



U.S. Citizenship
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Services

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FILE:

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WAC 05 061 51786

Office: CALIFORNIA SERVICE CENTER

Date: JUN 16 2006

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California 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 California. In Part 5, Item 2 of the Form I-140, the petitioner stated that it is engaged in the business of importing and selling home furnishings and 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 two independent grounds of ineligibility: 1) the beneficiary would not be employed in a managerial or executive capacity; and 2) the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer.

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 first 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 Form I-140, the petitioner submitted a letter dated December 4, 2004 in which it stated that at the time it filed the petition it had three full-time employees, including the beneficiary, an account executive, and a warehouse employee. The petitioner also stated that it had two independently contracted sales representatives who were paid on a commission basis. The petitioner provided the following information regarding the beneficiary's proposed position in the United States:

[The beneficiary] will help develop long term corporate strategies, and maintain all marketing and sales efforts of the company. He will be responsible for the highest level of functional control over the firm's strategic direction; fiscal and financial oversight and management; personnel management; capital budgeting; and expansion into foreign and domestic markets.

Additionally, [the beneficiary] will continue to act as the primary designer of products for [the petitioner]. By being so close to the U.S. market, [the beneficiary] continues to be stimulated by a "western" influence while maintaining his Asian sensibilities. This amalgamation, a.k.a.- [sic] "fusion", [sic] has been a key to [the petitioner]'s business successes to date.

On May 18, 2005, the director issued a request for additional evidence (RFE) instructing the petitioner to provide the following documentation to assist in determining the beneficiary's employment capacity in the proposed position in the U.S.: 1) the petitioner's organizational chart illustrating its staffing levels and identifying its employees by name and position title; 2) a detailed description of the beneficiary's proposed day-to-day duties with a percentage of time assigned to each duty in order to indicate how much of the beneficiary's time would be devoted to each of the listed duties; 3) the job descriptions of the beneficiary's subordinates, if any; and 4) the petitioner's 2004 tax return and several of its 2004 quarterly wage statements, including the 2004 statement for the fourth quarter, which accounts for the time period during which the Form I-140 was filed.

In response, the petitioner provided a letter dated August 4, 2005 in which counsel provided the following list of the beneficiary's proposed job responsibilities in the United States:

- Manages sales and marketing for North America and Europe including international tradeshows Manages distributors and [an] exclusive agent in Europe. Participates in European [t]rade [f]air[s]
- Responsible for [the] company's sales forecasting and [the] U[.]S[.] \$600,000 revenue goal.
- Responsible for 22 new products [sic] development[s] per year. Plans and executes new product launches, including advertising and public relations with national and international magazines.
- Develops and implements strategic partnerships to enhance marketing channels for [the] company's continued growth and expansion.
- Maintains close communication with key buyers from major retail chains
- Liaison between [the foreign entity's] office with [sic] buyers of major U[.]S[.] retail chains . . . for private label projects for other U[.]S[.] companies/wholesalers.
- Manages independent sales representatives[.]

Further in the correspondence, counsel stated that the beneficiary oversees the work of the petitioner's department managers, which include a sales and customer service executive and a shipping and receiving manager. As additional supporting evidence the petitioner provided its organizational chart and the requested financial documents. It is noted that while the petitioner's organizational chart appears to illustrate a multi-tiered organization, a thorough review of the document suggests that the beneficiary holds a number of

different positions, many of which are in the lower organizational tiers. For instance, the beneficiary appears to take on all aspects dealing with product design, regardless of the managerial or executive nature of the required duties. The beneficiary's name also appears under prototype development, manufacturing order management, and supplies management, all three of which comprise the overall responsibility of product manufacturing. Furthermore, while the petitioner indicated that [REDACTED] manages the logistics and fulfillment function, the beneficiary is named as the person who handles the international logistics, one of the components of the main function. Thus, the beneficiary is depicted as the subordinate of [REDACTED] with regard to the logistics and fulfillment function.

Finally, the petitioner's 2004 fourth quarter wage report indicates that the petitioner had only two employees, aside from the beneficiary,¹ at the time the Form I-140 was filed and only one of those employees has actually been identified in the petitioner's organizational chart. Thus, while the petitioner has submitted sufficient documentation to establish its employment of [REDACTED] there is no indication as to the services she provided or the position she assumed with the organizational hierarchy. Moreover, with the exception of the beneficiary and [REDACTED], none of the remaining three employees identified in the petitioner's organizational chart is included in the relevant quarterly wage report. Therefore, based on the petitioner's financial documentation the organizational chart that was submitted in response to the RFE does not reflect the petitioner's staffing levels at the time of the filing of the Form I-140. While it is likely that the organizational chart reflects the staffing levels that were established subsequent to the filing of the Form I-140, it is noted that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

On December 13, 2005, the director denied the petition concluding that the evidence of record fails to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. The director noted that the beneficiary's job duties do not include managing a subordinate staff of professional, managerial, or supervisory employees. While the director's observation is accurate with regard to the staff employed by the petitioner at the time the Form I-140 was filed, the AAO will look first to the petitioner's description of the job duties when determining whether a beneficiary would be employed in an executive or managerial capacity. *See* 8 C.F.R. § 204.5(j)(5). Therefore, the AAO's decision in the instant matter will include an analysis of the factors relevant to the director's conclusion.

