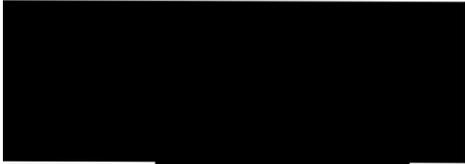


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FILE:



Office: TEXAS SERVICE CENTER

Date:

APR 05 2007

SRC 06 077 52396

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:

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 seeking to employ the beneficiary as its president. It claims that its revenue source is holding service contracts with local customers, overseeing product installations, and providing customer support in connection with the sale of the software developed by the petitioner's claimed foreign parent organization, located in Germany. 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 petitioner failed to establish that it has a work force in the United States and, therefore, cannot be deemed as more than a mere presence of an office or agent doing business in the United States.

On appeal, counsel disputes the director's conclusion, asserting that the director's decision was confusing, erroneous, and failed to clearly state the basis for the denial. Counsel 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 the present matter is whether the petitioner has provided sufficient evidence to establish that it is doing business in the United States and is not merely present as an office or agent.

The regulation at 8 C.F.R. § 204.5(j)(2) defines doing business as "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

The director reasoned that the petitioner's failure to establish a U.S.-based support staff suggests that the petitioner is not doing business in the United States, and focused on the fact that support services are provided abroad rather than in the United States. However, Citizenship and Immigration Services (CIS) cannot determine that the petitioner is not doing business without first considering whether or not the petitioner has provided evidence to establish that it provides products and/or services on a "regular, systematic, and continuous" basis. *Id.* In the present matter, the denial lacks a discussion of whether such evidence exists. Therefore, while the AAO concurs with the conclusion, the director's underlying reasoning is deficient in that it fails to address the most relevant factor, i.e., the petitioner's business transactions. Furthermore, there is no evidence to suggest that the director considered the documentation firmly establishing the beneficiary's employment with the U.S. petitioner both prior to and during the time of the filing of the instant Form I-140. Based on the director's reasoning, the beneficiary's employment with the U.S. petitioner is sufficient to establish that the petitioner is doing business. This analysis, however, is erroneous.

Regardless, the record lacks sufficient evidence to establish that the petitioner was providing its products and services on a "regular, systematic, and continuous" basis. *Id.* While the petitioner has provided invoices for November 2004 and for January through April 2005, there is no evidence to establish that the petitioner was doing business for the full 12-month period prior to filing the Form I-140 pursuant to 8 C.F.R. § 204.5(3)(i)(D) or that the petitioner continues to do business since the filing of Form I-140. 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)). That being said, the AAO acknowledges the petitioner's submission of its various corporate tax returns showing gross income earned. However, a tax return is not an appropriate indicator of whether or not a petitioner is doing business, as it does not show the frequency of the petitioner's business transactions and thus precludes CIS from determining whether the company's revenue is generated from transactions that occur on a "regular, systematic, and continuous" basis. *See* 8 C.F.R. § 204.5(j)(2). Despite counsel's claim that the petitioner is the only entity that distributes and provides support services for products developed by the German parent entity, 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). Based on the documentation submitted, the AAO cannot conclude that the petitioner has complied with 8 C.F.R. § 204.5(3)(i)(D) and continues to do business in the prescribed manner.

Additionally, while not explicitly addressed by the director, the petitioner's lack of evidence regarding an adequate support staff to provide the services that generate its revenue prevents CIS from being able to conclude that the petitioner has established that the beneficiary would be employed in a managerial or executive capacity under an approved petition.

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 beneficiary, in his capacity as president of the petitioning entity, provided a breakdown of his proposed employment, separating the job into five different functions: planning, organizing, staffing, directing, and controlling. The beneficiary stated that his daily activities focus on the following five areas:

Overall Operational Management: The primary business of the company is the development and sale of communications technology. [The beneficiary] spends a considerable amount of time directing the management of the organization through meetings and communications with subordinate managers and staff (generally employed by independent third parties) and other parties (such as regulators, representatives of financial organizations, and business partners).

