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U.S. Citizenship
and Immigration
Services

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FILE: EAC 06 123 50733 Office: TEXAS SERVICE CENTER Date: **JUL 03 2007**

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 limited liability company organized in the State of New Jersey. The petitioner assists its foreign affiliate in bringing together Indian companies seeking U.S. manufacturers that distribute electronic components and subsystems. The petitioner seeks to employ the beneficiary as its managing director. 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 the beneficiary would be employed in a qualifying managerial or executive capacity and denied the petition.

On appeal, counsel disputes the director's findings and submits a brief in support of her 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 issue in this proceeding is whether the beneficiary would be employed by the U.S. petitioner 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 March 16, 2006, in which it claimed two employees as part of its organizational structure and provided the following list of the beneficiary's proposed responsibilities under an approved petition:

1. Manage the development and execution of strategic sourcing strategies utilizing resources in India, UAE and Dubai;
2. Establish the policy and parameters for acceptance manufacturers representation agreements;
3. Manage the relationships between U.S. manufacturers and foreign end users particularly in areas of service/warranty issues;

4. Analyze new products and potential market opportunities;
5. Continue to capitalize on the synergies of three companies to reduce costs, maintain revenue, volume and profitability;
6. Manage the export management system (EMS) compliance program to ensure the company's exports[,] both electronic components and transfers of technology[,] are done in accordance with Export Administration regulations;
7. Serve as [the] responsible officer with the Bureau of Industry and Security (BIS) [f]or liability issues regarding the shippers export declaration;
8. Manage the marketing strategy of IT outsourcing to U.S. company's [sic]; [and]
9. Direct further expansion and opportunities to achieve revenue goals[.]

On May 20, 2006, the director issued a request for additional evidence (RFE) instructing the petitioner to provide its organizational chart. The petitioner was asked to include the names, job titles, and specific job duties of each employee named in the chart.

In response, the petitioner provided an organizational chart showing that the beneficiary occupies the senior-most position of managing director of the entire organization, which includes entities in India and the United States. The chart identifies [REDACTED] the beneficiary's wife, as the marketing director of the U.S. and Indian entities. Two other individuals are named and identified as employees of the U.S. entity. Both appear to be administrative assistants. The petitioner also provided three quarterly tax returns for 2005. While the petitioner started 2005 with two employees, the last two quarters of 2005 indicate that the petitioner paid wages to only one employee. The petitioner also provided Form W-4s, Employee's Withholding Allowance Certificates. One Form W-4 was completed by one of the administrative assistants on August 15, 2005 and another Form W-4 was completed by the other administrative assistant on January 10, 2006. As the petitioner did not provide any quarterly tax returns or wage reports for 2006, it is unclear whom the petitioner employed at the time the Form I-140 was filed. According to the petitioner's 2005 tax return, the petitioner paid \$5,625 in employee wages and salaries and another \$60,000 in guaranteed payments to members. Schedule K-1 specifically shows that the beneficiary was the sole recipient of the guaranteed payments despite the fact that 51% of the company's profits and losses were to be assumed by the other member with the remaining 49% of the profits and losses assumed by the beneficiary. The corresponding tax return for the beneficiary, Form 1040NR for 2005, shows that he filed as a single nonresident alien and collected \$54,133 in member income. Thus, not only is there confusion as to the distribution of payments to members, there is also a discrepancy between the amount of income he claimed in his personal tax return and the amount claimed to have been distributed to him in the tax return. The record lacks evidence to show that profit/loss distribution was in proportion to the 51%/49% split between the beneficiary's wife and the beneficiary, respectively.

On July 14, 2006, the director denied the petition, concluding that the petitioner failed to establish the beneficiary's prospective employment would be within a qualifying managerial or executive capacity. While the facts and documents presented in this matter suggest that the director's conclusion was warranted, the

AAO does not agree with her underlying reasoning. Specifically, in reaching her conclusion, the director primarily relied on the description of the proposed employment, thereby suggesting that the petitioner provided sufficient information about the beneficiary's specific job duties. In fact, the only description of the beneficiary's proposed employment was contained in the petitioner's initial support letter, and it is primarily comprised of broad job responsibilities, not specific job duties the beneficiary would carry out on a daily basis. Thus, in considering primarily the beneficiary's job description, the only conclusion that can be reached is that the petitioner failed to provide sufficient information to describe the specific tasks the beneficiary would carry out daily. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. *See* 8 C.F.R. § 204.5(j)(5). Only by reciting the actual duties themselves can the petitioner 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). Based on the record before the director at the time of the denial, it is unlikely that any determination could have been made as to what actual duties comprised the majority of the beneficiary's time at work.

