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U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: DEC 26 2007
SRC 06 186 52848

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 limited liability company organized in the State of Texas. 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 determined that the petitioner failed to establish the following: 1) that the beneficiary was employed abroad in a managerial or executive capacity; or 2) that the beneficiary would be employed by the U.S. entity in a qualifying managerial or executive capacity. On the basis of these individual grounds of ineligibility, the director denied the petition. In review of the record in its entirety, the AAO concludes that the petitioner has provided sufficient documentation to establish that the beneficiary's position abroad was within a qualifying capacity. As such, the AAO will address the remaining ground of ineligibility that served as the basis for the director's adverse determination.

On appeal, counsel disputes the director's conclusions 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 would be employed by the U.S. petitioner in 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 May 25, 2006, which includes the following list of responsibilities describing the beneficiary's proposed employment:

- Directs and coordinates activities of the organization and formulates and administers company policies [20%].

- In consultation with the management of the Turkish firm[,] develops long-range goals and objectives of the company—with emphasis on developing and guiding expansion policies [20%].
- [Is] responsible for corporate planning, general administration, marketing[,] sales and purchasing activities for [the petitioner] [20%].
- Directs and coordinates activities of managers and employees in the production, operations, purchasing and marketing departments for which responsibility is delegated for further attainment of goals and objectives [20%].
- Reviews and analyzes activities, costs, operations, and forecasts data to determine progress toward stated goals and objectives [10%].
- Reviews with management and employees [the] company's achievements and discusses [the] required changes in goals or objectives of the company [10%].

The petitioner also provided a copy of an undated organizational chart, which shows that the company is comprised of three retail locations with a manager/sales person at each location and two cashiers at two of the locations and one cashier at the third location. The chart also shows a warehouse manager at the same level as the three managers overseeing the retail locations. In total, the chart identified ten positions, including that of the beneficiary, whose position is at the top of the organizational hierarchy. It is noted for the record that in part 5, item 2 of the Form I-140, the petitioner stated that its current number of employees is four, which suggests that the organizational chart may not be an accurate illustration of the petitioner's organizational hierarchy at the time of filing.

Accordingly, the issue of the petitioner's organizational hierarchy was specifically addressed by the director in a notice dated July 13, 2006, where the petitioner was asked to provide additional information. The director explicitly noted that the job description recited above was too general to determine that the beneficiary's proposed position would primarily consist of qualifying job duties. Therefore, the petitioner was asked to provide a more detailed description of the beneficiary's proposed job duties as well as the job titles and brief descriptions of the job duties to be performed by the beneficiary's subordinates. The director clarified further that if the beneficiary would not oversee the work of subordinate employees, the petitioner would need to provide a detailed statement about the essential function the beneficiary would manage, including a discussion as to who would provide the products and/or services of the organization.

In response, counsel provided a letter dated August 10, 2006, which included, verbatim, the same percentage breakdown of the beneficiary's proposed job responsibilities. Although counsel stated that the beneficiary has primarily focused on executive job duties "through the assistance of a subordinate staff of thirteen," the record contains no supporting evidence to show that the petitioner employed thirteen employees at the time the Form I-140 was filed. Rather, the record contains the petitioner's second quarterly wage report for 2006, which identified a total of ten employees, including the beneficiary, only eight of whom were employed in May 2006 when the Form I-140 was filed. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. 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).

The AAO further notes that the names on the petitioner's organizational chart and quarterly wage report have only three individuals in common—the beneficiary, one manager/sales person, and one cashier. The remainder of the employees listed in the organizational chart are not among the employees listed in the wage report. Additionally, with the exception of the beneficiary, none of the employees listed in the petitioner's quarterly tax return appear to have been compensated salaries commensurate with those of full-time employees. The petitioner provided no discussion to explain how, in light of its staffing structure at the time of filing, the beneficiary would be relieved from primarily performing the sales and cashier functions associated with running the three retail operations.

