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U.S. Citizenship
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By

FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER Date: APR 30 2009
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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.

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, 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 is a Florida corporation engaged in the construction business. It seeks to employ the beneficiary as its director of business and product development. 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 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 assertions. A full discussion of the director's denial and counsel's arguments is provided below.

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 calls for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the beneficiary would be employed in the United States in a qualifying 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 September 26, 2006, which includes the following description of the beneficiary's proposed employment:

Determine and formulate the policies and business and product development strategies for [the petitioner], provide overall direction to the operation and ensure the company's future market share in temporary access solutions such as the manufacture of system scaffolding, fitting, tubing, staging, related production, and home construction.

Direct, plan, and implement business objectives, such as marketing and growth activities within the areas of prestigious luxury custom home construction and temporary access solutions.

Review financial data, reports, statements, and revenue reports to establish whether [the petitioner] meets its sales goals.

Confer with overseas board members regarding the conglomerate's continued product developing in the United States and educate and advise the board on industry[-] specific U.S. market trends, building codes, regulations, licensing, and restrictions as it relates to temporary access solutions product development.

Direct the training of staff as it relates to communications with prestigious luxury custom homebuyers and direct the education of staff concerning the market niche of temporary access solutions and its products.

Analyze and compare the activities of competitors to evaluate overall company performance and direct corrective measures as necessary[.]

Gauge luxury custom homes real estate market trends and study industry[-]specific business journals and reports and adjust business service offerings accordingly to remain competitive[.]

Assign and delegate responsibilities and preside at staff meetings.

The petitioner also provided an organizational chart, illustrating a five-tier hierarchy comprised of eight employees. The beneficiary was depicted at the tier that is second from the top-level executive, with a commercial manager and an operations manager as his immediate subordinates. It is noted, however, that in Part 5, Item 2, the petitioner stated that it had three employees at the time of filing.

On November 16, 2007, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a more detailed list of the beneficiary's proposed day-to-day job duties with a percentage of time assigned to each task. The petitioner was also asked to provide a completed copy of its 2006 tax return as well as all W-2 statements issued to the beneficiary's subordinates in 2006. Lastly, the director pointed out the discrepancy between the information provided in the previously submitted organizational chart and Part 5, Item 2 of the Form I-140 with regard to the petitioner's

staffing at the time of filing. The petitioner was asked to explain why it claimed only three employees in the Form I-140, but submitted an organizational chart identifying eight employees.

In response, the petitioner provided a letter dated December 19, 2007 from its attorney, who listed and briefly described the exhibits being submitted to address the director's concerns in the RFE. Exhibit 3 included a percentage breakdown illustrating how the beneficiary's time would be allotted to his various job responsibilities. As the director included key portions of the petitioner's description in his decision, the AAO need not repeat this information at this time. The petitioner also provided an organizational chart as part of Exhibit 4, illustrating a three-tiered hierarchy headed by the beneficiary with a commercial manager and an operations manager as his two direct subordinates. The chart further shows two construction engineers as direct subordinates of the operations manager. The petitioner explained that the chart previously provided in support of the Form I-140 included three employees who were actually part of the higher management staff at the foreign entity. The petitioner did not, however, explain the discrepancy between the organizational chart offered in response to the RFE and the personnel information provided in the Form I-140 at the time of filing. Lastly, the petitioner provided copies of the W-2 statements it issued in 2006 to its commercial and operations managers and its two construction engineers. The AAO notes that the petitioner provided no documentation to establish its employment of the beneficiary at the time the petition was filed, nor does any of the submitted documentation reconcile the apparent inconsistency between the petition, which indicates that the petitioner had three employees at the time of filing, and the petitioner's current claim that it employed five people at the time of filing.

On March 26, 2008, the director issued a decision denying the petitioner's Form I-140. The director noted that the petitioner failed to provide an adequate description of the beneficiary's specific job duties. The director further commented on the lack of complexity in the petitioner's organizational hierarchy, which, in light of a deficient job description, precluded an overall finding that the beneficiary would primarily perform job duties within a qualifying managerial or executive capacity.

