



U.S. Citizenship
and Immigration
Services

B4



FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER Date: **DEC 03 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:
[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.

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 matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed the Form I-140 seeking to employ the beneficiary in the position of marketing 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 denied the petition based on the finding that the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity. On appeal, counsel disputes the director's conclusion, claiming that the director failed to properly assess the job description in its entirety.

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 January 26, 2007 from the beneficiary's foreign employer. The letter included the following list of job responsibilities that would be assigned to the beneficiary in her prospective U.S. employment:

- a. Direct and manage research activities to identify potential candidates for the company client portfolio and analyze their financial background in order to assess their possible participation.
- b. Responsible for the direction and management of the promotional activities associated with the "King Air" taxi and "El Fortin" dude ranch.
- c. Coordinate Web based projects (i.e., internet home page, promotional banners, mass mailing, web links) and support the interface to traditional advertising initiatives.

- d. Maintain the company's project database up-to-date and identify promotional applications (i.e., newsletters, magazines, expos).
- e. Support the Marketing Department with market tendencies and industry opportunities and single company evaluations.
- f. Strengthen the company's public relations participation in the northeast region of Mexico
- g. Contribute to the creation of the company's newsletter.

On May 23, 2008, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a list of the specific job duties the beneficiary would perform during her U.S. employment and to assign a time constraint showing the percentage of time that would be allotted to each task on the list. The petitioner was also instructed to provide its organizational chart illustrating its organizational hierarchy at the time the Form I-140 was filed. The petitioner was asked to include job descriptions for the beneficiary's direct supervisor and her subordinate employees.

In response, the petitioner provided the official company job description for the beneficiary's proposed position, which was broken down into the following eight components:

1. Lead the annual marketing business plan for [the petitioner] (10% DA).
 - A. Create and implement short- and long-range goals, objectives, policies, and operating procedures for the overall company business plan (Grupo Amistad).
 - B. Oversee the performance of business goals and establish contingency plans as needed.
 - C. Serve on planning and policy-making committees.
2. Direct and coordinate company sales and marketing functions (50% DA).
 - A. Coordinate client visits
 - B. Create specific information given to each client base[d] on requirements
 - C. Update [the petitioner's] intranet with client information.
 - D. Create promotional materials with [the] company's services
 - E. Manage [the] company's website presence in search engines.
 - F. Directly manage major and critical developing client accounts, and coordinate the management of all other accounts.
 - G. Participate in the development of new project proposals.
3. Develop and coordinate sales selling cycle (10% DA).
 - A. Create reports on why [a] client decided for [sic] another location, why they chosen [sic] us, project timeframes, [and] letter[s] of recommendations after each closing.
 - B. Provide market tendencies on Texas-Mexico locations.

4. Direct and oversee the company marketing function to identify and develop new services for customers in real estate, construction or manufacturing (10% DA).
 - A. Design and maintain website[s belonging to the petitioner.]
 - B. Design and maintain website[s belonging to El Fortin Ranch].
 - C. Respond to inquiries from each website.
 - D. Supervise the preparation, issuance, and delivery of sales materials, exhibits, and promotion programs.

5. Research and develop strategies and plans which identify marketing opportunities, direct marketing, and new project development (5% DA).
 - A. Send mass mailing packets with corporate information to prospective clients in [the] database.
 - B. Obtain and Analyze financial background of future clients.
 - C. Evaluate demographic data on each city location

6. Analyze and evaluate the effectiveness of sales, methods, costs, and results (5% DA).
 - A. Evaluate each magazine ad for results
 - B. Coordinate Tradeshow leads and evaluate feasibility & potential.
 - C. Analyze next year's events with Chambers of Commerce, Trade Commissions & conferences.

7. Manage sales & marketing budgets—oversee the department's financial planning activities (5% DA).
 - A. Coordination of spending with Accounting Department.
 - B. Budget comparison—advertising, spending limits caps.
 - C. Review Travel and expenses Reports made by subordinates.
 - D. Recruit, train, and supervise new department staff.

8. Support companies [*sic*] public relation[s] efforts (5% DA).
 - A. Plan and coordinate public affairs and communication efforts with industry leaders.
 - B. Support Community Outreach.
 - C. Promote positive relations with partners, vendors, and distributors.

