



U.S. Citizenship
and Immigration
Services

B4



FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER Date:
LIN 08 117 51473

DEC 02 2009

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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner subsequently filed a motion seeking to reopen the proceeding. The director granted the motion, but affirmed the prior adverse decision. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Minnesota corporation operating as a travel agency. It seeks to employ the beneficiary as its managing director. 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's most recent decision was based on the finding 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 conclusion, asserting that the director misinterpreted the graph containing the percentage breakdown of the beneficiary's proposed employment. An appellate brief as well as supporting documentation have been submitted and will be addressed in the discussion 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 is 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 February 14, 2008 in which the following list of the beneficiary's prospective responsibilities was provided:

- He will plan, develop, and establish customer service policies and sales objectives of [the petitioner] and implement them through subordinate staff;
- He will develop [the petitioner]'s organizational policies and implement them through subordinate staff;

- He will establish responsibilities and procedures for subordinate staff to attain the desired sales, marketing and customer service objectives;
- He will review daily sales activity reports and financial statements in consultation with [the petitioner's m]anager to determine progress and status in attaining objectives and revise objectives and plans in accordance with current market conditions;
- He will direct and coordinate formulation of new products and customer service incentive programs in consultation with [the petitioner's m]anager and allocate funding for new and existing operations to maximize return on investment and to develop and increase productivity;
- He will plan and develop public relations policies in line with the desired company image with regard to customers, employees and the general public and implement them though [sic] his subordinate staff; and,
- He will evaluate performance of subordinate staff of [the petitioner] for compliance with established policies and objectives of the company and contributions in attaining these objectives.

In addition, the petitioner indicated that the beneficiary would recruit additional staff, review and approve service contracts, participate in trade shows, review and approve the operating budget, and direct the development of additional sales markets through subordinate staff.

The petitioner also described its organizational staff as consisting of two travel consultants, one secretary, and a manager. The petitioner stated that these employees would relieve the beneficiary from having to carry out daily operational tasks, thereby enabling the beneficiary to concentrate on tasks within a qualifying managerial or executive capacity.

On June 30, 2008, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a detailed list of the specific daily tasks that would be involved in the completion of each of the beneficiary's job duties as well as the percentage of time that would be assigned to each task.

In response, the petitioner provided a pie chart in which the beneficiary's time was allocated as follows:

1. 5% Plan, develop and establish customer service policies and sales objectives of [the petitioner] and implement them through [a] subordinate staff.

5% Develop [the petitioner]s organizational policies and implement them through [a] subordinate staff.
The petitioner stated that the above two sets of duties would involve the preparation of monthly incentive reports and having monthly staff and management meetings.
2. 15% Establish responsibilities and procedures for subordinate staff to attain the desired sales, marketing and customer service objectives.

The petitioner stated that in meeting the above responsibility, the beneficiary would prepare monthly incentive reports, have monthly staff and management meetings, and meet with the manager on a daily basis to address outstanding vendor commissions and overdue client accounts.

3. 45% Review daily sales activity reports and financial statements in consultation with [the petitioner's m]anager to determine progress and status in attaining objectives and revise objectives and plans in accordance with current market conditions.

The petitioner stated that in meeting the above responsibility, the beneficiary would: reconcile daily airline reporting; review and approve client account statements; authorize and discuss discounts, incentives, and payment terms regarding specific client accounts; authorize weekly airline billing reports; produce monthly profit/loss accounts and balance sheets; review the monthly bank statements and daily banking activity; and review and approve weekly airline billing, monthly account payments, and vendor account reconciliations.

4. 5% Plan and develop public relations policies in line with the desired company image with regard to customers, employees and the general public and implement them though [sic] subordinate staff.

5% Direct and coordinate formulation of new products & customer service incentive programs and allocate funding for new and existing operations to maximize return on investment and develop and increase productivity.

The petitioner stated that the above two sets of duties would involve meeting monthly with office staff and with the office manager.