On appeal, counsel asserts that the director did not take proper notice of the beneficiary's full job description and instead redacted what counsel deems to be relevant portions of the description. However, counsel has provided no evidence to support this erroneous assumption. In fact, when making a determination regarding the petitioner's eligibility, the director considers all documents that have been submitted for the record, despite the fact that the director chooses not to specifically enumerate and discuss each document. It is illogical, not to mention time consuming, to address irrelevant documents and information. For the purpose of providing simple clarification to the petitioner to best explain why an adverse conclusion had been reached, the director uses his discretion to expressly list and address only the documents and information that are directly relevant to the specific ground(s) being cited as the basis for denial.

In the present matter, the director properly cited only those portions of the beneficiary's job description that were most relevant to the issue at hand, i.e., whether the proposed employment would be primarily comprised of qualifying managerial or executive job duties. As such, rather than duplicate the statements that followed the key portion of the job description, the director chose to focus on the task or responsibility assigned to the beneficiary. For instance, the petitioner stated that 15% of the beneficiary's time would be spent reviewing financial data, including a variety of reports and statements. The remainder of the description regarding this portion of the job description

included the petitioner's explanation of why the beneficiary needs to conduct the review and the business goal the petitioner hopes to attain as a result of the beneficiary's actions. While the AAO has conducted its own independent review of the record and duly takes notice of all of the petitioner's statements, it is unclear how an explanation of business goals adds to U.S. Citizenship and Immigration Services' (USCIS) understanding of the beneficiary's day-to-day job duties. In other words, merely explaining that the beneficiary would review reports and statements for the purpose of ensuring that the petitioner meets its targets and generates sufficient revenue provides no insight into the beneficiary's actual daily tasks.

Counsel similarly faults the director for omitting the statements that follow another portion of the job description, which states that the beneficiary spends 20% of his time analyzing and comparing the activities of the petitioner's competitors. Counsel points out that the director failed to restate the additional statements that discussed the demise of competing companies and the petitioner's expectation to survive and succeed in the current market. The petitioner then continued with a discussion of the construction companies that have recently failed and seemingly indicated that the beneficiary ultimately determined the basis for these failures versus other companies' successes. Again, it is entirely unnecessary for the director to quote, verbatim, the petitioner's lengthy discussions, which are ineffective in conveying a more accurate description of the beneficiary's day-to-day tasks. While counsel cites 8 C.F.R. § 204.5(j)(5), thereby seemingly acknowledging the importance of a detailed job description, he defends the petitioner's deficient statements, which ultimately fail to convey a meaningful understanding of the tasks that the beneficiary would perform on a day-to-day basis.

That being said, counsel apparently differentiates between a detailed job description and the director's request for a detailed statement of day-to-day job duties, arguing that there is no statute or regulation that requires the petitioner to provide the latter accompanied by a percentage breakdown. Counsel's argument, however, fails to take into account precedent case law establishing that it is the actual duties themselves that 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). Furthermore, the provisions of 8 C.F.R. § 103.2(b)(8)(iii) clearly empower USCIS with the discretionary authority to deny a petition even when all initial required evidence has been submitted. Thus, USCIS recognizes that even in instances where a petitioner complies with initial documentary requirements, it may nevertheless be ineligible for the immigration benefit sought. Accordingly, the same regulatory provisions empower USCIS with the authority to issue either a notice of intent to deny or an RFE for further evidence of eligibility, implying that the director enjoys broad discretion in the type of evidence or documentation that can be requested. Thus, counsel is incorrect in his assertion that the director is precluded from requesting a detailed percentage breakdown of the beneficiary's proposed tasks simply because such documentation is not expressly enumerated in any regulatory provision. Moreover, the information the director requested in the present matter is highly relevant and necessary in determining the petitioner's eligibility. As such, there is simply no basis upon which the AAO can conclude that the director's request for specific information regarding a highly relevant subject matter was in any way contrary to law and "devoid of reality," as claimed by counsel.

