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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUN 01 2005

EAC 02 259 50939

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.

for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a New Jersey corporation claiming to operate as a restaurant, banquet hall, and catering service provider. It seeks to employ the beneficiary as department manager of its banquet and catering operations. 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.

On appeal, counsel disputes the director's conclusion and submits documentation in support of the petitioner's claims.

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 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 the following description of the duties to be performed by the beneficiary under an approved petition:

a. *Corporate Planning*:
[The beneficiary] will analyze the present financial and budgetary position of this company in light of present financial, economic and business conditions, evaluate the potential strengths and weaknesses of this company in light thereof, forecast and plan the future business activities of the company, setting forth goals for the progress, growth and expansion for the company's Catering/Banquet Operation's [sic] Division future.

b. *General Administration*:

[The beneficiary] will oversee, in the management of the Catering/Banquet Operations Division, financial and budgetary operations of this department, such as purchasing, inventory control, personnel and other related matters of the department, to see that the same are conducted in an orderly manner with due and proper compliance with the company requirements and to ensure smooth and efficient overall department and company operations.

c. *Business Development*:
[The beneficiary], in overseeing this company's Catering/Banquet Operations Division's, financial and budgetary management in conjunction with other company departments that have responsibility for promoting this company's entertainment, banquet, catering and dining products and services, will both plan and work with other department managers in the vertical and horizontal expansion of this company. [The beneficiary] will direct his financially related activities in the direction of the expansion of catering, banquet and special occasion operations . . . .

d. *Marketing-Sales*:
[The beneficiary] . . . will set guidelines and financial objectives as they relate to the establishment of this company's marketing and advertising policies. Initially, [he] will analyze financial and other goals and the potential of both present and potential new markets, assess the requirements of our customers and potential new customers . . ., will survey present expenditures and financial outlays in relation to both present and potential new markets, and assess the financial requirements of our proposed activities. With this information[, the beneficiary] will participate in making recommendations on both department and company policy for the development and implementation of a comprehensive marketing strategy and oversee the implementation of the same to ensure aggressive and effective marketing of this company's banquet and catering services. In order to achieve this goal, [the beneficiary] will have to analyze the costs and related cost/benefit analysis of advertising/marketing and other promotional activities so as to obtain the highest return on the investment of company financial resources in these areas. These activities will be undertaken as may be required and justified by business prudence. One of the responsibilities of [the beneficiary] in this area will be the pricing of our company's banquet and catering services . . . .

e. *Purchases*:

[The beneficiary] will have overall responsibility, through the supervision of a subordinate financial and purchasing administration staff, for overseeing the purchase of goods, materials, inventory and supplies by the Catering/Banquet Operations Division. [He] will oversee the comparison of catalogue listings, examine samples, assign subordinates to attend demonstrations of products and conventions, call for quotations, negotiate prices and contract terms, evaluate alternative offers, and make choices between suppliers.

f. *Personnel*:

> [The beneficiary] will be fully authorized to hire and appoint a managerial, administrative and other staff, prescribe their job duties, approve their compensation and promotions, supervise their functions, and, if necessary, terminate their employment . . . .

The petitioner also submitted its organizational chart, which identified the position titles, but did not identify any of the employees occupying those positions. Additionally, the petitioner submitted an employment letter from the beneficiary's foreign employer stating that the beneficiary was employed as the company's catering manager from December 1, 1996 to March 25, 2002.

On May 29, 2003, the director issued the first of two requests for additional evidence. The petitioner was instructed to submit the beneficiary's W-2 wage and tax statements for 2002, as well as a description of its organizational structure identifying all entities that are part of the same organization.

The petitioner responded with a letter dated August 15, 2003 explaining that it operates as a restaurant, banquet hall, and catering service specializing in Korean cuisine and claimed to employ approximately 100 people to man its operation. Although the petitioner submitted its own 2002 tax return and various quarterly tax statements from 2003, it failed to submit the requested 2002 W-2 wage and tax statement for the beneficiary. The only wage documents submitted by the petitioner in regard to the beneficiary were various earnings statements from May 25 to August 8, 2003.

On September 22, 2003, the director issued the second request for additional evidence informing the petitioner that the beneficiary's wage statements for 2003 indicate that he earned less than $14,000 despite the petitioner's claim that the beneficiary's salary is $35,000 per year. The director pointed out that based on the beneficiary's wage statements for 2003, the beneficiary's salary for the first half of the year was less than $7,000, which is far less than the beneficiary's claimed salary. The petitioner was asked to explain the discrepancy between the beneficiary's proffered wage and the wage he was actually paid.

The petitioner responded with a letter dated December 10, 2003 stating that the beneficiary was forced to take extended leave from his job when his wife was hit by car and seriously injured in December of 2001. The petitioner claimed that the beneficiary did not work for "much of 2002 and early part of 2003" during which he was caring for his wife and their two children. The petitioner also provided a copy of the police report filed after the accident. In addition, the petitioner provided a number of the beneficiary's earning statements, including the statement for November 30, 2003 through December 5, 2003, which shows that the beneficiary's year to date earnings were $22,500. It is noted that even though the petition was filed in August 2002, no earnings statements were submitted to show that the beneficiary was employed during that time period.

On March 1, 2004, the director denied the petition concluding that the petitioner did not submit sufficient evidence to establish that the beneficiary would be employed in a managerial or executive capacity. The director noted that the petitioner was not forthcoming with information about interruptions in the beneficiary's period of employment and instead waited until Citizenship and Immigration Services (CIS) inquired about the beneficiary's low pay in 2002 and 2003 before discussing the beneficiary's missed time from work.

