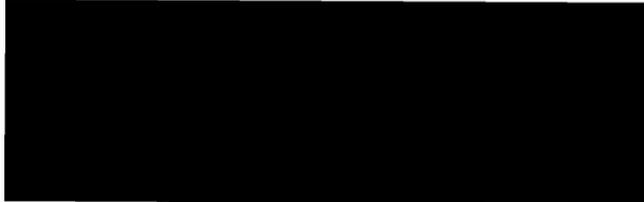




U.S. Citizenship
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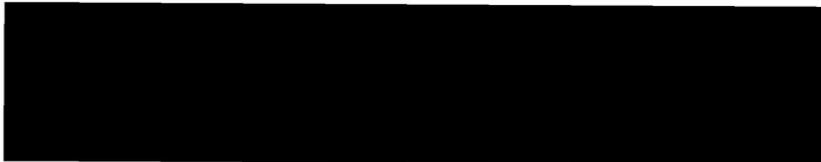
Office: TEXAS SERVICE CENTER Date:

FEB 05 2008

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center.¹ 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 sale and export of construction equipment and parts. It seeks 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 two independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary was employed abroad in a managerial or executive capacity; and 2) the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity.

After a thorough review of the record, the AAO concludes that the petitioner has provided sufficient information to establish that the beneficiary's position abroad was within a qualifying managerial or executive capacity. In an earlier appellate decision regarding the Form I-140 previously filed by the same petitioner, the AAO specifically identified a number of deficiencies that led to the adverse conclusion with regard to the beneficiary's position abroad. In support of its most recent Form I-140, however, the petitioner has cured most of those deficiencies, including the provision of additional information regarding the foreign entity's organizational hierarchy, the job duties of the beneficiary's subordinates, and an illustration of the beneficiary's position within the organization. A comprehensive review of this information suggests that the petitioner has met its burden of proof with regard to the beneficiary's foreign position and, as such, this basis for the director's denial is hereby withdrawn. Accordingly, this decision will primarily address the remaining issue concerning the beneficiary's proposed position with the U.S. entity.

On appeal, counsel disputes the director's findings 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.

¹ The record shows that the petitioner previously filed another Form I-140, which was denied on June 17, 2005. The appeal from that decision was dismissed by the AAO on December 14, 2005.

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 has established that the beneficiary would be employed in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;

- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the Form I-140, the petitioner submitted a letter dated July 29, 2005, which includes the following description of the beneficiary's proposed employment in the United States:

[A]s [p]resident of our corporation, [the beneficiary]'s duties and responsibilities include establishing the business and financial goals as well as policies of our corporation together with overseeing the achievements of these goals and policies. He also is responsible for coordinating all activities between [a]dministration, [m]arketing and [s]ales and [s]ervice [s]upport, supervising and evaluating the work performance of our [v]ice [p]resident/[m]arketing [d]irector, our [a]dministrator, together with hiring and firing employees and setting their salaries.

Approximately 30% of [the beneficiary]'s work week involve establishing the business and financial goals and policies of our corporation together with overseeing the achievement of the business and financial goals and policies. Approximately 30% of his work week involves coordinating all activities between administration, sales and product support. Approximately 30% of his work week involves supervising and evaluating the work performance of our [v]ice [p]resident/[m]arketing [d]irector, and [a]dministrator together with hiring and firing employees and setting their salaries. The balance of [the beneficiary]'s work week involves day-to-day activities.

Additionally, the petitioner stated that since the time of filing the instant Form I-140, it has employed five individuals, two of whom are the beneficiary's direct subordinates. The petitioner maintains that the beneficiary's subordinates are professional and managerial employees with subordinates of their own.

Upon further review, the director determined that the petitioner failed to submit sufficient evidence and information establishing that the beneficiary would be employed by the U.S. entity in a qualifying managerial or executive capacity. Accordingly, on January 11, 2007, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a detailed description of the beneficiary's daily job duties as well as the percentage of time assigned to each duty. The director acknowledged the above job description and asked the petitioner to specify actual duties associated with the beneficiary's goal-setting and policy-making responsibilities. The petitioner was also instructed to provide more specific job descriptions for the employees that are subordinate to the beneficiary.

In response, the petitioner provided a letter dated March 15, 2007 in which an additional description of the beneficiary's responsibilities was provided.² The petitioner also provided its organizational chart as well as the names, job titles, and job descriptions of the remaining employees within its hierarchy.

² This portion of the petitioner's response was recited on page 4 of the director's decision. As such, the AAO need not repeat the description in this decision.

