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[Redacted]

FILE: [Redacted]
SRC 05 263 52665

Office: TEXAS SERVICE CENTER Date: **MAR 07 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:
[Redacted]

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 F. 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 Georgia corporation engaged in the acquisition and operation of retail businesses. 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 would be employed in a managerial or executive capacity; and 2) the petitioner failed to establish that the beneficiary was employed abroad 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 issues in this proceeding call for an analysis of the beneficiary's employment capacity. One issue is whether the petitioner established that it would employ the beneficiary in a managerial or executive capacity, and the second issue is whether the beneficiary was employed abroad in a primarily 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 September 27, 2005, which contained the following list of the beneficiary's proposed job responsibilities:

1. Locate and negotiate the acquisition of targeted businesses;
2. Recruit and train managerial and other subordinate employees;
3. Direct the management of the company; and
4. Establish and implement corporate policies for the U.S. affiliate.

With regard to the beneficiary's employment abroad, the petitioner stated the following:

[The beneficiary] was engaged in budgeting, purchasing, finance, and accounting. [He] also oversaw all subordinate managers and employees, and [he] possessed the ultimate authority to hire and fire, as well as to contract for and bind the [c]ompany in any way [he] saw fit.

On November 17, 2005, the director issued a notice of intent to deny (NOID) the petitioner's Form I-140 and instructed the petitioner to provide additional documentation to establish the petitioner's eligibility for the benefit sought. Specifically, with regard to the beneficiary's employment capacity, the petitioner was asked to provide a detailed description of the beneficiary's proposed day-to-day duties with a percentage of time assigned to each duty in order to establish how much of the beneficiary's time would be devoted to each of the listed duties. With regard to the beneficiary's employment abroad, the director instructed to the petitioner to explain how the majority of the beneficiary's duties consisted of qualifying tasks.¹

The petitioner provided a response from counsel dated December 15, 2005 in which counsel provided the following with regard to the beneficiary's proposed position in the United States:

With regard to the specifics of the [b]eneficiary's job duties, he spends approximately 20% of his time in administration and training; approximately 30% of his time in the planning, budgeting, marketing, banking, and finance; approximately 30% of his time is spent searching for, reviewing and analyzing potential new business acquisitions, zoning and legal issues and; approximately 20% of his time is spent meeting with potential partners, co-investors, and commercial real estate agents.

Counsel also provided the following information with regard to the beneficiary's employment abroad:

[The beneficiary], as [c]hief [e]xecutive of the company, managed corporate operations on a day-to-day basis. He performed financial, administrative, marketing and sales management tasks. He supervised the company's finances, such as budget, cost control, employee payroll and benefit payments, debtors and creditors and bookkeeping. The [b]eneficiary possessed the ultimate authority to hire and fire, as well as to contract for and bind the [c]ompany in any way he saw fit. . . . As well, he had the full authority to hire and fire employees as he saw fit, and to contractually bind the corporation.

After reviewing the record, the director denied the Form I-140 in a decision dated December 29, 2005. The director determined that, given the petitioner's staffing levels at the time of filing of the Form I-140, the beneficiary would be required to primarily perform the petitioner's non-qualifying operational tasks. With regard to the beneficiary's employment abroad, the director concluded that the beneficiary primarily

¹ The director improperly discussed the 12-month period prior to the filing of the Form I-140 when instructing the petitioner to provide information regarding the beneficiary's employment abroad. The regulations at 8 C.F.R. § 204.5(j)(3)(i)(B) specifically address beneficiaries that are already in the United States and employed by the same organization at the time the Form I-140 is filed. As the petitioner filed the Form I-140 after the beneficiary's arrival to the United States as a nonimmigrant, the relevant time period for employment abroad is one year out of the three years prior to the beneficiary's entry to the United States. *Id.*

performed non-qualifying tasks, including bookkeeping, payroll, and sales and supervised non-managerial, non-professional, and non-supervisory personnel.

While the AAO concurs with the director's general conclusion concerning the petitioner's eligibility, her comments regarding the beneficiary's employment abroad are not reflective of information found in the record of proceeding. More specifically, the record does not indicate that the beneficiary directly performed the foreign company's bookkeeping, payroll, and sales tasks. Rather, the record indicates that the beneficiary supervised these and other tasks. Nor does the record contain any information regarding the beneficiary's subordinates abroad. As such, the director's affirmative statements regarding the specific duties performed by the beneficiary and the employment capacities of the beneficiary's subordinates, if any, are unfounded. Accordingly, the AAO hereby withdraws the director's unfounded observations.

Nevertheless, the record as presently constituted does not support a finding of eligibility, as it lacks sufficient information to determine that the beneficiary's proposed employment in the United States and his prior employment abroad primarily consist or consisted of qualifying tasks.

On appeal, counsel recites the statements previously provided to describe the beneficiary's proposed employment as well as his employment abroad, and asserts that such statements adequately establish the beneficiary's performance of primarily qualifying tasks both in the United States and abroad. Counsel further states that the relevant statutory definitions merely require that the beneficiary's duties be primarily, not entirely, within a qualifying capacity and argues that the beneficiary in the present matter fits the statutory requirements. While counsel's assessment of the regulations is correct, the record does not establish that the beneficiary's employment abroad and his proposed employment in the United States can be described as primarily within a qualifying capacity.