5. 10% Evaluate performance of subordinate staff of [the petitioner] for compliance with established policies and objectives of the company and contributions in attaining these objectives.

The petitioner stated that the beneficiary would meet the above responsibilities by preparing monthly incentive reports and having monthly staff and management meetings.

6. 10% Other, [n]on-executive duties

This portion of the chart lists the following non-qualifying tasks: opening mail, capturing accounting and other data into the computer, answering emails and letters, making and receiving phone calls, and performing various banking transactions.

The petitioner also provided an organizational chart, depicting the beneficiary as the head of the organization with a manager and company secretary reporting directly to him. The remainder of the staff includes two corporate travel agents and one leisure travel agent, both subordinates of the manager. Although the petitioner provided a first quarterly wage report for 2008, the report lists only five employees, one of whom is

not included in the organizational chart. Therefore the wage report does not support the information conveyed in the organizational chart. It is further noted that the wage listed in the report for one of the petitioner's corporate travel agents is not commensurate with that of a full-time employee. As such, it is unclear whether the petitioner employed three full-time travel agents at the time the Form I-140 was filed.

In a decision dated September 26, 2008, the director affirmed his prior denial of the petition on the basis that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The director discussed the pie chart submitted in response to the RFE, focusing specifically on two portions of the chart—the 10% attributed specifically to non-qualifying tasks and the 45% attributed to reviewing daily sales activity reports and financial statements. The director concluded that in reviewing the "totality of the evidence" it cannot be determined that the beneficiary would be spending the primary portion of his time performing tasks within a qualifying capacity.

On appeal, counsel asserts that the director based his decision on an erroneous interpretation of the tasks used to describe the largest segment of the pie chart. Specifically, counsel argues that only a small portion of the 45% segment actually includes non-qualifying tasks and that the primary portion of the beneficiary's time is still attributed to qualifying tasks. Counsel proceeds to restate and provide further information about each of the ten items listed within the 45% segment of the pie chart, assigning each item one tenth of the 45%. Based on counsel's interpretation, only three of the ten enumerated items amount to non-qualifying tasks, consuming a total of only 13.5% of the beneficiary's overall time. Specifically, the beneficiary identified reviewing company bank statements and daily banking activity as well as producing monthly profit/loss accounts and balance sheets as the three non-qualifying tasks, arguing that the remaining seven items listed within the 45% segment of the pie chart are within a qualifying capacity.

While counsel properly points out that each underlying job duty must be viewed separately, the general format in which the petitioner chose to present the percentage breakdown precluded the director from being able to make the necessary analysis. Rather than list each of the beneficiary's proposed tasks separately and subsequently assign a percentage of the beneficiary's time that would be attributed to each task, the petitioner opted to assign the percentage of time to broad categories, leaving the director to question how much of the assigned time was being allotted to specific duties that were not listed in the pie chart. This error was most noticeable in the portion of the pie chart that consumed the largest amount of the beneficiary's time, i.e., the portion of the chart that indicated that 45% of the beneficiary's time would be attributed to reviewing daily sales activity reports and financial statements, which included ten underlying tasks with no prior indication as to the specific percentage of time allotted to each task. While counsel has attempted to repair this deficiency on appeal by presenting a new position breakdown, there is no indication from the petitioner that counsel's assertions are accurate representations of how the beneficiary's time would actually be distributed. It is noted that the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 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).

