specialized training program in the Eastern technique for [a] new and experienced massage therapist, much like the specialized courses taught at the Korban Clinica and is currently in negotiations with several schools to initiate an internship program. [The beneficiary] is also developing new training courses for therapists on the newest technique[, r]ealignment of [m]uscular [f]iber.

\* \* \*

In the present case, [the beneficiary] is the top manager for the United States organization and is solely responsible for formulating policies, business development, negotiating deals and contracts, marketing strategies, business expansion and overseeing and planning corporate strategies for the United States organization. [The beneficiary] is also solely responsible for overseeing the recruiting and training of new staff, has wide latitude in decision making for the whole United States operation, and reports directly to the parent company overseas.

On December 3, 2003, the director issued a request for additional evidence (RFE) instructing the petitioner to submit a detailed description of the beneficiary's routine day at work including the percentage of time the beneficiary would spend performing each of his listed tasks. The director also asked that the petitioner provide evidence showing how the beneficiary plans to manage the U.S. organization through other employees.

In response, the petitioner provided the following breakdown of the beneficiary's duties:

- 20% - Directing and coordinating the financial and budget activities to fund the operations, maximize the investments and increase operating efficiency.  
[The beneficiary] is solely responsible for establishing the prices of the service offered and the merchandise sold . . . . [The beneficiary] also reviews financial statements and daily sales activity reports to measure productivity and goal achievement and determine areas needing cost reduction and program improvement. [The beneficiary] manages the payroll, and accounts receivable and payable.

- 15% - Establishing and implementing company policies, goals, objectives and procedures.  
[The beneficiary] establishes policies and procedures that mirror that of Korban Clinica and are enumerated above, while ensuring that the operations are in compliance with all local laws, including business and health regulations. [The beneficiary] has successfully established the objectives for the company, which is to provide top quality therapeutic treatments for any patient need, account for the expansion of the company.
- 15% - Determining staffing requirements, including interviewing, hiring, training, and firing personnel.  
[The beneficiary] is responsible for interviewing and hiring massage therapists for both the Utah and California facilities. [He] personally trains the massage therapists in the [e]astern [m]assage techniques unique to Korban Clinica. [The beneficiary] also conducts quarterly performance reviews based upon [his] observations of therapists' application of the techniques and patient feed back [sic]. [He] is responsible for firing a massage therapist or any staff member that does not meet the standards of Korban Clinica/[the petitioner].
- 20% - Devising marketing and business development strategies.  
[The beneficiary] is responsible for placing advertising to target specific audiences, such as sports publications. [He] is also responsible for devising and advertising special promotions to attract new patients.
- 10% - Developing the business expansion in the United States[.]  
[The beneficiary] is responsible for researching possible business expansion opportunities, including finding new locations that are optimal for the services [the petitioner] offers, negotiating contracts for leases and vendors, and determining business and licensing requirements.
- 10% - Developing specialized training programs.  
[The beneficiary] is presently developing specialized training programs in the [e]astern technique for both new and experienced massage therapists, much like the courses taught at Korban Clinica. Specifically, [he] is developing courses on the newest technique[, r]ealignment of [m]uscular [f]iber. In conjunction with this training program, [the beneficiary] is devising workbooks based on this newest technique that will be submitted to the National Board of Certification of Massage and Bodywork for approval and use as a continuing education course.
- 10% - Developing an internship program.  
[The beneficiary] is negotiating with technical schools that offer certification in massage therapy for an internship program similar to that of Korban Clinica.

The petitioner also indicated that it has two message therapists in its California location and three massage therapists, an executive secretary, a secretary, and a translator at its Utah location.

On May 6, 2004, the director denied the petition concluding that 65% of the beneficiary's time would be spent performing non-qualifying tasks and that the beneficiary would not be employed in a qualifying managerial or executive capacity.

Although the petitioner filed an appeal, it was submitted untimely and, therefore, treated as a motion before the director. The director considered the evidence submitted and affirmed the original denial.

On appeal from the director's latest decision, the petitioner states that the beneficiary "is solely responsible for directing the management of [the petitioner]" and provides the following additional statement regarding the beneficiary's responsibilities:

[The beneficiary] is also responsible for formulating policies, business development, including negotiating deals and contracts, marketing, business expansion and overseeing and planning corporate strategies. [He] is also responsible for overseeing the staff in both the Utah and California clinics over which he has authority to hire and fire, recruiting for the current clinics and new clinics that are in the development stages, and training new staff in the specialized therapeutic massage for which the company is known. [The beneficiary] has sole discretion over the day-to-day operations of the United States company.

Under [his] direction, [the petitioner]'s clientele has increased by twenty percent (20%) in the Utah facility and [the petitioner] has expanded to a second clinic in Redondo Beach, California. In addition, [the beneficiary] is developing a specialized training program in the Eastern technique for new and experienced massage therapist, much like the specialized courses taught at the Korban Clinica and is currently in negotiations with several schools to initiate an internship program. [The beneficiary] is also developing new training courses for therapists . . . .

The petitioner claims that the beneficiary oversees the work of six professional massage therapists. As such, it must establish that the beneficiary's subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. Section 101(a)(32) of the Act states that the term "profession" includes, but is not limited to architects, engineers, lawyers, physicians, surgeons, and teacher of elementary or secondary schools, colleges, academies, or seminaries. Additionally, as provided in 8 C.F.R. § 204.5(k)(2), the term "profession" includes not only one of the occupations listed in section 101(a)(32) of the Act, but also any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. In the instant matter, the petitioner has not established, nor does the AAO have reason to believe, that massage therapists require a baccalaureate degree or its equivalent. Therefore, the AAO cannot conclude that the beneficiary primarily manages a staff of professional employees. As these subordinates have no oversight duties that would involve supervising subordinate employees, the AAO also cannot conclude that the beneficiary's subordinates are either supervisory or managerial.

In examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the instant matter, the beneficiary's list of responsibilities indicates that the beneficiary is solely responsible for supervising the petitioner's non-professional, non-supervisory, and non-managerial employees in addition to advertising the petitioner's services and creating training courses as well as actually training additional non-professional, non-supervisory, and non-managerial employees. 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 employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Although the record adequately conveys the heightened degree of discretionary authority bestowed upon the beneficiary, this factor does not override the significance of the nature of duties primarily performed by him. The beneficiary primarily performs and would perform duties of a non-qualifying nature. As such, the AAO cannot conclude that the beneficiary would be employed in a managerial or executive capacity.

Beyond the decision of the director, the petitioner has not submitted sufficient evidence to establish that the beneficiary's duties abroad were within a qualifying capacity. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What did the beneficiary primarily do on a daily basis during his employment abroad? The actual duties themselves will 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).

Additionally, the regulation at 8 C.F.R. § 204.5(j)(3)(D) requires that the petitioner establish that it had been doing business for one year prior to filing the petition, which in the instant matter took place in October of 2003. Although the petitioner submitted sufficient evidence to establish that its foreign counterpart was engaged in the "regular, systematic, and continuous" provision of its services, the record lacks similar evidence in regard to the business activities of the petitioner. See 8 C.F.R. § 204.5(j)(2) for the definition of doing business.

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 discussed above, this petition cannot be approved.

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.