



U.S. Citizenship
and Immigration
Services

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DEC 08 2009

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FILE: [Redacted]
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OFFICE: NEBRASKA SERVICE CENTER

Date:

IN RE: Petitioner:
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 reopen or 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 is a Florida corporation that seeks to employ the beneficiary as its president and general manager. 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 determined that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity and denied the petition on that basis. On appeal, counsel disputes the director's conclusion and submits an appellate brief addressing the denial.

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 from counsel dated January 15, 2007 in which counsel stated that the beneficiary would be employed in an executive capacity and recited the components that comprise the statutory definition. Additionally, the petitioner provided a broad list of the beneficiary's proposed duties and responsibilities accompanied by the petitioner's organizational chart.¹ The chart illustrated a multi-tiered entity headed by the beneficiary, who is depicted as having two direct subordinates—a retail manager and a nationwide media buyer. The former is shown as managing a regional sales manager, three call center representatives, and an installer supervisor, overseeing six installers. The nationwide media buyer is shown as overseeing an advertising manager, who is shown as overseeing a designer, a marketing

¹ It is noted that, with the exception of the percentage breakdowns, which were supplied in response to the director's April 25, 2008 request for additional evidence, the petitioner provided nearly identical job descriptions in support of the initial petition and in response to the director's request. As the director included the percentage breakdown in the denial, the AAO need not repeat this information in the present discussion.

employee, and a computer service employee. The petitioner named the individuals filling the positions depicted in the chart.

On April 25, 2008, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a more detailed job description for the beneficiary's proposed employment, including a list of specific job duties the beneficiary would perform and the percentage of time that would be allotted to each task. The petitioner was also asked to provide its organizational chart illustrating its staffing levels.

In response, counsel submitted a letter dated July 7, 2008 claiming that the beneficiary's proposed position would be within a managerial capacity. It is noted that this claim is different from counsel's earlier claim in which he stated that the beneficiary would be employed within an executive capacity. While this distinction would not disqualify the petitioner from the immigration benefit sought, it does indicate the need for further information in order to clarify the beneficiary's proposed job duties and the employment capacity under which those duties would fall. Counsel also provided a percentage breakdown to account for the responsibilities that would consume the beneficiary's time. It is noted that counsel's description is virtually identical to the description provided earlier by the petitioner with the assigned percentage breakdown being the main point of distinction. Thus, counsel did not add to the director's understanding of the beneficiary's specific daily tasks.

Additionally, the petitioner provided another organizational chart and copies of the IRS Form 1099s, Miscellaneous Income, it issued in 2007. It is noted that the organizational chart provided in response to the RFE illustrated an identical hierarchy with the same number of positions as illustrated in the initial organizational chart. The primary difference between the two charts is the names of several of the individuals occupying the listed positions. The AAO further observes that a number of individuals who were listed in the original and updated organizational charts were not among those to whom a 2007 Form 1099 was issued. Also noted is the fact that a number of the individuals to whom the petitioner issued the Form 1099s received wages that indicate very limited periods of employment.

After reviewing the evidence and information submitted, the director issued a decision dated August 12, 2008 denying the petition. The director noted the lack of evidence establishing the employment of a number of the employees identified in the petitioner's organizational chart. While the director did not specify which organizational chart he was using as a point of reference, a review of the documentation indicates that the director's comments apply to both charts. The director observed the lack of evidence of in-house personnel to perform the daily operational tasks as well as a deficient job description that fails to establish the beneficiary's performance of tasks within a primarily managerial or executive capacity.

On appeal, counsel asserts that a detailed job description with the requested time allocations was provided to establish that the beneficiary would be employed in a managerial capacity.

In order to determine that the petitioner would employ the beneficiary in a qualifying executive or managerial capacity, the U.S. Citizenship and Immigration Services (USCIS) will first examine the beneficiary's description of job duties per 8 C.F.R. § 204.5(j)(5). USCIS will then examine the record to determine whether the petitioner was adequately staff to relieve the beneficiary from having to primarily perform the petitioner's daily operational tasks that are outside the realm of what is deemed to be within a qualifying capacity. 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 briefly noted above, however, the job description provided in response to the RFE was little more than a restatement of the job description initially provided, despite the fact that the director clearly found the earlier job description to be inadequate, as apparent from the very fact that the RFE requested more detailed information about the proposed job duties. In fact, the primary distinction between the first and second job descriptions was the time allocation. While the time allocation was clearly counsel's attempt to comply with the director's instructions, it is noted that reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. **See 8 C.F.R. § 204.5(j)(5)**. Case law has firmly established the importance of a detailed job description, finding that the actual duties themselves will 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, counsel merely assigned a percentage of time to broad job responsibilities. However, the fact that a percentage of time was allocated does not mean that the petitioner has satisfied the director's request for a detailed delineation of specific tasks. For instance, while counsel claimed that 10% of the beneficiary's time would be spent establishing policies and objectives, she failed to specifically identify any policies or objectives, nor did she specify any of the underlying tasks the beneficiary would perform daily in his effort to establish goals and policies. Counsel also claimed that 30% of the beneficiary's time would be devoted to overseeing personnel by advising and guiding them in their daily work. However, the petitioner failed to provide sufficient documentation establishing exactly whom it employed at the time of filing, nor did the petitioner provide a list of specific tasks to explain exactly how or by what means the beneficiary would be overseeing personnel. Additionally, while counsel attributed another 15% of the beneficiary's time to directing and coordinating the promotion of company services, she failed to specify the beneficiary's actual role in such promotion. Given that the record lacks evidence to establish the existence of marketing and sales personnel at the time the petition was filed, it is unclear who would be performing the sales and marketing tasks, nor is it apparent that the petitioner had the capability of relieving the beneficiary from having to perform or at least assist in the performance of these non-qualifying operational job duties.