Additionally, counsel restates a number of job descriptions for managerial positions as issued by the U.S. Department of Labor (DOL). This information, however, is irrelevant in the present matter, where a specific definition of "managerial capacity" is applied in an isolated immigration context. In

other words, use of the term "managerial" is not limited in its application, such that it can only be used in the immigration setting. Rather, this term is widely applied to a number of different positions which vary in complexity, depending on the industry and organizational hierarchy of the entity in which the manager may be employed. However, the petitioner in the present matter is attempting to establish that the beneficiary is eligible for classification in a specific immigrant category, i.e., the category of a multinational manager or executive. In order to establish that the beneficiary merits classification in this category, the petitioner must establish that the beneficiary's prospective employment fits within the confines of the relevant statutory definition for managerial or executive capacity. *See sections 101(a)(44)(A) and (B) of the Act.* Therefore, the only job description that is relevant in the present matter is the one that specifically applies to the beneficiary's prospective U.S. employment. The job titles and accompanying descriptions provided by the DOL were not created in light of the statutory definitions of managerial and executive capacity and do not describe the specific job duties of the beneficiary. As such, counsel's argument is entirely lacking in relevance and foundation.

Lastly, counsel argues that the director's use of the word "clear" and its derivatives implies the director's use of the wrong standard of proof, i.e., clear and convincing rather than the preponderance of the evidence standard. This assertion, however, is also erroneous. Contrary to counsel's apparent misconception, the director's use of words like "clear" and "clearly" simply explains that further clarification of certain information was needed in order to meet the preponderance of the evidence standard. In other words, unless relevant information about the beneficiary's job description and the petitioner's organizational hierarchy is conveyed clearly, the director cannot conclude that the beneficiary would more likely than not be employed in a qualifying managerial capacity. In the present matter, the director properly determined that the petitioner failed to clarify relevant information regarding the beneficiary's proposed job duties. Without this highly relevant information, USCIS cannot conclude that it is more likely than not that the primary portion of the beneficiary's time would be allotted to job duties in a qualifying capacity.

As previously stated, in examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See 8 C.F.R. § 204.5(j)(5).* After reviewing the evidence submitted in the present matter, the AAO concludes that the director's finding regarding the lack of a sufficient job description was warranted. Specifically, the petitioner used broad terminology such as plan, direct, implement, coordinate, and analyze to account for more than 50% of the beneficiary's time. However, there is no information as to the specific tasks that would be formed or the means by which the beneficiary intends to meet these broad business objectives. Additionally, despite the director's express request for the petitioner to reconcile the inconsistency regarding its staffing at the time of filing, there is no evidence that adequate documentation was provided to address this valid concern. 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).

Thus, in reviewing the evidence on record, the AAO finds that the petitioner failed to provide sufficient information regarding the beneficiary's job duties and did not clarify with proper documentation exactly whom it employed at the time of filing such as to establish that the petitioner

was adequately staffed to relieve the beneficiary from having to primarily perform non-qualifying tasks under an approved petition. For this reason, the petition may not be approved.

Furthermore, while not previously addressed by the director, in the process of its independent review of the submitted documentation, the AAO observed an anomaly in one of the petitioner's submitted stock certificates that has led to further questions regarding the petitioner's eligibility. Specifically, the AAO notes that the photocopied stock certificate, which was issued to [REDACTED], appears to be invalid. To illustrate further, the top left of the stock certificate, which lists the number of the specific certificate in a series, indicates that this is stock certificate No. 1. It also appears that the number was altered at some point and the photocopy was made after the alteration. Additionally, further down the document, where the number of the stock certificate is supposed to be shown again, the same document is identified as stock certificate No. 2. The record is void of any documentation that would reconcile or explain this apparent discrepancy. This anomaly regarding the validity of a relevant document has caused the AAO to question the petitioner's claimed qualifying relationship with a foreign entity and the credibility of the petitioner's overall claim. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Accordingly, the AAO finds that this unresolved inconsistency precludes the finding that a qualifying relationship exists between the petitioner and the beneficiary's foreign employer as required by 8 C.F.R. § 204.5(j)(3)(i)(C).

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.