On appeal, counsel challenges the director's reasoning and asserts that the director failed to cite the specific facts of the case. While counsel is correct in stating that the director failed to include a well-reasoned factual analysis in his discussion, the overall conclusion as to the lack of sufficient evidence establishing that the beneficiary would primarily perform qualifying tasks is correct. Counsel's suggestion that the beneficiary exhibits the characteristics of a function manager are without merit. The mere fact that the beneficiary does not oversee a managerial, supervisory, or professional staff does not establish that he is a function manager. Nor does counsel's claim that the beneficiary is a function manager relieve the petitioner from having to meet the basic burden of establishing that the beneficiary would *primarily* perform duties of a qualifying nature. *See* sections 101(a)(44)(A) and (B) of the Act. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be

¹ The petitioner provided the beneficiary's Form 1040 income tax return for 2004 identifying the petitioner as the beneficiary's employer. Thus, despite the fact that the beneficiary's name does not appear in the petitioner's 2004 fourth quarter wage report, the petitioner has established its employment of the beneficiary.

performed, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function.

Thus, the petitioner should be able to articulate who actually performs the daily operational tasks, since a function manager claim implies that the beneficiary is relieved from having to do so. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In the instant matter, the organizational chart submitted in response to the RFE contradicts counsel's suggestion that the beneficiary manages an essential function. First, there is no indication that the beneficiary's focus would be on any particular function. Rather, the petitioner's relatively complex, multi-tiered chart suggests that the beneficiary would be directly involved in performing duties within three out of the five main functions. Second, the record lacks any evidence that the beneficiary's duties would be limited to mere oversight. Instead, the chart indicates that the beneficiary would research, design, and develop the products to be sold by the petitioning enterprise. As such, it appears that the beneficiary would be overseeing *and* performing the duties of the organization's various essential functions.

Furthermore, in addition to the inaccurate chart, which fails to illustrate the petitioner's actual organizational hierarchy during the relevant time period, the petitioner failed to identify the specific duties the beneficiary would perform on a daily basis. The actual duties themselves 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). While the petitioner provided a list of the beneficiary's general responsibilities, it failed to define those responsibilities with actual daily tasks and did not provide sufficient evidence to establish that the petitioner either employed or contracted sufficient support personnel to relieve the beneficiary from having to perform nonqualifying tasks.

Despite the beneficiary's overall authority and position within the petitioner's hierarchy, both of which counsel points out on appeal, the petitioner is required to establish that the beneficiary primarily performs duties of a qualifying nature. See sections 101(a)(44)(A) and (B) of the Act. Moreover, counsel's statement that the beneficiary is engaged in customer relations only furthers the AAO's conclusion that the petitioner lacks the necessary support staff to relieve the beneficiary from having to perform nonqualifying tasks. Merely claiming that the beneficiary had a staff of independent contractors is insufficient. Such claims must be corroborated with sufficient documentary evidence. See *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 the instant matter, such evidence has not been submitted. Therefore, based on the evidence furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

The other issue in this proceeding is whether the petitioner has a qualifying relationship with a foreign entity.

While the AAO concurs with the director's ultimate conclusion that the petitioner has not established that it has a qualifying relationship with the beneficiary's foreign employer, the director's reasoning underlying the conclusion is irrelevant to the issue at hand. The director determined that both the petitioner and the beneficiary's foreign employer are entities that exist separately from the beneficiary. Yet, the director

included an entire discussion about sole proprietorships and partnerships implying that the petitioner is not a legal entity that is separate from the beneficiary. In the instant matter, the petitioner is neither a sole proprietorship nor a partnership. The record clearly shows that the petitioner is a limited liability company. Therefore, the director's contradictory and irrelevant statements are hereby withdrawn.

Notwithstanding the director's faulty statements, the record lacks sufficient evidence to establish that the petitioner and the beneficiary's foreign employer are affiliates as the petitioner claims.

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;

* * *

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

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 response to the RFE, the petitioner indicated that the beneficiary borrowed money, which was used as start-up capital. As evidence to establish that the beneficiary borrowed money, the petitioner provided a photocopy of a promissory note indicating that the beneficiary borrowed \$25,000 from [REDACTED]. However, the authenticity of this document is questionable in light of the severe discrepancy in the dates that appear therein. Namely, while the front of the document is dated March 1, 1998, the petitioner signed and dated the document on March 1, 1999, one year later than the date at the top of the front page. 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, the fact that the funds were borrowed at least one year, perhaps even two years, prior to February of 2000, the date the petitioner was organized, gives rise to doubt as to whether the beneficiary actually used the borrowed funds to capitalize and purchase controlling ownership interest in the U.S. petitioner. As previously stated, 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also*

Matter of Siemens Medical Systems, Inc., 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595. In the instant matter, while the record contains sufficient documentation establishing the beneficiary's controlling interest in the foreign employer, the petitioner has failed to provide credible documentary evidence to establish that the beneficiary owns a controlling interest in the U.S. petitioning entity. Therefore, the petitioner has failed to meet the requirement described in 8 C.F.R. § 204.5(j)(3)(i)(C).

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 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

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.