After a thorough review of the petitioner's submissions, the director issued a decision dated June 19, 2007 in which she concluded that the petitioner failed to establish that the beneficiary's proposed position would primarily consist of qualifying managerial or executive job duties. A number of adverse findings were contributing factors in the director's overall determination. First, the director considered the petitioner's stage of development in light of its small staffing structure, finding that the petitioner's limited staff would likely preclude the beneficiary from being able to primarily perform duties within a qualifying capacity. Second, the director found that the petitioner failed to provide the specific information regarding the beneficiary's day-to-day job duties, noting that the lack of this necessary information precluded CIS from determining that the beneficiary does not primarily perform productive tasks of a non-qualifying nature. Lastly, the director accurately pointed out that the petitioner failed to specify the "administrative tasks" that consume 20% of the beneficiary's work week.

On appeal, the petitioner's counsel challenges the director's findings and provides yet another job description, which also primarily consists of broad job responsibilities rather than specific tasks that illustrate how exactly the beneficiary will meet his responsibilities. More specifically, counsel asserts that the beneficiary prepares and presents an annual operation plan and a 3-year projection plan to the company's board of directors. While the presentation of the plan may be deemed a qualifying task, it is unclear how the preparation of the plans also falls within the qualifying category. Moreover, counsel failed to state what actual tasks are involved in the preparation of these plans and how much of the beneficiary's time is attributed to such tasks. Counsel also states that the beneficiary defines objectives and methods for achieving them. However, no information was provided as to the actual objectives the beneficiary has established, by what means the beneficiary establishes these objectives, which would indicate whether the duties associated with this task are qualifying, or the amount of time attributed to these unspecified tasks.

Next, counsel points out the beneficiary's exercise of broad decision-making authority, a factor which is undisputed, despite the director's adverse decision. Moreover, authority over the petitioner's operation is not in itself a task, but rather a necessary component of being at the top of a hierarchical structure. That being said, the beneficiary's heightened degree of control over the petitioning entity does not preclude him from having to perform non-qualifying tasks. As such, the burden is on the petitioner to specify the actual tasks and to provide sufficient documentation establishing that the non-qualifying tasks do not consume the primary portion of the beneficiary's time, as one 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). Accordingly, while the beneficiary may use his discretionary authority to establish company credit policies, hire and fire employees, execute legal documents, and establish sales goals for the company, the petitioner is required to provide a detailed job description for the beneficiary's proposed position, which must include specific tasks to be performed daily. It is unlikely that setting sales goals, executing legal documents, and hiring and firing employees are daily tasks, and if they are, the petitioner should state as much and quantify the amount of time the beneficiary attributes to the performance of these tasks. That being said, counsel readily admits that various tasks are not performed daily. For example, counsel states that one 2-hour meeting is held weekly to address sales objectives and various credit issues, while reviewing the company's progress with key personnel occurs only once every three months. Thus, in reviewing the job description provided by counsel, the AAO has no clearer picture of the beneficiary's daily schedule than it did after reviewing the broad list of objectives provided earlier by the petitioner.

While counsel cites 8 C.F.R. § 204.5(j)(5), which stresses the petitioner's duty to provide a detailed job description for the beneficiary's proposed position, he continues to focus on discretionary authority as a sign that the position to be occupied by the beneficiary will be within a qualifying capacity. As previously stated, this understanding of the regulatory requirements is incorrect. While the petitioner's organizational chart supports counsel's assertion that the beneficiary supervises managerial employees, the broad job descriptions provided thus far fail to establish that such oversight duties comprise the primary portion of the beneficiary's time. Aside from weekly status meetings and quarterly personnel progress reviews, the record lacks further information to establish the means by which the beneficiary manages the subordinate personnel on a daily basis.

Lastly, even if the petitioner were able to establish that the beneficiary's subordinate staff of four employees is adequate to relieve him from having to primarily perform non-qualifying tasks, the record does not contain documentation to establish that all five individuals were employed by the petitioner at the time the Form I-140 was filed. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). While the petitioner has provided quarterly wage reports to establish whom it employed directly prior to the filing of the instant Form I-140 as well as a quarterly wage report showing whom it employed at the time the RFE was issued, there is no documentation showing whom the petitioner employed at the time of filing. The AAO cannot assume that all five individuals were employed during that crucial time without proper documentation, particularly in light of the second quarterly wage report for 2005, which shows that the petitioner had only three employees as of July 6, 2005, only 35 days prior to the filing of the petition. While it is possible that the petitioner hired two additional employees between the July 6, 2006 (the date on the second quarterly wage report) and the date the petition was filed, additional documentation is needed to support such a claim.

As previously stated, 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). In the instant matter, none of the descriptions provided contain sufficient detail to disclose the duties that will comprise the primary portion of the beneficiary's daily activities. This finding, coupled with the petitioner's failure to document its staffing structure at the time the Form I-140 was filed, support the director's adverse decision. Therefore, based on the ground of ineligibility discussed above, this petition cannot be approved.

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.