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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship and Immigration Services

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FILE:

WAC 05 083 53578

Office: CALIFORNIA SERVICE CENTER

Date:

OCT 01 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, 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 seeking to employ the beneficiary as its general manager/owner. 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 beneficiary would not be employed in a managerial or executive capacity by the U.S. petitioner and denied the Form I-140.

On appeal, counsel disputes the director's conclusions 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 primary issue in this proceeding is whether the beneficiary would be employed by the U.S. petitioner in a capacity that is managerial or executive.

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 its organizational chart showing the beneficiary in the position of president, or senior-most position with the company's hierarchy. The chart shows four direct subordinates consisting of a marketing executive, a dispatcher, a quality control officer, and an employee in charge of billing/office assistant. The only employee, other than the beneficiary, with subordinates of his/her own is the dispatcher, who supervises three drivers. The petitioner also submitted a letter from counsel dated January 24, 2005, which included the following description of the beneficiary's proposed employment in the United States:

[The beneficiary] continues to manage two corporations providing similar services, Orient Express and [the petitioner], which is now the larger of the two companies. [The beneficiary] supervises a [m]arketing [e]xecutive, [d]ispatcher (who supervises three [d]rivers), [q]uality [c]ontrol [o]fficer and [o]ffice [a]ssistant. [sic] who has primary responsibility for customer service. [The beneficiary] directs day-to-day operations, including overall administration,

sales, and marketing. In addition, [he] supervises the [q]uality [c]ontrol [o]fficer who is responsible for vehicle inspections, safety inspections, and employee training. [The beneficiary] hires and fires all subordinate employees, including supervisory employees. With regard to financial management, [the beneficiary] is responsible for liaising with the company accountant and for planning the financial strategies of the entire organization. In addition, [the beneficiary] has successfully negotiated contracts with several large area hospitals . . . requiring precise compliance with government regulations.

On June 14, 2005, Citizenship and Immigration Services (CIS) issued a request for additional evidence (RFE) instructing the petitioner to provide the following documentation to assist in determining the beneficiary's employment capacity of the proposed position in the United States: 1) the petitioner's organizational chart illustrating its staffing levels and identifying its employees by name and position title; 2) a detailed description of the beneficiary's proposed day-to-day duties illustrating the beneficiary's typical day of work; and 3) the petitioner's quarterly wage statements for the first quarter of 2005.

In response, the petitioner submitted an organizational chart identifying the same positions as those identified in the chart submitted earlier. However, instead of two separate employees performing the duties of a dispatcher and a quality control officer, the chart suggests that Wendi Kreil carries out the duties of both positions. The more recent chart also shows an additional driver for a total of four drivers.

With regard to the beneficiary's proposed job duties, the petitioner provided an additional description, which breaks down the position into seven areas of concentration as follows:

Strategic Planning

Strategic [p]lanning for [the petitioner] includes an ongoing analysis of the market for medical assistance services with an emphasis on routine medical transportation. [The beneficiary] must regularly analyze whether the corporation should offer greater or lesser levels of services to its existing customer base or expand it[s] services to new types of customers. Such an analysis includes an analysis of the strengths and weaknesses of the corporation and a similar analysis of the competition in existing and future markets.

The planning process is not done in a vacuum but must recognize the constraints and limitations imposed by the other major areas of corporate management. . . .

The [s]trategic [p]lanning duties must be completed on a regular basis since the strengths, weaknesses, threats and opportunities continue to change on a daily basis.

Marketing

[The beneficiary] is primarily responsible for the entire marketing program of the company. These duties include a detailed analysis of the target market for the medical transportation services offered by the company. [The beneficiary] must constantly evaluate the level of services and the price that will make his company's services attractive as compared to the competition. He must also determine how he can convey the advantages and benefits of his company to its target market.

Given the nature of the business, [the beneficiary] must employ very targeted marketing efforts to reach his clients since the primary clients are large organizations rather than individual consumers. Therefore, he must determine how to reach the decision makers in such organizations This frequently involves regular contact with decision makers and those who have influence on buying decisions.

Operations Management

The operations of [the petitioner] are another major area of responsibility for [the beneficiary]. He developed and is constantly updating scheduling, communication and transportation systems for the business. Scheduling systems have been developed and updated for both staff and passengers with an eye toward avoidance of delays and other problems.

A large part of operations management for the company focuses on operational training. [The beneficiary] constantly manages training for the company to ensure a minimum of problems in transporting passengers.