Accordingly, in a decision dated August 16, 2006, the director issued a decision denying the petitioner's Form I-140. The director again commented on the deficient job description provided in response to the previously issued notice despite the director's clear attempt to illicit the necessary information. The director further noted that the petitioner failed to explain who actually relieves the beneficiary from having to primarily perform duties of a non-qualifying nature.

On appeal, counsel asserts that the beneficiary's proposed employment involves a considerable amount of discretionary authority, which he exercises regularly. However, the beneficiary's discretionary authority is not in question. Rather, the key to determining that the beneficiary fits the definition of a multinational manager or executive is identifying, with specificity, the qualifying duties to be performed on a daily basis and providing sufficient documentation to establish that the petitioner is adequately staffed to relieve the beneficiary from having to primarily engage in 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). In the present matter, counsel's expanded job description on appeal attempts to illustrate the variety of ways in which the beneficiary exercises his discretionary authority. However, the record still lacks an adequate job description indicating what specific tasks the beneficiary would perform on a daily basis. Furthermore, a number of the tasks that are cited, i.e., conducting research, performing accounting duties, and seeking out product wholesalers, are non-qualifying. That being said, counsel readily admits that the beneficiary performs whatever tasks are necessary, including operating a cash register, to ensure the successful operation of the retail outlets. However, it is unclear what portion of the beneficiary's time is allotted to these non-qualifying tasks.

As previously stated, the petitioner must establish that the majority of the beneficiary's time is spent performing qualifying duties. Here, the petitioner has failed to provide sufficient evidence to establish that it had the ability to employ the beneficiary in a primarily qualifying capacity at the time the Form I-140 was filed. While counsel refers to employees who have been working at the petitioner's retail outlets, the petitioner has not provided sufficient documentation to illustrate its organizational structure at the time of filing. As discussed above, most of the employees who were named on the petitioner's organizational chart are not listed in the petitioner's second quarterly wage report for 2006. Also, the petitioner's quarterly wage report for the second quarter of 2006 shows that the petitioner had eight employees in May 2006 when the Form I-140 was filed. However, the following month, the petitioner paid only one employee, presumably the beneficiary, thereby giving rise to serious doubt as to the petitioner's ability to maintain the beneficiary in a qualifying capacity. Lastly, it is unclear why the petitioner claimed only four employees in the Form I-140. 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 maintained inconsistent information with regard to its staffing structure and has provided documentation that supports neither the petitioner's nor counsel's claims, which are also inconsistent with one another. As such, the petitioner has failed to provide an adequate basis to enable the AAO to conclude that the beneficiary would primarily perform duties of a qualifying nature. Rather, the record strongly suggests that, at the time the Form I-140 was filed, the petitioner lacked the organizational complexity and the necessary staff to enable the beneficiary to focus primarily on qualifying tasks. For these reasons, the petition may not be approved.

Additionally, beyond the director's decision, the record does not show that the petitioner established its ability to pay the beneficiary's proffered wage pursuant to 8 C.F.R. § 204.5(g)(2), which 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 present matter, Part 6, No. 9 of the petitioner's Form I-140 states that the beneficiary's proffered wage was \$583.33 per week, or approximately \$30,000 annually. Although the petitioner provided its quarterly wage statement, which includes the month during which the Form I-140 was filed, the beneficiary's salary at the time was only \$3,200 for the entire quarter, or approximately \$267 weekly. Although the petitioner is not required to actually pay the proffered wage unless and until the Form I-140 is approved and the beneficiary actually assumes the position offered, it must nevertheless provide documentation to establish its ability to pay as of the date it files the petition. 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)). It is noted that the petitioner's bank statements, which have been submitted in large quantities, are not appropriate indicators of an entity's ability to pay the beneficiary's proffered wage. Rather, the petitioner could have submitted its tax return for the relevant time period in order to establish its ability to pay. Such documentation, however, was not provided. Nor did the petitioner provide any other documentation establishing its ability to pay the beneficiary the proffered wage.

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, 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.