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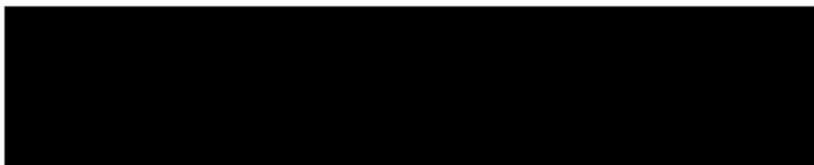
IN RE:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was organized in the state of Florida claiming to be in the business of operating food and retail stores. The petitioner 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 denied the petition based on the determination that the petitioner failed to establish that the beneficiary would be employed 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 primary issue in this proceeding is whether the petitioner would employ the beneficiary 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 a letter dated August 17, 2006, which includes the following responsibilities to be assigned to the beneficiary under an approved petition:

1. Direct operations by developing and implementing strategies and services that meet or exceed the needs of the U.S. operations.
2. Direct and coordinate activities within the organization to obtain optimum efficiency and economy in order to maximize profits.
3. Plan and develop organizational policies and goals, and implement these goals through the supervising of employees.
4. Direct and coordinate promotions to develop new markets.

5. Analyze budgets to identify areas in which reductions can be made, and allocate [an] operating budget.
6. Supervise and direct preparation of directives to subordinates in the outlining of policies, programs or organizational changes to be implemented.
7. Supervise personnel.

On July 2, 2007, the director issued a request for additional evidence (RFE) instructing the petitioner to provide the following documentation to assist Citizenship and Immigration Services (CIS) in determining the beneficiary's employment capacity in the proposed position in the United States: 1) a detailed description of the beneficiary's proposed day-to-day duties with a percentage of time assigned to each duty; 2) the petitioner's organizational chart illustrating the beneficiary's position compared to others within the hierarchy; 3) the job descriptions of the beneficiary's subordinates; 4) the petitioner's hours of operation and the working hours of each staff member; and 5) the beneficiary's W-2 statement for 2006 as well as the petitioner's quarterly tax return for the first quarter of 2007.

The petitioner responded with a letter from its prior counsel, dated September 20, 2007, which included the following percentage breakdown of the beneficiary's proposed employment:

1. Direct operations by developing and implementing strategies and services that meet or exceed the needs of the U.S. operations. Direct and coordinate activities within the organization to obtain optimum efficiency and economy in order to maximize profits. 30%

[The beneficiary] will be in charge of the strategic development of the company. He will work with the company owners/directors and other managerial personnel in designing and implementing company development strategies. He will periodically review the company goals and targets and discuss with partners and managers ways to improve the finance and operations of the company.

2. Supervise and direct preparation of directives to subordinates in the outlining of policies, programs or organizational changes to be implemented. Plan and develop organizational policies and goals, and implement these goals through the supervising of employees. 30%

[The beneficiary] will direct and lead the operation of the company by working through his managers. He makes sure on a daily basis that all of his managers are successfully performing their duties. This includes directing and training managers and evaluating their performances, establishing local and national sales territories, quotas and goals for the company, reviewing and evaluating weekly reports such as control sheets, weekly inventory reports, hourly deposits and readings, sales by PLU reports, and coordinator reports.

3. Direct and coordinate promotions and other marketing activities to develop new markets for the company. 20%

[The beneficiary] will be responsible for the overall marketing of the U.S. operations. He will supervise and direct employees to conduct marketing research. He will review various marketing proposals, plans and make the final decisions. He will also represent the company in various public appearances to promote the company.

4. Analyze budgets to identify areas in which reductions can be made, and allocate operating budgets. 20%

[The beneficiary] is responsible for making decisions of budgeting and finance. His job duties include planning and developing and establishing policies and objectives in order to maximize company sales and profits; reviewing plans and objectives to determine progress and status in attaining objectives and revising objectives in accordance with the conditions at hand. He will work with the managers of the company to make sure that the company maintains a healthy financial status.