Human Resources

[The beneficiary] manages the hiring, firing and training of personnel. This includes evaluating whether individuals have the basic qualifications for their job and if they will work well within the company's organizational culture. If problems develop, he must determine the legal, financial and operational impacts of any termination decision.

Financial Management

[The beneficiary] developed [sic] continues to modernize the financial systems of the company. He supervises the bookkeeping functions of the business and interacts with the company accountant. He performs the financial analysis to determine whether strategic opportunities can be realized.

[The beneficiary] evaluates if and when outside investments are made with corporate funds. [He] is also responsible to [sic] ensure that staff performs timely billing, pays bills from vendors, and pays taxes when due.

Management Information Systems

[The beneficiary] has developed systems to collect and manipulate data about the various elements of the company. He spends time training staff to compile the necessary raw data and then determines how to put the data into a form that can be used to make decisions.

General Administration Management

These duties tend to be mostly periodic in nature. [The beneficiary] arranges all insurance and oversees overall risk management. He makes sure that the company obtains all necessary approvals He must negotiate contracts with various agencies, vendors and customers. He develops and maintains relationships with banks and other key vendors.

In describing the beneficiary's typical day of work, the petitioner provided a list of the beneficiary's morning and afternoon tasks. In the morning, the beneficiary compares and analyzes customer satisfaction records, gives feedback to the relevant employees, and determines new ways of eliminating or reducing customer problems. The beneficiary also discusses market opportunities with the marketing executive and determines the feasibility of such opportunities in light of company finances and personnel. The beneficiary also makes calls to medical facilities and checks to see whether changes have been implemented where necessary.

In the afternoon, the beneficiary checks with the dispatch/quality control employee for updates, responds to customer complaints, determines the basis for the customer complaints, and takes actions necessary to remedy the complaints. The beneficiary also reviews accounts for proper fund allocation, oversees the accountant to ensure timely recording of finances and filing of taxes, and oversees all other aspects of the company to ensure that all issues are addressed.

The petitioner also provided a copy of its quarterly wage report showing its employment of a total of five employees, including the beneficiary. Based on the compensation of each employee, it appears that the company's marketing executive and one of its drivers were both employed on a part-time basis. Although the compensation of two other drivers suggests that they were employed on a full-time basis during the time the Form I-140 was filed, the fourth driver is not included in the relevant quarterly wage statement. The wage report also does not include [REDACTED] who is claimed to be performing the duties of both dispatcher and quality control officer, or [REDACTED] the employee purportedly in charge of billing and assisting with office duties. Thus, at the time the Form I-140 was filed, the petitioner was comprised of a staff that included the beneficiary, two full-time drivers, one part-time driver, and a part-time marketing executive. There appear to have been no employees filling the dispatcher, quality control officer, or office assistant positions.

On May 2, 2006, the director denied the petition, concluding that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity. The director discussed information in the petitioner's first quarterly wage report for 2005, noting similar observations as those noted above. The director properly questioned the likelihood that the beneficiary would primarily perform duties within a qualifying capacity in light of the petitioner's staffing levels and its apparent lack of a full-time support staff to relieve the beneficiary from having to primarily perform daily operational tasks.

On appeal, counsel asserts that the director made a grave error in denying the petitioner's Form I-140 on the basis of the wrong set of job duties. Specifically, counsel asserts that the job duties recited in the director's decision were those that pertained to the beneficiary's foreign employment, not job duties that pertained to his proposed U.S. employment. While counsel's observation in noting the director's error is correct, the director's error does not warrant reversal of the denial. The director did not solely rely on the description of job duties in making his final determination. Rather, the director provided an accurate and thorough analysis of the petitioner's staffing hierarchy, determining that the evidence of record suggests that the petitioner lacks an adequate support staff to relieve the beneficiary from having to primarily perform the daily operational tasks. While the AAO acknowledges that other factors, such the correct description of the beneficiary's duties, should have been considered, a comprehensive review of the proposed duties to be performed by the

beneficiary in the United States supports the director's overall conclusion regarding the petitioner's ineligibility. More specifically, the petitioner's description suggests that an overwhelming portion of the beneficiary's job would be comprised of non-qualifying duties in which the beneficiary would carry out the petitioner's essential functions. For instance, the strategic planning and marketing responsibilities would require the beneficiary to conduct market analysis, market to target clientele, and seek out business opportunities; the operations management responsibility suggests that the beneficiary would be directly involved in scheduling and transportation as well as training employees to provide proper transportation to passengers; the management information systems responsibility would require the beneficiary to train a staff in compiling data even though the staff the beneficiary would train has not been shown to be managerial, supervisory, or professional;¹ and the general administrative management responsibility would involve negotiating contracts with agencies, vendors, and customers.

