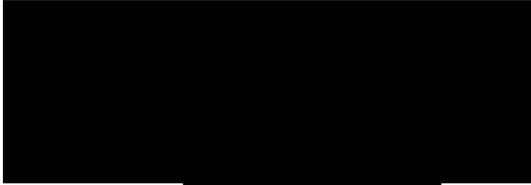




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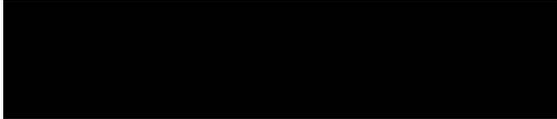


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Office: TEXAS SERVICE CENTER Date: MAR 07 2007

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Beneficiary:

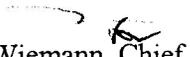


PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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 engaged in the retail and wholesale of wooden toys manufactured by its claimed foreign parent entity, located in the Czech Republic. It 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 determined that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity and denied the petition.

On appeal, the beneficiary, on behalf of the petitioner, disputes the director's conclusion and submits a brief explaining her role within the foreign and U.S. entities.

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 U.S. petitioner would primarily employ the beneficiary 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 provided a letter dated December 14, 2005, which included the following information regarding the beneficiary's employment in the United States:

In this capacity [as general manager], [the beneficiary] has: 1) [b]een responsible for the day-to-day operations of the company, including inventory and sales; 2) [p]erformed market research to investigate new distribution possibilities; 3) [o]verseen the development of creative marketing and sales programs to promote business; and 4) [b]een responsible for all personnel decisions, including the contracting [of] independent contractors.

[The beneficiary] fulfills all company operational requirements. She is responsible for all hiring and firing of personnel, organizing and determining sales territories and quotas, etc.

She is also responsible for compliance with all governmental regulations, shipping options, customs clearances, and proper record keeping.

On February 16, 2006, 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 United States: 1) evidence of the petitioner's staffing levels, including the position titles and job duties of all employees; 2) a detailed description of the beneficiary's proposed day-to-day duties with a percentage of time assigned to each duty; 3) an explanation discussing who provides the petitioner's services or provides its products; and 4) the W-2 forms issued by the petitioner in 2004.

In response, the petitioner provided a letter from counsel dated April 5, 2006.<sup>1</sup> Counsel stated that the petitioner would employ the beneficiary in a primarily executive capacity and followed up with statements indicating that the beneficiary "serves in the managerial position of [g]eneral [m]anager." Counsel referred to the beneficiary as a "manager/executive of a multinational organization" and provided the following statements regarding the beneficiary's responsibilities:

She is responsible for the day-to-day operations of the company, including inventory and sales. She plans, develops and establishes policies and objectives to obtain optimum profitability and highest corporate gain. She directs the administration and infrastructure of the U.S. entity. She has complete control over all financial, administrative, personnel, marketing and sales decisions. She also coordinates new distributions possibilities, negotiates, finalizes and signs contract[s]; analyzes costs and determines profit margins, tracks incoming funding and receivables; manages fundamental issues such as permits, legal affairs, contracts, and funding insurance matters and is responsible for the development of creative marketing and sales programs to promote business. [The beneficiary] also oversees the supply and distribution of the company's products. She establishes relations with suppliers and distributors. As a [g]eneral [m]anager, [the beneficiary]'s duties are to ensure that the company would be successful in establishing and maintaining a strong business presence in the United States. She is charged with using her business expertise to oversee the expansion of business interest[s]. In the execution of the duties, she is empowered by the company to exercise wide latitude in all decision making and report only to the executive team of the Czech company.

Counsel further explained that the petitioner's business operation does not require a large staff. He stated that the petitioner is a family business that employs the beneficiary and her husband whose tasks include taking phone orders, packing and preparing boxes for shipping, preparing invoices, and handling shipments within the United States. With regard to the breakdown of duties, counsel stated that the beneficiary carries out the following "executive" duties in her position as general manager:

[A]pproximately 70% of the [b]eneficiary's time spends [sic] in the day-to-day operations which consist of directing the administration and infrastructure of the U.S. operation; formulating and setting all business policies an[d] practices; managing the short and long

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<sup>1</sup> Although the record contains a properly filed Form G-28, Notice of Entry of Appearance as Attorney or Representative, submitted with the Form I-140, the petitioner's statements on appeal as well as its choice to represent itself on appeal indicates that the previously retained counsel is no longer representing the petitioner in the present matter.

term financial planning and investments; establishing relationships with retail stores, galleries and specialty toy stores and general public; planning promotional campaigns; preparing marketing meetings with potential buyers; conducting all financial operations; and monitoring all expenditures, supplies and distributions. More specifically, of that 70%, the [p]etitioner estimates about 20% is devoted to the development of creative marketing and sales programs to promote business, 30% is devoted on [sic] the review of inventory and sales, and the remaining 20% is devoted to billing, invoicing, tracking of shipments, insurance matters and reviewing of orders. The [b]eneficiary also spends a fair portion of his [sic] time in reviewing current practices, implementing new procedures and policies of its structure to improve the cost effectiveness and efficiency of the company's operations and contribute [sic] to the business development and success of the enterprise.