In order to make any determination as to the nature of duties primarily performed, the petitioner must provide a detailed job description. *See* 8 C.F.R. § 204.5(j)(5). 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). Accordingly, with regard to the beneficiary's proposed employment in the United States, the director's NOID included a request for a specific list of duties and the respective percentage of time the beneficiary would be expected to spend performing each duty. While counsel's response included the requested percentages, the job description lacked specific duties and instead was entirely comprised of broad job responsibilities which failed to disclose the actual tasks the beneficiary would perform on a daily basis. For instance, counsel stated that 20% of the beneficiary's time would be attributed to administration and training. However, he did not explain what duties "administration" specifically entailed nor did he explain the type of training the beneficiary would conduct and which employees he would train. Counsel also stated that 30% of the beneficiary's time would involve planning, budgeting, marketing, banking, and finance. However, again, counsel failed to state any of the specific duties associated with these broad responsibilities. Thus, at least 50% of the beneficiary's time would be spent performing duties that are entirely undefined. Precedent case law has established that the actual duties themselves reveal the true nature of the employment. *Id.* at 1108. The fact that the petitioner has failed to provide Citizenship and Immigration Services (CIS) with this crucial information precludes the AAO from conducting a proper analysis of the beneficiary's proposed employment in the United States.

Furthermore, the record strongly suggests that the primary purpose of the petitioner's business is to invest in convenience store operations. According to counsel's NOID response, 30% of the beneficiary's time would be spent seeking out and researching the benefits of the investment opportunities, while another 20% of his time would be spent meeting with investors and real estate agents. Thus, it appears that at least 50% of the beneficiary's time would be spent actually performing the petitioner's essential function. 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). As the beneficiary in the present matter spends at least half of his time performing the essential tasks necessary to carry out the desired investment transactions, it cannot be concluded that he primarily performs duties of a qualifying managerial or executive nature.

Additionally, counsel strongly relies on the district court case of *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570 (N.D. Georgia 1988). Specifically, counsel asserts that the cited case established precedent for CIS's treatment of small company petitioners seeking to classify their respective beneficiaries as executives and managers. *Id.* However, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. Regardless, counsel's reliance on *Mars Jewelers Inc. v. I.N.S.* is misplaced. The court clearly states in its decision that the error made by the legacy Immigration and Naturalization Service (INS) was applying the 1987 regulations instead of the 1983 regulations to a petition filed in 1986. *Mars Jewelers Inc. v. I.N.S.*, 702 F. Supp. at 1570, 1575. Thus, while the court found that the beneficiary in that matter was not a first-line supervisor under the 1983 regulations, it implied that this would not have been the case had the 1987 regulations applied. *Id.* at 1575. Specifically, the court in *Mars Jewelers Inc. v. I.N.S.* stated the following:

It is apparent that the INS was inappropriately applying its 1987 regulations to this factor. Under the 1987 regulations, one of the requirements of a manager is that he "supervises and controls the work of other supervisory, professional or managerial employees. . . ." 8 C.F.R. 214.2(l)(1)(ii)(B) (1988). This language is not in the 1983 regulations.

Id. (footnote omitted). Thus, contrary to the assertions of counsel, as the present petition was filed in 2005, it would have been legal error for the director to apply the obsolete 1983 regulations and the holding in *Mars Jewelers Inc. v. I.N.S.* to the present matter.

Therefore, in determining whether the beneficiary is a first-line supervisor or not, it is irrelevant under the current regulations whether the beneficiary is supervised by other higher-ranking employees. What is relevant is the beneficiary's subordinate staff and whether any are supervisory, managerial, or professional (as discussed *supra*) and whether they are sufficient to relieve him from engaging in the day-to-day operations of the business. While counsel cites other AAO decisions in support of the appeal, the decisions are unpublished and, therefore, are not binding in the present matter.

With regard to the beneficiary's employment abroad, the record contains a general account of the beneficiary's responsibilities, suggesting that the beneficiary primarily had oversight authority over duties that others

performed. However, the record contains no explanation specifically defining the beneficiary's duties or his role in the company with respect to subordinate employees, nor is there any information as to who actually performed the foreign entity's daily operational tasks. 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)). In the present matter, the record lacks sufficient information regarding the duties performed by the beneficiary abroad during the relevant one-year time period. As such the AAO cannot conclude that the beneficiary was employed abroad or that he would be employed in the United States by the petitioner in a qualifying managerial or executive capacity.

Furthermore, the record supports a finding of ineligibility based on at least one additional ground that was not previously addressed in the director's decision. Namely, 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." In the present matter, the record suggests that the petitioner is a business investor involved in the purchase and operation of retail stores. However, the record lacks documentation to show that the petitioner was making investments in retail stores on a "regular, systematic, and continuous" basis during the relevant 12-month period. *See id.* In fact, the record contains evidence of only one purchase transaction, which took place over two years prior to the filing of the Form I-140. Furthermore, the documentation the petitioner provided to show operation of its one convenience store location during the relevant 12-month time period was two sales invoices and several of its corporate tax returns. However, sales invoices that account for only two months out of a 12-month period are not sufficient to establish that the petitioner had been doing business on a "regular, systematic, and continuous" basis for one year prior to filing the form I-140. Additionally, a tax return is not an accurate indicator of consistent business transactions, particularly where the source of revenue is sales for which sales receipts are regularly generated.

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 ground 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.