It therefore appears that at least 55% of the beneficiary's time would be allotted to tasks that remain undefined and unclear. In light of this determination, and given the lack of documentation establishing exactly which positions were filled at the time of filing, it cannot be concluded that the petitioner required the beneficiary to perform in a primarily managerial or executive position or that the petitioner was able to employ the beneficiary in such a capacity.

Counsel also asserts that the beneficiary oversees a significant number of independent contractors, referring to the numerous Form 1099s that establish the wages paid to independently contracted individuals. Counsel's argument is flawed, as the beneficiary's management of independent contractors does not result in the performance of tasks that are within a managerial or executive capacity. Whether or not these specific tasks would normally be deemed managerial or executive if performed in relation to the internal staff, i.e., *employees*, of the petitioner, they would be deemed in this instance to be tasks necessary to provide a service, albeit a management service, being provided by the petitioner as a general contracting company and, thus, would be non-qualifying. Additionally, while the existence of independent contractors is relevant as a means of determining who performs the petitioner's daily operational tasks, the evidence submitted in the present matter does not establish that, at the time of filing, the petitioner was adequately staffed with employees and/or independent contractors to relieve the beneficiary from having primarily perform non-qualifying tasks. In verifying the names of the individuals who were listed in the two organizational charts on record with the

IRS Form 1099s that were issued by the petitioner in 2007, most of the employees listed in the organizational charts were not among those to whom 2007 IRS Form 1099s were issued. More specifically, of the 18 contractors and employees listed on the first organizational chart, the AAO is able to verify that the petitioner paid limited wages to four independent contractors and a full salary to the beneficiary, as indicated in the petitioner's 2007 tax return. With regard to the organizational chart submitted in response to the RFE, the AAO is able to verify that seven of the 18 individuals listed in the chart were issued IRS Form 1099s. However, as neither organizational chart is dated, it is unclear which one pertains specifically to the date the Form I-140 was filed. Since a petitioner must establish eligibility at the time of filing, any employees or independent contractors that were hired after the date of filing cannot be considered when determining eligibility at the time of filing.

The AAO further notes that no 2007 IRS Form W-2s, Wage and Tax Statement, were submitted to identify the individuals whom the petitioner did not identify as independent contractors. Additionally, taking into account the low wages paid to some of the independent contractors, the AAO can only assume that either the contractors worked very limited work schedules or they provided services to the petitioner for a very brief time period. Either way, the petitioner has failed to establish exactly which employees and contractors were providing it with services at the time of filing.

Lastly, the AAO notes that the petitioner's 2007 tax return indicates that the petitioner paid a total of \$32,000 in salaries and wages. However, the sum total of the Form 1099s the petitioner issued in 2007 indicates that the petitioner paid at least \$36,207 in wages to independent contractors. 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). In the present matter, not only is there a clear inconsistency with regard to the amount of wages paid by the petitioner in 2007, but there is also a discrepancy between the petitioner's organizational charts and the Form 1099s in the sense that employees that were named on one or both organizational charts were not necessarily issued Form 1099s and numerous employees to whom Form 1099s were issued were not necessarily identified in either of the organizational charts. This mass of confusion precludes the AAO from being able to determine exactly whom the petitioner employed at the time of filing and what services were being provided to support the beneficiary's proposed position in helping to relieve him from having to primarily perform non-qualifying tasks.

In the present matter, the petitioner has neither described the beneficiary's proposed employment with sufficient detail, nor has it provided sufficient evidence to establish that it was adequately staffed at the time of filing such that the beneficiary would be relieved from having to primarily perform tasks of a non-qualifying nature. As such, the AAO cannot conclude that the beneficiary would be employed in a qualifying managerial or executive capacity.

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.