The remaining 30% of the [b]eneficiary's time, outside the 70% is devoted in [sic] marketing research activities to establish and maintain a strong business presence in the United States. She identifies and ensures the development of new distribution opportunities; supervises organizational and business development for the logistical operations; oversees client and public relations; negotiates, finalizes and signs contracts; analyzes cost and determines profit margins; tracks incoming funds and receivables; [and] consents to hire and terminate employees. The beneficiary dedicates time to resolve legal affairs and obtains all licenses and permits.

Counsel also objected to the RFE's instruction to provide evidence of the petitioner's staffing, arguing that the petitioner's needs and the complex nature of its business must be taken into account. Counsel's arguments are not persuasive, as his deliberate refusal to fully address requests presented in the RFE regarding the petitioner's staffing levels preclude CIS from taking into account the petitioner's reasonable needs. Moreover, counsel's reference to the petitioner's reasonable needs is a mere attempt to justify the beneficiary's continued performance of daily operational tasks, which cannot be deemed qualifying. There is no case law or regulation that suggests a petitioner's reasonable needs override the statutory requirement that a beneficiary must primarily perform duties of a qualifying managerial or executive nature.

That being said, counsel repeatedly referred to the beneficiary as both a manager and an executive, failing to distinguish between the two individual employment capacities and their distinct definitions under sections 101(a)(44)(A) and (B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

Finally, the petitioner complied with the RFE request for its 2004 W-2 statements, which were submitted for the beneficiary and for her husband.

In a decision dated June 13, 2006, the director denied the petition noting that the petitioner's description of the beneficiary's proposed employment suggests that the beneficiary would primarily perform duties of a non-qualifying nature.

On appeal, the beneficiary explained that the petitioner has been able to thrive because of the personal contact she has maintained with the company's clientele. The beneficiary clarified that her duties would be within a

managerial capacity and explained that additional employees would be hired upon approval of the petition. However, 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). The beneficiary's assertion that the petitioner is not fully staffed because of the status of the instant Form I-140 merely indicates that the petitioner was not adequately staffed at the time of filing such that the beneficiary could be relieved from having to primarily engage in the daily operational tasks involved in selling the wooden toys manufactured by the foreign entity.

The beneficiary provides a supplemental list of her proposed duties and responsibilities, stressing the importance of personal contact with the owners and managers of the stores that purchase the petitioner's merchandise. The beneficiary also explains that the need to minimize capital investment into the company has resulted in her contracting out to other companies for the performance of "lower level duties of the [petitioner]." More specifically, the beneficiary claims that the company's accounting, ads and catalogs, transportation, and packing and shipping services are all provided by outside contractors. However, the record lacks documentation to corroborate this claim. 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 record adequately conveys the level of the beneficiary's discretionary authority with respect to most matters concerning the business, there is insufficient evidence to establish that the petitioner was adequately staffed at the time the Form I-140 was filed such that the beneficiary would primarily perform duties within a managerial or executive capacity. Based on the evidence provided, no one other than the beneficiary herself was able to provide the much-needed sales services that would generate the company's revenue. While this staffing structure may be justified by the needs of a company that is still in its early stages of development, there are no legal exceptions to the statutory mandates that require the beneficiary of a Form I-140 to primarily perform duties of a qualifying nature. 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). Based on the evidence furnished, it cannot be found that the beneficiary would be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Furthermore, the record supports a finding of ineligibility based on additional grounds that were not specifically addressed in the director's decision.

First, while the director made note of the petitioner's failure to provide certain information regarding the beneficiary's foreign job duties, he did not render a conclusion as to whether the petitioner established that the beneficiary was employed abroad in a qualifying managerial or executive status for at least one out of the three years prior to her entry to the United States as a nonimmigrant employee of the petitioner. See 8 C.F.R. § 204.5(j)(3)(i)(B). Regardless, a review of the record on appeal shows that the beneficiary's duties abroad were not specified. Therefore, while it appears that the beneficiary may have had a high degree of discretionary authority, the AAO cannot conclude that her duties were primarily of a qualifying nature. 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).

Second, 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. While the petitioner indicates that it is a subsidiary of the beneficiary's foreign employer, the record lacks documentation to corroborate this claim. 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.

Third, the regulation at 8 C.F.R. § 204.5(g)(2) 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, the petitioner has claimed that the beneficiary would be compensated approximately \$31,000 annually under an approved petition. Although the petitioner has provided a number of its bank statements, such documentation is not an accurate indicator of whether a company is able to pay the beneficiary's proffered wage. Nor has the petitioner establish its ability to pay by submitting its 2004 tax documentation, which, regardless of content, is irrelevant in establishing the petitioner's financial status as of December 2005 when the Form I-140 was filed. Thus, based on the record as presently constituted, the AAO cannot conclude that the petitioner was able to compensate the beneficiary the proffered wage when the petition was filed.

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 has not sustained that burden.

**ORDER:** The appeal is dismissed.