The petitioner also provided an organizational chart depicting a multi-tiered hierarchy, including three managerial tiers and one tier of employees. The beneficiary's position is directly subordinate to the company's directors/shareholders. Subordinate to the beneficiary are the positions of marketing/purchasing, which is handled by [REDACTED]; and [REDACTED] operations, which is also handled by [REDACTED] and [REDACTED]; and accounting/payroll, which is outsourced. The only position that is shown as having subordinates is that of operations, which is divided in half, giving one management position to [REDACTED] and one management position to [REDACTED] each of whom is shown as heading a staff of four employees. Thus, based on the illustrated hierarchy, [REDACTED] and [REDACTED] are each supervising themselves in their respective managerial positions in addition to having separate job duties under the heading of marketing/purchasing.

Additionally, the petitioner provided separate job descriptions for each of the three positions that are directly subordinate to the beneficiary as well as a weekly schedule for two random weeks in 2007 representing the hours worked by the employees in each of the petitioner's two Subway locations. With regard to the job descriptions, the position of marketing/purchasing manager is assigned with conducting market research, preparing market reports, presenting marketing plans, and making all necessary purchases; and the position of operations manager is assigned with daily operations of the manufacturing factory, assigning work schedules to employees, supervising employees to ensure that they comply with proper procedures and safety rules, hiring and firing employees, and preparing production reports. In light of the nature of the petitioner's business, i.e., owning and operating two Subway restaurants, the petitioner's references to factory and manufacturing are confusing. The petitioner provided no explanation nor is there a clear link between Subway restaurant businesses and manufacturing of any kind. The petitioner also failed to explain how Mr. [REDACTED] and [REDACTED] make time for the job duties that are associated with their respective marketing/purchasing management positions, which appear to be separate and distinct from their respective restaurant management duties. It is noted that [REDACTED] work schedule for the week of September 11, 2007 shows that he worked a total of 45 hours. The petitioner provided no explanation as to how much more time [REDACTED] would contribute to those duties that are outside the immediate realm of managing his designated Subway location.

Furthermore, in light of the stores' hours of operation, the AAO notes a considerable anomaly with regard to the work schedule of store # [REDACTED]. Specifically, the store's Friday work schedule shows that the earliest time

any employee began work at that location on September 14, 2007 was 11:00 a.m., even though the store's hours of operation during the week were from 9:00 a.m. until 9 p.m. It is unclear who was operating the store at that location for the two hours prior to the time the first three employees came on duty to start their respective shifts at 11 a.m.

Lastly, the AAO notes that the probative value of work schedules that reflect the petitioner's hours of operation in 2007 is limited, as the Form I-140 in the present matter was filed in 2006. In addition, the work schedule for store [REDACTED] shows only three employees working under [REDACTED] while the organizational chart indicates that [REDACTED] had four employees working under him.

On January 9, 2008, the director issued a decision denying the petitioner's Form I-140. The director found that the petitioner's description of the beneficiary's prospective employment was overly vague, consisting primarily of general responsibilities without explanation as to how the beneficiary meets those responsibilities. The director further noted that the petitioner failed to explain the apparent discrepancy between the 36 Form W-2s it issued in 2006 and the considerably fewer number of employees named in the organizational chart. The director concluded that the petitioner failed to establish a need and an ability to support a primarily managerial or executive capacity employee.

On appeal, counsel questions the relevance of the director's observation regarding the number of W-2s issued in 2006, asserting that an explanation is not warranted, as the petitioner was merely complying with the director's request for W-2 statements. Counsel's argument, however, lacks merit. While the number of W-2s in and of itself is not noteworthy, the fact that the number of W-2s issued in 2006 far exceeds the number of employees listed in the petitioner's organizational chart gives rise to questions regarding the underlying reason for the discrepancy. 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, counsel's firm belief that the director's observation is irrelevant to the overall issue of the petitioner's eligibility, precludes the petitioner from being forthcoming with information that may be dispositive of the director's adverse finding. The AAO notes that while counsel provides a number of possible explanations to resolve the inconsistency, there is no indication that counsel's statements are factually based. 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 Obaighbena*, 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).

