



U.S. Citizenship
and Immigration
Services

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FILE:

EAC 05 152 51448

Office: VERMONT SERVICE CENTER

Date: SEP 11 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, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a New York corporation seeking 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 denied the petition based on three independent grounds of ineligibility: 1) the petitioner failed to provide sufficient documentation establishing a qualifying relationship between the U.S. entity and the beneficiary's claimed foreign employer; 2) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and 3) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

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 first issue in this proceeding is whether the petitioner has a qualifying relationship with the beneficiary's claimed employer abroad.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

* * *

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In support of the Form I-140, the petitioner provided a letter dated April 21, 2005 in which it stated that it is wholly owned by [REDACTED]. In support of this claim, the petitioner provided a stock certificate showing [REDACTED] as owner of 200 shares of the petitioner's stock out of a possible 200 authorized shares. The petitioner also provided its tax returns for 2001, 2002, and 2003 all identifying MIC as the petitioner's sole owner. It is noted that, while the petitioner stated that MIC has subsidiaries in Taiwan, Hong Kong, and China, the beneficiary's employer abroad was not specifically identified.

On March 8, 2006 Citizenship and Immigration Services (CIS) issued a request for additional evidence (RFE) instructing the petitioner to provide evidence of its ownership and further information regarding the beneficiary's employment abroad.

In response, counsel submitted a letter dated May 5, 2006 in which counsel stated that the beneficiary was employed abroad as vice president of [REDACTED] located in Wenzhou, China. Thus, based on counsel's statement, the petitioner's relationship with the beneficiary's foreign employer is that of an affiliate, not parent/subsidiary, as suggested by the supporting statement and documentation submitted with the Form I-140. In support of the beneficiary's claimed employment abroad, the petitioner provided a letter dated December 23, 1996 from the New York City Commissioner for International Business and United Nations. The letter was addressed to the beneficiary and referred to her as vice president of [REDACTED] in Wenzhou, China.

On August 24, 2006, the director issued a decision denying the petition. The director found that the petitioner failed to provide documentation establishing common ownership and control between the U.S. entity and the beneficiary's claimed employer. The director also noted that the petitioner failed to submit documentation establishing the duration of the beneficiary's foreign employment.

On appeal, while counsel clearly acknowledges the director's adverse decision, he fails to address the finding specifically concerning the qualifying relationship between the U.S. petitioner and the beneficiary's foreign employer.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595. In the present matter, while the petitioner has provided documentation indicating a parent/subsidiary relationship between [REDACTED] and the U.S. entity, the latter is not the beneficiary's claimed foreign employer. Rather, the beneficiary's claimed foreign employer is an entity located in China, which, like the petitioner, is also purportedly owned by [REDACTED]. However, 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)). As the petitioner has not provided evidence documenting the beneficiary's foreign employment or MIC's ownership of the claimed foreign employer, it has failed to establish the existence of a qualifying relationship as required by 8 C.F.R. § 204.5(j)(3)(i)(C).

The two remaining issues in this proceeding call for a discussion of the beneficiary's employment abroad as well as an analysis of the beneficiary's proposed job duties in her position with the U.S. petitioner.

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 the petitioner's support letter dated April 21, 2005, the petitioner made a brief reference to the beneficiary's foreign employment. However, the petitioner did not provide any information regarding the beneficiary's duties during her employment abroad, nor was any documentation offered to support the claim that the beneficiary was employed abroad by a qualifying entity during the requisite time period. The petitioner did, however, provide the following list breaking down the beneficiary's proposed duties and responsibilities:

a) Set [g]eneral [g]oals and [o]bjectives for the company[;] b) [a]pprove company rules and regulations[;] c) [r]eview and approve [e]xpenses [b]udget and asset purchase[s], [r]eview [f]inancial statements; d) [f]ormulate company structure, [a]pprove hiring and firing of staff at [a] manager[ial] or higher level[;] e) [c]oordinate with executives of other companies or participate at important trade conferences[;] f) assume full profit and loss responsibilities for the U[.]S[.] company and report to the chairman of the board of the parent company in China. Utilize the expertise of outside expert such as [a] financial consultant. About 7 hours for each itemized duties. Work [is] done through the assistance of [a] senior assistant/manager.

The petitioner also provided the following hourly breakdown of the beneficiary's typical daily activities:

- 8:30-9:00 Check calendar & [t]o-[d]o list in Outlook while downloading e-mails. . . . Talk to [an] assistant on [sic] the appointments and meetings for the day, scan the Inbox to identify for [sic] important and high priority e-mails, make quick notes and forward to the relevant staff for processing or reply by herself if the incoming mail was from the high level executive of key accounts, make a few internal phone call[s,] if necessary[,] to check project status or clarity [sic] some issues.
- 9:00-10:00 Review all the documents prepared by [the] manager and assistant regarding important data, results and progress in different areas of the company business.
- 10:00-12:00 Discuss on the phone or [in a] meeting with [the] manager regarding different issues and make the decisions.
- 12:00-13:30 Lunch [b]reak.