The petitioner also provided its organizational chart, which depicted a four-tiered, seven-employee structure, including the company president at the top of the hierarchy, three vice presidents and the beneficiary as marketing director at the second tier of the hierarchy, and a marketing coordinator and facility maintenance employee in the third and fourth tiers, respectively, supervised by the beneficiary.

In a decision dated October 20, 2008, the director denied the petition. The director listed a number of the tasks that comprised the eight general components of the petitioner's proposed position and found that only a small portion of the beneficiary's time would actually be spent performing tasks within a qualifying managerial or executive capacity. The director therefore concluded that the beneficiary would not be primarily employed in a qualifying capacity.

On appeal, counsel for the petitioner asserts that the director's decision is erroneous, basing this contention on the fact that the director did not consider the more detailed explanations that were provided to clarify how the beneficiary would carry out each of the eight components the director included in his decision. Counsel's argument, however, is not persuasive, as it is almost entirely premised on the notion that the only portion of the job description that the director considered was the portion that he restated in the decision, which did not include the clarifications and specific tasks that described the eight components in greater detail. A careful reading of the director's discussion of the beneficiary's job description clearly shows that the director made specific references to a number of the underlying clarifications. In so doing, the director found that the petitioner provided sufficient information to establish that the primary portion of the beneficiary's proposed employment would consist of non-qualifying tasks. Counsel's assertion that the director failed to consider relevant facts simply because he chose not to repeat certain information is not persuasive, as there is no requirement that the director repeat, verbatim, all of the information that the petitioner provides. The director provided sufficient analysis of the record to adequately inform the petitioner of the precise basis for the denial. The AAO finds the director's reasoning and his use of discretion to be sound.

As indicated in the director's decision, in examining the executive or managerial capacity of the beneficiary, U.S. Citizenship and Immigration Services (USCIS) will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). In the present matter, the petitioner stated that 50% of the beneficiary's time would be spent performing such tasks as coordinating client visits (which suggests a degree of involvement directly with the client), providing the client with information based on the client's specific requirements, updating the company's intranet, managing the petitioner's website presence, managing client accounts, and assisting with the development of project proposals. The petitioner also indicated that the beneficiary would provide other operational services, such as designing websites and engaging in marketing tasks. 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). The above listed duties are necessary for providing important services, but duties nevertheless that are indicative of daily operational tasks. As these tasks would cumulatively consume more than 50% of the beneficiary's time, the director was right to conclude that the beneficiary would not be employed in a primarily managerial or executive capacity.

Additionally, the AAO notes that the director expressly instructed the petitioner to include an organizational chart that reflects the petitioner's organizational hierarchy at the time of filing. The AAO further notes that the Form I-140 indicates that the petitioner had four employees at the time of filing. However, this information is inconsistent with the organizational chart the petitioner provided in response to the RFE, where the petitioner identified a total of seven employees. 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). As the petitioner did not provide

sufficient evidence to establish exactly whom it employed at the time of filing, the AAO is unable to determine which positions were filled and whether the beneficiary actually had any subordinate employees at the time of filing to relieve her from having to primarily perform non-qualifying tasks. Thus, if the petitioner did not employ an adequate support staff, it is possible that the beneficiary may have had to perform even more non-qualifying tasks than the job description actually indicates.

In summary, the petitioner has provided a job description that is indicative of an individual whose time would be primarily spent performing non-qualifying tasks. The petitioner has also provided an organizational chart that fails to accurately illustrate the petitioner's hierarchy at the time of filing and fails to establish that it was adequately staffed to employ the beneficiary in a qualifying capacity. Therefore, on the basis of these findings, this petition cannot be approved.

Furthermore, while not specifically addressed in the director's decision, it is noted that 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 her entry to the United States as a nonimmigrant to work for the same employer. In the instant matter, the director specifically addressed this issue in the RFE by instructing the petitioner to provide a detailed analysis of the beneficiary's daily activities during her employment abroad. In response, the petitioner provided a job description of the beneficiary's foreign employment that was identical to the description of the beneficiary's proposed employment. The AAO concurred in the director's finding that the description of the proposed employment is indicative of a position that would require the primary portion of the beneficiary's time to be spent performing non-qualifying tasks. For the same reason, the AAO concludes that the description provided for the beneficiary's foreign employment indicates that the primary portion of the beneficiary's time was spent performing non-qualifying tasks. Therefore, the petition cannot be approved on the basis of this additional ground.

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.