Additionally, counsel asserts that the beneficiary's subordinates are two managers, who are knowledgeable in managing the petitioner's personnel and its finances. Counsel further asserts that the petitioner has sufficient personnel at each of its two store locations such that the beneficiary is relieved from the non-qualifying tasks that are directly entailed in working in a restaurant. However, as discussed above, the record remains unclear as to the petitioner's staffing at the time the Form I-140 was filed, as the 2006 W-2s do little to establish whom exactly the petitioner employed as of August 30, 2006. Even if, as suggested by counsel, the petitioner issued a large number of W-2s to employees who were briefly employed during intermittent periods throughout the tax year, this assertion must be supported with documentary evidence in order to meet 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)).

Moreover, even if the petitioner provided sufficient evidence to corroborate the assertions put forth in the organizational chart, there is no presumption that the beneficiary is relieved from having to primarily perform non-qualifying tasks merely because the petitioner has a manager and employees at each of its two restaurant locations. The underlying assumption is that the only tasks that are performed in the restaurant setting can be deemed as non-qualifying and that any tasks that are performed outside that setting are likely to be within a managerial or executive capacity. This presumption, however, is erroneous. 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). 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. In the present matter, the director's RFE specifically addressed the job description the petitioner initially provided and clarified what information that description was lacking. While the petitioner acknowledged the director's request, the response did not include the requested information, but rather included more of the same broad statements that were originally provided. For example, the petitioner indicated that 30% of the beneficiary's time would be allotted to designing and implementing development strategies, which would involve periodically reviewing company goals and targets. However, the petitioner failed to identify any strategies that have been or would be designed and implemented or to specify actual job duties performed or to be performed in the design and implementation process.

The petitioner further stated that another 30% of the beneficiary's time would be allotted to supervising subordinates, which would include training managers, evaluating their performances, establishing local and national sales territories, quotas and goals. However, the petitioner failed to explain how the training of existing managerial personnel is a realistic daily need and how the managers would arrange the time to be trained when their primary concern is running the restaurants that are assigned to them. The petitioner also failed to explain the need to assign sales territories either locally or nationally. The petitioner owns two restaurants that are part of a national franchise, thereby indicating that there are Subway restaurants throughout the United States. Why, then, would the petitioner have the need to establish national sales territories to sell a product that is already made available throughout the entire country at numerous locations or to engage in an activity which is more likely than not performed solely by the franchisor? The broad terminology used in describing the beneficiary's employment is not readily applicable to the specific nature of the petitioner's restaurant businesses and further perpetuates the confusion as to what exactly the beneficiary would be doing on a daily basis. Case law has firmly established the significance of a detailed description of job duties, acknowledging that 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, at least 60% of the beneficiary's time would be consumed with tasks that have not been defined. Therefore, since the petitioner has failed to specifically identify the tasks that would consume the primary portion of the beneficiary's time, the AAO cannot conclude that the beneficiary would be primarily employed in a qualifying managerial or executive capacity.

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. It appears that the director made a general comparison between the beneficiary's U.S. and foreign job descriptions, suggesting that the two were equally lacking in specific job duties. However, it does not appear that the director included the latter as a

basis for denial. Nevertheless, the director's wording strongly indicates that the job description provided for the beneficiary's foreign employment is similarly deficient in its lack of information regarding the beneficiary's specific tasks. As previously stated, in order for USCIS to make an informed determination as to the capacity in which the beneficiary was employed abroad, the petitioner must provide a detailed description of specific job duties. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. As this information was not provided, the AAO cannot affirmatively determine that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

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 various tax documents showing gross income earned in 2004 and 2005, a tax return does not show the frequency of the petitioner's sales transactions. As such, it cannot be relied upon to determine whether an entity is conducting business on a "regular, systematic, and continuous" basis and the petition must be denied for this additional reason. *See 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.