On appeal, counsel claims that the petitioner arranged for the salaries of several of its employees, including the beneficiary, to be paid by [redacted], which is purportedly owned by the same family that owns the

petitioning entity. In support of this claim, the petitioner submits two W-2 wage and tax statements for the beneficiary—one is a 2003 W-2 statement from [redacted] showing the beneficiary's gross total earnings of $11,050 and the other is a 2003 W-2 statement from the petitioner showing the beneficiary's gross total earnings of $24,900. Combination of the two W-2 statements indicate that the beneficiary's salary for 2003 was approximately $35,000, the wage offered in the initial I-140 petition. However, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). In the instant case, the petitioner had not previously claimed that any portion of the beneficiary's salary was paid by someone other than the petitioner. Moreover, even when given the opportunity to discuss why the beneficiary was paid less than the wage offered in the petition, the explanation offered by the petitioner was that the beneficiary missed significant periods of employment in 2002 and 2003 as a result of the beneficiary's wife's accident. The petitioner did not claim or imply in any way that the beneficiary was fully compensated in 2003 and that a portion of that compensation came from a party other than the petitioner.

Counsel also maintains the claim that the beneficiary did not work for most of 2002 as a result of the injuries his wife sustained in her 2001 accident. In support of this claim, the petitioner submitted a letter dated December 19, 2001 from a doctor at the Sports Medicine & Orthopedic Center of New Jersey discussing the beneficiary's wife's injuries and the treatment she would receive. The letter stated that the patient was hospitalized for three days and would require assistance for approximately four months. The letter further stated that the patient would require the assistance of her mother-in-law to care for her children and indicated that the patient's husband works full-time. The letter did not indicate that the beneficiary intended to take time off of work to care for his wife. Moreover, if the beneficiary actually did intend to take significant time off of work to care for his wife only weeks after purportedly commencing his job in the United States, there is no explanation from the petitioner as to why it chose to file an I-140 petition to employ the beneficiary on a full-time permanent basis when the beneficiary was unable to assume a full-time position due to family obligations.

In addition, the AAO notes that the director stated that the beneficiary was employed abroad from 1996 to 2000. This determination was apparently based on information provided by the beneficiary in his Biographic Information, Form G-325. However, based on the documentation submitted by the petitioner and based on the petitioner's statement, which was initially submitted in support of the petition, the petitioner has consistently claimed that the beneficiary was employed abroad for the petitioner's purported affiliate from December 1, 1996 until March 25, *2002*, not until 2000. Hence, the record contains conflicting information regarding the beneficiary's dates of employment abroad, which gives rise to questions regarding the beneficiary's actual dates of employment in the United States. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Furthermore, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* At 591.

Upon review, the evidence of record does not establish that the beneficiary would be employed in a managerial or executive capacity. 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). 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 does the beneficiary primarily do on a daily basis? 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). In the instant case, the petitioner has failed to specify what the beneficiary would actually do and exactly how he would be relieved of having to perform non-qualifying duties. Moreover, the record contains conflicting information regarding the dates of the beneficiary's employment abroad and in the United States, as well as a lack of documentation indicating what the beneficiary was doing throughout 2002, a year in which the petition was filed and in which the petitioner simultaneously claims the beneficiary was primarily devoted to caring for his injured wife. In a case where a petitioner seeks to relocate an employee to the United States based on the claim that it is unable to find others in the United States to perform the tasks of a particular petition, the AAO is reluctant to believe that the beneficiary was hired at a time when he was purportedly unable to perform the required duties of his position as a result of family obligations, which would have clearly been known to both the beneficiary and the petitioner at the time the petition was filed. Thus, the petitioner has not provided sufficient information revealing what the beneficiary had been doing in the United States between the time he first came to be employed in the United States in December 2001 and August 2002 when the instant petition was filed. While this information is not typically required when filing an I-140 petition, the instant case is unique in that the petitioner has provided conflicting information and has generally failed to provide a comprehensive overview of the beneficiary's activities since his arrival to the United States. These shortcomings contribute to the AAO's suspicion as to the overall credibility of the petitioner's claim. As such, the AAO cannot affirmatively determine that the beneficiary would primarily perform managerial or executive duties. For this initial reason, this petition cannot be approved.

Additionally, the AAO cannot affirm the director's conclusion that the petitioner satisfied its burden of establishing that it has a qualifying relationship with a foreign entity.

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;
>
> * * *
>
> *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In the instant case, the petitioner claimed in the statement submitted in support of the petition that Ms. [redacted] owns 100% of the foreign entity and 50% of the U.S. entity. However, the petitioner's claim with regard to Ms. [redacted] ownership of the foreign entity contradicts the "List of Names of

Stockholders" document submitted in support of the petition. Specifically, this document indicates that the following individuals own the foreign entity:

- [redacted] – 55%
- [redacted] – 20%
- [redacted] – 15%
- [redacted] – 10%

As previously indicated, the petitioner must resolve any inconsistencies in the record by independent objective evidence. *See Matter of Ho*, 19 I&N 591-92. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* Absent clear evidence as to the true ownership of the foreign entity, the AAO cannot find that the petitioner has submitted sufficient evidence to establish that the U.S. and foreign entities are qualifying organizations.

In addition, the stock certificates for the U.S. entity show that 50 shares were issued to each of the owners. However, the company is authorized to issue 1,000 shares total. Absent the petitioner's minutes or stock ledgers, the AAO cannot affirmatively determine that the U.S. entity has no other owners, as the petitioner has the right to issue 900 shares in addition to the 100 shares that are indicated in the two stock certificates on record. The documentation submitted does not exclude the possibility that the petitioner has owners other than those indicated in the two stock certificates. As such, the petitioner has failed to submit sufficient evidence establishing its ownership.

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 issues discussed in the paragraphs 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.