



U.S. Citizenship
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[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **AUG 06 2007**
WAC 04 028 51887

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DISCUSSION: The approval of the preference visa petition was revoked by the Director, California Service Center.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 California corporation engaged in the business of importation and retail of bedding. It seeks to employ the beneficiary as its president. 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 revoked approval of the petition based on two independent grounds of ineligibility: 1) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity; and 2) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

On appeal, counsel disputes the director's conclusion and asserts that the director's basis for such conclusion is erroneous. A brief is submitted in support of counsel's assertions.

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 two primary issues in this proceeding call for an analysis of the beneficiary's employment capacity. The first issue is whether the beneficiary's prospective employment with the U.S. petitioner is within a qualifying capacity, and the second issue is whether the beneficiary's employment abroad was within a qualifying 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 November 4, 2003, which contained the following statements regarding the beneficiary's foreign and proposed employment, respectively:

[The beneficiary] has been continuously employed by our Korean [p]arent [c]ompany since its establishment in 1990 as the [p]resident. In that capacity, he was responsible for overseeing all duties related to the manufacture and international trade and sale of beddings and other products. [The beneficiary] has proven to be a successful businessperson as

evidenced by the development, continuing growth and vitality of the [p]arent [c]ompany in Korea.

Since February of 2001, [the beneficiary] has been continuously employed as the [p]resident of our company, a position involving executive functions. In this highly important position, [the beneficiary] is responsible for the developing and overseeing of all U.S. operations, including setting corporate policies, developing strategies for marketing, fiscal and personnel matters. Under [his] leadership, in addition to main office/showroom in Carson, California, the U.S. [c]ompany has already opened 4 showroom/retail stores in other cities of [sic] California Furthermore, in May of 2003, the U.S. [c]ompany has also established a corporation in the state of New Jersey [The beneficiary] will play a key role in this development plan, and his continual [sic] presence is essential to bring this plan to a successful conclusion.

No additional information was provided with regard to the beneficiary's position abroad. However, with regard to the U.S. entity, the petitioner provided an organizational chart illustrating a multi-tiered organization comprised of twelve positions occupied by twelve individuals, including the beneficiary, whose position is at the top of the hierarchy. The chart further shows that the beneficiary's immediate subordinates include an operations manager, who has four direct subordinates, and a general manager, who also has four direct subordinates. The two quality control employees, who are at the lowest tier within the organization, are supervised by a warehouse supervisor. Each of the employees within the organizational chart is confirmed to have been employed as of the third quarter of the 2003 tax year.

On October 29, 2004, Citizenship and Immigration Services (CIS) issued a request for additional evidence (RFE) instructing the petitioner to provide job descriptions and educational levels of the beneficiary's subordinates, a detailed account of the beneficiary's day-to-day job duties to illustrate a typical day of work, and the petitioner's third quarter 2004 wage report.

In response, counsel questioned the need for the 2004 wage report in light of the filing date of the instant petition. Nevertheless, the requested document was submitted along with another copy of the petitioner's third quarterly wage report for 2003 and the reports for the first two quarters of 2005. It is noted, however, that despite counsel's apparent knowledge of the need to establish eligibility as of the filing date, i.e., November 6, 2003, the relevant wage report for the fourth quarter of 2003 was not provided.

On May 12, 2006, the director issued a notice of his intent to revoke (NOIR) approval of the petitioner's Form I-140. The director repeated the beneficiary's daily work schedule, which was provided in response to the RFE, and made various erroneous observations regarding other submitted evidence. Namely, the director discussed the petitioner's 2005 quarterly wage reports, stating that the petitioner only had five employees during each of the respective quarters and "[t]hus, there are only seven subordinates." The director's statements are confusing and unfounded, as the wage reports for 2005 indicate that the petitioner had at least ten employees at all times during the two quarters discussed. The director also determined that the warehouse supervisor and quality control specialist are the petitioner's only two employees with the remaining managerial employees working for other branches. However, there is no indication that the "branches" that were referenced by the director were anything other than the various locations of the petitioner's retail outlets. Lastly, the director stated that the petitioner failed to provide its 2003 organizational chart. This statement is

erroneous as indicated by the record, which includes the initial 2003 organizational chart submitted in support of the Form I-140 and another copy of the same chart, which was submitted in response to the RFE.

Ultimately, the director determined, based on his confusing and often erroneous observations, that the petitioner lacked sufficient personnel to support the beneficiary in a primarily managerial or executive position. The director also determined that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. These two conclusions served as the basis for the director's NOIR.

In response, counsel submitted a letter dated June 8, 2006 in which he argued that the comments and observations that served as grounds for the director's intent to revoke were erroneous and that the director's determination was therefore unwarranted. Counsel further asserted that the beneficiary's employment abroad included supervising six subordinate managers and directors and 35 staff members. In support of this claim, the petitioner provided an organizational chart and a complete list of employees that were under the beneficiary's supervision during his employment abroad.

On August 8, 2006, the director revoked approval of the petition basing the decision on the same erroneous comments and observations that were previously cited in the NOIR. As previously indicated, the director's comments and observations regarding the petitioner's staffing were confusing and erroneous, and failed to address other relevant factors. For instance, despite the initial request in the RFE, the petitioner has not provided job descriptions for the employees that were members of the petitioner's staff at the time the Form I-140 was filed. Lack of this relevant information precludes a comprehensive analysis to determine who was performing which duties and how each of the employees within the petitioner's organization contributed to relieving the beneficiary from having to primarily perform non-qualifying daily operational tasks. Additionally, while the petitioner provides an illustration of its personnel structure by virtue of submitting an organizational chart, employment of the individuals named in the chart could not be verified due to a lack of evidence. 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)). While counsel clearly understood the significance of a fourth quarterly wage report and even commented on the director's error in not requesting this document, the petitioner did not provide it for CIS's review. Therefore, the petitioner's staffing at the actual time of filing remained in question. Furthermore, while the petitioner provided documentation to address the issue of the foreign entity's organizational hierarchy and the beneficiary's role therein, there are no definitive statements identifying the specific tasks carried out by the beneficiary during his employment abroad. As such, while the AAO acknowledges the inherent flaws in the director's underlying analysis, the decision to revoke the approval of the petition based on the two cited grounds was properly issued.