Despite the director's focus on one specific aspect of the pie chart, the AAO finds that other portions of the pie chart are also deficient. Specifically, the petitioner attributed 5% of the beneficiary's time to planning, developing, and establishing customer service policies and sales objectives; 5% to developing the petitioner's policies; 15% to establishing responsibilities and procedures to attain the desired sales, marketing, and customer service objectives; 5% to directing and coordinating formulation of new products and customer incentive programs; planning and developing public relations policies; and 10% to evaluating the

performance of the subordinate staff. According to the petitioner's explanation, all of these broadly stated objectives would be met by preparing monthly incentive reports and conducting monthly staff meetings. However, it is unclear how preparing monthly reports and holding a monthly staff meeting translates into the daily tasks necessary to meet the wide range of business goals assigned to the beneficiary's position. It is unclear whether the beneficiary would generate the same monthly incentive report to achieve the multiple objectives that have been assigned to him and if so, further clarification is required to explain the specific tasks that are on the beneficiary's daily agenda. In other words, if the beneficiary's ultimate goal at the end of each month is to generate an incentive report and hold a staff meeting, the petitioner must explain what specific tasks the beneficiary actually performs to ensure that the report is completed and that the agenda for the monthly meeting is set. 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 petitioner has not provided the information necessary to determine exactly what tasks the beneficiary would perform on a daily basis and how much of the beneficiary's time would be devoted to qualifying tasks versus the non-qualifying ones. The only clarity in the pie chart is the 10% portion that is expressly entitled "Other, Non-executive duties." The remainder of the chart contains vague job responsibilities or broadly-cast business objectives, which the petitioner claims would be attained through the preparation of incentive reports and monthly staff meetings. It is unclear why the petitioner thinks that any activity that takes place on a monthly basis is suitable to explain the specifics of what the beneficiary would actually do on a daily basis. This is a significant deficiency in the petitioner's description of the beneficiary's job duties.

Additionally, the record contains inconsistent information as to whom the petitioner actually employed at the time the Form I-140 was filed. Specifically, the petitioner's organizational chart depicts six positions, including that of the beneficiary. However, the 2008 quarterly wage report for the first quarter during which the petition was filed identified a total of five employees, only four of which were identified in the petitioner's organizational chart. It is noted that the individual identified in the chart as the company secretary was not listed on the wage report. It is therefore unclear who within the entity was performing the secretarial job duties at the time of filing. Without further information, the AAO cannot rule out the possibility that the beneficiary may have been performing or at least assisting with the performance of those non-qualifying tasks in addition to the ones that were already identified in the pie chart.

In summary, the petitioner has failed to provide an adequate description of the beneficiary's proposed employment. Despite the director's RFE request, the goal of which was to solicit a detailed discussion of the actual tasks that would consume the beneficiary's time, the petitioner provided only general information, whose use is limited to gauging the beneficiary's level of discretionary authority. It is noted that 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). In the present matter, the petitioner has not provided sufficient information to indicate what specific duties the beneficiary would primarily be performing. As such, the AAO cannot affirmatively conclude that the beneficiary would primarily perform managerial or executive duties.

Furthermore, while not addressed in either of the director's decisions, the record contains documentation that leads the AAO to question the nature of the business relationship between the petitioner and the beneficiary's

foreign employer. The regulation at 8 C.F.R. § 204.5(j)(3)(i)(C) states that the petitioner must establish that it has a qualifying relationship with 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; *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, the petitioner initially stated that it is majority owned by Dynamic South Africa, the beneficiary's foreign employer. Specifically, the petitioner claimed that the foreign entity owns 60% of its shares while the beneficiary owns the remaining 40%. In response to the RFE, the petitioner provided a document entitled "Resolution in lieu of First Meeting of the Directors of the Board of Dynamic Travel, Inc." Resolution No. 6 of this document reiterates the 60/40 share distribution that was initially claimed in the February 14, 2008 support letter. The petitioner also provided two stock certificates and a stock ledger reiterating the same ownership distribution. However, the petitioner's 2007 tax return, Schedules E and K,¹ both expressly name the beneficiary as 100% owner of the petitioning entity. 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). The factual inconsistency presented herein precludes the AAO from being able to determine who owns the petitioning entity. Without the element of ownership being firmly established, the AAO cannot confirm the existence of the requisite qualifying relationship.

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.

¹ Statement 3 explains that the beneficiary is the 100% owner of the filing entity, i.e., the petitioner.