On appeal, counsel asserts that the director did not request clarification of the beneficiary's duties. However, item 2 of the RFE clearly asks that the petitioner's organizational chart be accompanied by the names, job titles, and job duties of the petitioner's employees. As the beneficiary has been claimed as one of the petitioner's employees, the director's request implies that the beneficiary's specific job duties must also be provided. Therefore counsel's assertion is erroneous. It is noted that 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).

Counsel further asserts that the beneficiary would assume the role of a function manager. This claim appears to have been prompted by the director's comments addressing the petitioner's small support staff, which, according to the four quarterly tax returns for 2005, was comprised of a single paid employee directly prior to the time the petition was filed. However, the petitioner must establish a basis for making this claim. 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 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. 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 present matter, counsel and the beneficiary suggest that the day-to-day operational tasks related to sales and engineering are provided by offshore employees in India and independent contractors in the United States. However, in claiming that crucial operational functions are carried out by outsourced personnel, the petitioner must provide evidence to show that it has paid for the services that are purportedly rendered on a regular and systematic basis. 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 the petitioner has provided a single letter dated December 7, 2005 from the sales and export manager of Aries Electronics, Inc. claiming that they provided the services of test engineers on a contractual basis in 2005, this claim is only an extension of the petitioner's own claim and must be similarly documented with evidence of

the petitioner's payment for the services that were rendered. This lack of documentation further compromises the claim that the beneficiary oversees the work of individuals who are not directly employed by the petitioner. Moreover, counsel's claim that the petitioner employs two individuals in addition to beneficiary also remains without supporting evidence, as no quarterly tax documents or wage reports have been submitted to account for the time period during which the petition 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).

In examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the present matter, the petitioner failed to provide this critical information in response to the RFE. It is noted that 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). Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

Moreover, even if the AAO were to consider the supplemental information provided on appeal, such information strongly suggests that the beneficiary would not only oversee, but also perform many of the key components of the petitioner's essential function. Namely, counsel states in her brief that the main purpose of the U.S. entity is to locate new manufacturers to provide products for overseas entities, to analyze the new products, and to negotiate agency agreements with manufacturers. In the present matter, counsel readily states that the beneficiary spends more than one third of his time performing all three functions. As previously indicated in this discussion, 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. *Matter of Church Scientology International*, 19 I&N Dec. at 604. Since the petitioner has not provided sufficient evidence of a support staff who can relieve the beneficiary in performing these crucial, though non-qualifying tasks, it is unclear who, aside from the beneficiary, would carry out these tasks for the remainder of the time.

Additionally, counsel asserts that rest of the beneficiary's time would be spent "performing duties for the [REDACTED]". She stated that these duties would include attending sales and engineering meetings via telecommuting, addressing personnel, policy, and budgeting issues, and meeting with "important customers" in India. However, it is unclear that any of these tasks are related to the beneficiary's specific position with the U.S. entity. While the petitioner has maintained that the petitioner is a member of a group of related organizations, the record clearly shows that the petitioner is a separate entity, which has been independently organized under the laws of the State of New Jersey. Thus, despite the organizational chart showing the beneficiary as the head of each of the entities that comprise the [REDACTED], only those duties that the beneficiary would perform in his capacity as managing director of the petitioning entity can be taken into account for the purpose of establishing the petitioner's eligibility in the present matter. The personnel, policy, and budgeting issues that arise in any of the other affiliate organizations are not part of the beneficiary's proposed employment with the U.S. petitioner and are thus irrelevant in the present matter.

On review, the record as presently constituted does not establish that the beneficiary would be employed in a primarily managerial or executive capacity. While the record delineates the complex essential functions of

the U.S. petitioner, it does not provide evidence of a staff, other than the beneficiary himself, who would carry out the tasks associated with these essential functions. Moreover, it appears that a significant portion of the beneficiary's time would also be devoted to performing tasks that would benefit affiliates of the petitioner rather than the petitioner directly. As such, based on the evidence furnished, it cannot be found that the beneficiary would be employed by the U.S. petitioner in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

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. Specifically, 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner must establish that it has been doing business for at least one year prior to filing the Form I-140. The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "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." In the present matter, the petitioner provides a detailed explanation of the role it plays in a complex process of pairing up the capabilities of U.S. manufacturers with the specific needs of overseas end users. The petitioner also explains that its payment may be delayed by a lengthy process in which attaining a finished product and full execution of an agency contract may take several years. However, the petitioner's 2005 tax return clearly shows the generation of a gross income. Moreover, the petitioner claims that its gross income has consistently grown since it commenced doing business in 2003. However, there is no documentation in the record to show how the petitioner has generated income since 2003 or that the claimed income has been the result of its conducting business on a "regular, systematic, and continuous" basis. *See id.* Without documentation to support the claims made, the AAO cannot conclude that the petitioner met the requirements specified in 8 C.F.R. § 204.5(j)(3)(i)(D).

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 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 has not sustained that burden.

ORDER: The appeal is dismissed.