Additionally, section 205 of the Act, 8 U.S.C. § 1155, states: "The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The regulation at 8 C.F.R. § 205.2(a) further states the following:

Any Service officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition upon notice to the petitioner on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this Service.

The general provisions of the Act and regulation cited above clearly afford the director the discretionary authority to look beyond the petitioner's eligibility at the time of filing. In the present matter, the director's analysis is admittedly confusing. However, his mention of the petitioner's quarterly wage report strongly suggests that in addition to the petitioner's eligibility at the time of filing, the director was also concerned with the petitioner's ability to employ the beneficiary in a primarily managerial or executive capacity subsequent to the Form I-140's approval. Therefore, despite the director's failure to provide a clear and cohesive analysis, his discussion of the petitioner's diminished support staff in 2005 is relevant and must be addressed.

On appeal, counsel submits the relevant wage report for the fourth quarter of 2003 during which the Form I-140 was filed. The document shows 15 full-time employees during each of the three months that comprised the fourth quarter. It is noted, however, that the organizational chart submitted initially and in response to the RFE identified only 13 employees. Therefore, the position titles and placements within the petitioner's hierarchy for [redacted] and [redacted] are unknown. As previously stated, the petitioner has not provided job descriptions for any of its employees, with the exception of the beneficiary. Without this relevant information, the AAO is unable to analyze the beneficiary's duties in the context of the operational tasks performed by his subordinates and other staff members. Section 101(a)(44)(C) of the Act specifically states that "[a]n individual shall not be considered to be acting in a managerial or executive capacity . . . merely on the basis of the number of employees that the individual supervises. . . ."

Furthermore, 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 hourly breakdown of the beneficiary's daily schedule, which was provided in response to the RFE, indicates that more than 50% of the beneficiary's time was being allocated to sales meetings where contracts were negotiated and updated. This limited overview suggests that six hours of the beneficiary's daily duties was being spent performing sales-related, or non-qualifying, tasks. 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). Furthermore, the fact that the beneficiary carries out crucial components of the sales function brings into question the role and duties of Sung W. Kang, the individual identified as the petitioner's sales manager at the time the Form I-140 was filed. This lack of clarity as to the roles of the individual employees that comprised the petitioner's organizational hierarchy and the strong indication that the beneficiary was directly involved in performing non-qualifying tasks on a daily basis suggest that, at the time the Form I-140 was filed, the petitioner had not yet reached the point at which it could support the beneficiary in a managerial or executive capacity.

With regard to the beneficiary's duties abroad, counsel asserts that the beneficiary occupied the senior-most position within the foreign company's hierarchy, assertions which were conveyed in the foreign entity's organizational chart and corresponding employee roster. While the AAO acknowledges the director's erroneous observation with regard to the petitioner's submission of certain documents, these documents alone do not establish the nature of the duties primarily performed by the beneficiary during his employment abroad. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient. 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). Without an account of the beneficiary's specific duties, the AAO cannot affirmatively conclude that he was employed abroad in a qualifying managerial or executive capacity regardless of the size of the organization and the number of

subordinates supervised. Again, as noted above, section 101(a)(44)(C) of the Act specifically states that the number of employees that the beneficiary supervised or directed may not be the basis for finding that the individual acted in a managerial or executive capacity.

Additionally, as suggested by the director the petitioner's support staff appears to have diminished in size after the Form I-140 was filed. Thus, even if the petitioner were able to establish eligibility at the time of filing, its ability to maintain eligibility beyond that point is relevant. In the present matter, the record does not contain sufficient information to show that the petitioner established eligibility either at the time of filing or thereafter.

Furthermore, the record does not support a finding of eligibility based on at least one additional ground that was not previously addressed in the director's decision. Namely, 8 C.F.R. § 204.5(j)(3)(i)(C) states that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer. In the present matter, the petitioner claims that it is wholly owned by the beneficiary's foreign employer. The following was submitted in support of this claim: 1) the petitioner's Articles of Incorporation; 2) stock certificate no. 1 showing that the petitioner issued 230,000 shares of its stock to the beneficiary's foreign employer; 3) the petitioner's stock transfer ledger showing that \$230,000 was paid in exchange for issuance of 230,000 shares of stock; 4) a copy of a bank receipt showing the fund transfer and identifying the foreign employer as the originator of the transaction and the petitioner as the recipient of the funds. Cumulatively, this documentation suggests that the beneficiary's foreign employer paid \$230,000 in exchange for 230,000 shares of the petitioner's stock. Based on the stock transfer ledger, no other shares were issued. However, Schedule L, item 22(b) of the petitioner's tax return for 2002 shows that the petitioner received \$500,000 in exchange for issuance of common stock. There is no explanation as to the origin of the remaining \$270,000. In response to the RFE, the petitioner also provided its 2001 tax return in which Schedule L, item 22(b) shows that the \$500,000 was received during the 2001 tax year. 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). In the present matter, the petitioner has provided no explanation to account for the origin of the additional \$270,000, nor is there any indication that the beneficiary's foreign employer remains the sole owner of all of the petitioner's issued stock.

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 of 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.