- 13:30-14:30 Read trade publications or business magazines to [sic] such as [the W]all [S]treet Journal [to] be aware of the up-date[d] information and business trend[s].
- 14:30-15:00 Communicate with trade association representative[s], high ranking bankers as well as business partners such as executives of other companies.
- 15:00-16:00 Contact or call our business consultant for business developing strategy[.]
- 16:00-17:00 Paperwork, formulating internal rules, adjusting strategies.
- 17:00-17:30 Review [the] calendar and [t]o-[d]o list and make adjustments, then schedules for the next day.
- 21:00-21:30 Contact [the] China [c]orporate parent if necessary.

In CIS's March 8, 2006 RFE, the petitioner was instructed to provide the following documentation to assist the Agency in assessing the petitioner's eligibility: 1) evidence of the petitioner's staffing, including the number of employees and their respective positions; 2) a complete hourly breakdown for each of the petitioner's employees, including one for the beneficiary; and 3) evidence that the beneficiary was employed by a qualifying organization during the requisite time period in a managerial or executive capacity.

In response, the petitioner resubmitted position descriptions for the beneficiary and other staff members. The AAO notes that the petitioner's initial submissions included a brief statement of the beneficiary's responsibilities as well as those of other staff members. No additional information was provided with regard to the beneficiary's job duties.

Accordingly, the director based the denial, in part, on the conclusion that the petitioner failed to establish that the beneficiary was employed abroad with a qualifying entity in a qualifying capacity or that she would be employed in the United States in a primarily qualifying managerial or executive capacity. With regard to the petitioning entity, the director stated, "[A]ll the employees[,] with the exception of two sales people[,] are stated to be supervisory, analytical, or support." The director did not clarify, however, what is meant by "analytical" or "support." Moreover, as counsel properly pointed out on appeal, upon reviewing the brief job duties of the petitioner's staff, it appears that several individuals were charged with what may be deemed as operational tasks. As such, the director's comment on this issue, without further explanation, appears to be unfounded. Despite the director's flawed analysis, the petitioner has not established that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity.

On appeal, counsel failed to address the director's adverse finding regarding the beneficiary's foreign employment. As the petitioner did not previously provide sufficient evidence documenting the employment with a qualifying entity and failed to provide information establishing that the foreign employment was within a qualifying capacity, the director properly determined that the petitioner failed to establish the beneficiary's foreign employment in a qualifying capacity.

With regard to the beneficiary's proposed employment, counsel discusses the size of the petitioner's business premises and the yearly costs of renting such a substantial store front and warehouse space in an effort to convey the level of business conducted by the petitioner. Counsel further disputes the director's observations regarding the petitioner's staffing and asserts that its use of part-time help does not compromise the petitioner's ability to employ the beneficiary in a primarily managerial or executive capacity.

Counsel's arguments have been considered. However, 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). Thus, regardless of the size of the petitioner's business premises or the volume of business it conducts, the petitioner must provide a detailed account of the beneficiary's daily tasks explaining how the beneficiary will spend her time. As previously stated, the petitioner must establish that the beneficiary's time would be primarily spent performing duties of a qualifying managerial or executive nature. See sections 101(a)(44)(A) and (B) of the Act, respectively. In the present matter, the petitioner provided an hourly breakdown of the beneficiary's typical day of work. However, the breakdown does not establish that the beneficiary would primarily perform qualifying tasks. Specifically, the petitioner stated that the beneficiary would spend two hours meeting with the manager regarding different issues and making decisions. The petitioner did not provide any information as to the types of issues and decisions that would consume such a significant portion of the beneficiary's day. The petitioner also stated that approximately 30 minutes would be spent daily communicating with trade association representatives, bankers, and business associates. However, the petitioner did not specify the subject matter of these phone calls. Although the petitioner claims that the beneficiary would spend one hour daily calling a business consultant and others to develop business strategy, there is no evidence that a consultant has been hired; nor has the petitioner specified what is involved in "business developing strategy." Lastly, the petitioner indicated that one hour would be spent daily performing paperwork, formulating rules, and adjusting strategies. However, the petitioner did not specify the nature of the paperwork or fully describe how or on what basis the beneficiary would formulate rules and adjust her strategies.

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). In the present matter, the hourly breakdown discussed above does not contain information specific enough to determine what duties the beneficiary would primarily perform on a daily basis.

Therefore, based on the evidence of record, the AAO cannot conclude that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity.

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 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).

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.