Additionally, a review of the petitioner's description of the beneficiary's typical day of work suggests that the beneficiary would be directly involved in customer service related duties, including reviewing customer satisfaction records and responding to customer complaints. Without evidence of an adequate support staff and without further explanation of the beneficiary's duties in the context of duties performed by that support staff, the descriptions provided suggest that the beneficiary's time would be primarily allotted to the performance of non-qualifying daily operational 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, when considering the beneficiary's job descriptions in light of the petitioner's support staff at the time the Form I-140 was filed, the AAO cannot conclude that the beneficiary would primarily perform duties of a qualifying managerial or executive capacity.

With regard to counsel's suggestion that the director found [REDACTED] to be absent from the petitioner's payroll, such comment is incorrect and without basis. A review of the denial clearly indicates that the director identified [REDACTED] as one of the employees listed in the petitioner's organizational chart and noted that based on [REDACTED] compensation as shown in the relevant quarterly wage report, [REDACTED] was employed on a part-time basis. [REDACTED] whose name the director cited directly under [REDACTED] was shown as not having been included in the wage report. Counsel further challenges the director's valid concern over who performs [REDACTED] duties when she is not working. However, counsel's explanation that another employee perform [REDACTED] tasks fails to account for the obvious unavailability of other employees. As previously stated, the petitioner's quarterly wage report for the first quarter of 2005 shows that the petitioner was comprised of the beneficiary, a part-time marketing executive, and one part-time and two full-time drivers. The only employees available during [REDACTED] absence are the beneficiary himself and the company drivers. Counsel's suggestion that anyone other than the beneficiary would be assigned the duties of a marketing executive is not reasonable, as it implies that the company's drivers are able to perform those tasks. While counsel claims that certain employees did not appear on the petitioner's payroll until the third quarter of 2005, 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).

¹ See section 101(a)(44)(A)(ii) of the Act.

Additionally, counsel claims that the director failed to take into account the petitioner's reasonable needs and cites an unpublished AAO decision to support her argument. However, counsel has furnished no evidence to establish that the facts of the instant matter are analogous to those in the unpublished decision, where independent contractors were apparently hired to carry out various non-qualifying operational tasks. In the present matter, the AAO has addressed at length the petitioner's failure to adequately staff its organization, which directly results in the beneficiary's continued and primary involvement in the company's daily operational tasks. Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Lastly counsel challenges CIS's reliance on *Matter of Church Scientology International*, asserting that various relevant portions of the case amount to nothing more than dicta. 19 I&N Dec. 593. However, counsel's objection is unfounded. Specifically, in *Matter of Church Scientology International*, the Commissioner examined the claimed managerial capacity of a member of the Church of Scientology and concluded: "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." *Id.* at 604. Based on the specific job duties provided, the AAO found that the beneficiary in *Matter of Church Scientology International* appeared to function as a staff officer or specialist rather than as a manager or executive. As discussed above, the beneficiary's job duties are primarily comprised of addressing customer service issue, marketing the petitioner's services, and overseeing a staff that is not comprised of managerial, supervisory, or professional personnel. Thus, counsel's reasoning is erroneous and does not explain how the beneficiary's specific duties in the petitioner's organizational structure as it existed at the time of filing could create an environment in which the beneficiary would be able to primarily perform managerial or executive duties.

Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily 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 additional grounds that were not previously addressed in the director's decision.

First, 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 his entry to the United States as a nonimmigrant to work for the same employer. In the instant matter, counsel readily acknowledges that the duties attributed to the beneficiary's position abroad were deemed by the director as primarily non-qualifying. While counsel was correct in pointing out that the director should have recited the beneficiary's proposed duties, as the beneficiary's proposed employment was the issue in the director's decision, the fact remains that the director did not find the beneficiary's duties with the foreign entity to be those of a qualifying managerial or executive employee. Based on further review of the description of the beneficiary's foreign duties, the AAO concurs and also finds that the petitioner has failed to establish that the beneficiary's employment abroad was primarily comprised of qualifying managerial or executive job duties.

Second, 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." Although the petitioner provided its tax returns, balance sheets, and bank statements, these documents do not establish that

the petitioner had been providing its ambulatory services on a "regular, systematic, and continuous" basis from January 2004 to January 2005, the one-year period prior to the date the petitioner filed its Form I-140. *Id.*

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 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.