**Goal and Policy Formulation:** This involves analyzing the historic and current operations of the business and its competitors to determine future direction of the business. It also involves understanding government regulation and international accounting standards to ensure policies are formed that comply with such regulations and standards.

**Worker Supervision:** [The beneficiary] is ultimately responsible for supervising 2 workers in North America and one worker [in] Europe, all of which [sic] are highly trained computer professionals.

**Financial Oversight:** Though the company employs financial advisors, [the beneficiary] is very involved in financial management, including issues related to financing, investment, and budgeting. [He] is ultimately responsible for controlling the financial performance of the company by reviewing periodic sales figures, activity reports and financial statements. He approves all changes in the company to increase its size and profitability.

**Public Relations:** [The beneficiary] must make periodic appearances in the media, with government and non-governmental organizations, with financial organizations, and various company locations.

Each of the above headings were broken down as follows: 50% of the beneficiary's time is attributed to overall operational management, 20% to goal and policy formulation, 15% to worker supervision, 10% to financial oversight, and 5% to public relations.

On March 2, 2006, the director issued a request for additional evidence (RFE) instructing the petitioner to provide the following documentation for all contractual labor hired and 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 his time would be devoted to each of the listed duties.

Counsel provided a response dated June 12, 2006 stating that the beneficiary supervises employees at IBM as they implement the technology purchased from the petitioner. Counsel further stated that the beneficiary supervises five overseas employees and provided their names, position titles, and respective salaries. With regard to the director's request for a breakdown of job duties, counsel stated that the same information was provided earlier in support of the petitioner's nonimmigrant petition seeking to continue employment of the beneficiary as an intracompany transferee. No additional information was provided with regard to the beneficiary's duties.

While the AAO acknowledges that the statutory definitions for managerial and executive capacity are the same for both immigrant and nonimmigrant multinationals, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427.

In addition, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. CIS denies many I-140 immigrant petitions after approving prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 25; *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). As such, counsel had no basis for assuming that CIS simultaneously refers to all petitions filed by one petitioner in order to obtain all information necessary to determine the petitioner's eligibility for a particular benefit.

In the present matter, the director clearly asked for a detailed list of the beneficiary's proposed duties and a breakdown of time spent performing each duty. Counsel's indication that the relevant information may exist in another record of proceeding regarding the same petitioner is insufficient. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). While the AAO acknowledges the job description presented in support of the petition, the director properly implied, by virtue of requesting additional evidence, that the previously provided information was inadequate. The job description provided by the beneficiary was a broad compilation of responsibilities, not actual duties the beneficiary would perform daily in trying to fulfill those responsibilities. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Furthermore, the record lacks evidence to show who, if not the beneficiary, carries out the petitioner's daily operational tasks. Despite the numerous references to subordinate personnel, the petitioner has not provided evidence to show that at the time the Form I-140 was filed it had the necessary marketing, sales, customer service, and technical support staff to carry out the required non-qualifying tasks on a daily basis. Counsel's claim that the petitioner maintains contractors and overseas personnel is not documented. There is no evidence to show that the petitioner has paid for any services other than those of the beneficiary himself. 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).

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). CIS will also review the petitioner's staffing levels in light of the job description and reasonable needs of the organization to ensure that proper support is in place in order to relieve the beneficiary from having to primarily engage in the performance of non-qualifying tasks. In the instant case, the petitioner has provided a deficient description of duties and has failed to document the claims made with regard to its support personnel. *See Matter of Soffici*, 22 I&N Dec. at 165. As such, the AAO cannot conclude that the beneficiary would primarily perform managerial or executive duties.

Furthermore, the record supports a finding of ineligibility based on another ground that was not previously addressed in the director's decision. Namely, 8 C.F.R. § 204.5(j)(3)(i)(B) states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to entering the United States as a nonimmigrant to work for the petitioner. In the present matter, the list of broad responsibilities initially provided in support of the Form I-

140 is not sufficient to convey an understanding of the actual duties the beneficiary carried out on a daily basis during his employment abroad. Without this relevant information, the AAO cannot conclude that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

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 of ineligibility as 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 must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.