



U.S. Citizenship
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[Redacted]

FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: JUL 07 2006
SRC 04 149 52809

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:
[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.


Robert P. Wiemann, 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 Florida corporation engaged in the operation and management of Quiznos franchises and commercial real estate investment. It seeks to employ the beneficiary as its marketing 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 within a managerial or executive capacity.

On appeal, counsel disputes the director's findings 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 is whether the beneficiary's proposed position would be within 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.

The record indicates that no evidence was submitted in support of the Form I-140. However, the record shows that the beneficiary provided a statement in support of her Form I-485 from the president of the beneficiary's foreign employer describing the job responsibilities associated with her proposed employment in the United States. The following description was provided:

[The beneficiary] [w]ill manage the organization in the United States on a long-term basis in accordance [with] directives received from the company's [m]anaging [d]irector. The [m]arketing [d]irector's [sic] will function is [sic] a senior level within [the petitioner]'s hierarchy and with regard to the functions that she will manages [sic] on a permanent basis.

[The beneficiary] [w]ill direct and manage on a permanent and long term basis the managerial position o f the marketing business activities of the investment, development, and management company. [She] [w]ill direct and coordinate the marketing of organizational

services and investments. [She] [w]ill coordinate, plan and formulate aspects of marketing research that can be utilized from findings, costs of project, and requirements. [She] [w]ill review [the] market and analyze proposals to determine if benefits can be derived to justify expenditures. [She] [w]ill approves [sic] and submits [sic] marketing plans for investments in Subways fast food restaurants [sic] franchises . . . and [will] submits [sic] proposals considered feasible to management from the marketing point of view for consideration and allocation of funds. [She] [w]ill be responsible for coordinating the activities of the [m]arketing and [s]ales department. [She] [w]ill implement a modern and cost efficient marketing business plan, recommend staffing, training, and performance evaluations to develop and control [the] marketing and sales program. [She] [w]ill implement the full integration of marketing plans, objectives, and goals of the parent company abroad and the American enterprise. [She] [w]ill analyze sales and marketing statistics to formulate policy and to assist in promoting investments and sales in the [s]outheast and [s]outhwest United States. [She] [w]ill review market analyses to determine prospective customer's [sic] needs, volume potential, price schedules, and discount rates to accommodate goals of [the] company. [She] [w]ill coordinate advertising and sales activities with the [m]arketing [d]epartment to assist in establishing investments [sic] purchases and sales goals. [She] [w]ill analyzes [sic] and controls [sic] expenditures of [the] division to conform to budgetary requirements. [She] [w]ill assist other departments within [the] establishment to prepare manuals and technical publications. [She] [w]ill manage and oversee, in conjunction with the company staff, the periodic marketing, sales, and advertising needs and reports showing sales volume and potential sales. [She] [w]ill report directly and be responsible of [sic] her managerial duties to the company's [m]anaging [d]irector.

On May 13, 2005, the director issued a request for additional evidence (RFE). The RFE addressed the following issues: 1) the beneficiary's job duties abroad prior to her entry into the United States as a nonimmigrant;¹ 2) the petitioner's relationship with the beneficiary's employer abroad; 3) the petitioner's documentation with regard to its doing business in the United States for one year prior to filing the Form I-140; and 4) the continued existence and ongoing business activity of the beneficiary's foreign employer.

On September 19, 2005, the director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

On appeal, counsel asserts that Citizenship and Immigration Services (CIS) failed to provide the petitioner with a reasonable opportunity to submit evidence addressing the issue of the beneficiary's proposed employment in the United States.

While counsel's assertion regarding the director's error is accurate, such error does not automatically suggest that the director's entire decision must be overturned. In the instant matter, the AAO acknowledges that the director committed a procedural error by failing to solicit further evidence with regard to the specific issue at hand in the instant matter. However, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal. A review of the petitioner's

¹ The director repeatedly stated that the beneficiary was admitted to the United States in the L-1B nonimmigrant visa category. This statement, however, is incorrect, as the record shows that the beneficiary was admitted to the United States as an L-1A intracompany transferee.

submissions suggests that the director's conclusion was warranted. Therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence.

In support of the appeal, the petitioner submits a statement from the beneficiary dated October 17, 2005.² The beneficiary provided the following list of her proposed duties with the petitioning entity:

[M]arketing the services and products of the corporation, specifically overseeing the advertising and marketing campaigns for our Quiznos Subs divisions, as well as marketing the services of our real estate management and leasing division, and its accompanying organizational services; formulating, directing and coordinating marketing activities and policies to promote products and services, and providing information to supervisors, co-workers, and subordinates, in order to communicate these policies to them in a clear and cogent manner; communicating with persons outside the corporation so as to represent the corporation to customers, the public, government, and other external sources; using sales forecasting and strategic planning to ensure the sale and profitability of products, lines, or services, and analyzing business developments and monitoring market trends.

* * *

[D]evelop pricing strategies by balancing our business objectives with customer satisfaction; identify, develop, and evaluating [sic] our marketing strategy . . . ; evaluate the marketing impact on [the] financial aspects of our services and product development, such as budgets, expenditures, research and development appropriations, and return-on-investment and profit-loss projections.

The beneficiary also states that her responsibilities include the following: compiling lists of the services and products offered by the petitioner; review products and services that can be potentially offered in the future, recommend staffing; evaluate the performance of those who execute the marketing and sales duties; analyze sales and marketing statistics; review market analyses; and control marketing-related expenses. The beneficiary affirmatively states that she is not involved in the day-to-day operations, but rather manages the corporation's essential marketing function over which she has express discretionary authority.

While the petitioner has provided a broad list of the beneficiary's proposed responsibilities, which suggest a high degree of discretionary authority with respect to the marketing function, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In other words, an impressive list of responsibilities and a multi-tiered organizational chart are mere extensions of the petitioner's claim, which must be corroborated with documentary evidence. In the instant matter, the record strongly suggests that the beneficiary's duties are primarily focused on overseeing the work of other employees who purportedly carry out the marketing and sales related functions. As such, the petitioner must provide evidence establishing its employment of such individuals. In the instant matter, the record lacks such evidence. In fact, the organizational chart submitted

² Although the bottom of the submitted pages of the statement indicates that the statement is comprised of a total of eight pages, the first two pages of the statement are missing. Therefore, the AAO will consider only the information contained within the submitted portion of the statement.

on appeal indicates that the beneficiary would head the investment division, which is comprised of a number of properties. However, neither the organizational chart nor any of the other submissions clarify who actually performs the marketing and sales related duties. This information is essential for the purpose of determining that the beneficiary would not primarily perform nonqualifying tasks. *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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). Thus, while the petitioner may have provided a job description that suggests that the beneficiary would be employed in a primarily qualifying managerial or executive capacity, the lack of supporting documentary evidence precludes the AAO from overturning the director's conclusion.

Additionally, though not addressed by director, the regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the instant matter, the record lacks sufficient evidence establishing the petitioner's ability to pay the beneficiary's proffered wage of \$24,000.

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 ground for 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.