



U.S. Citizenship
and Immigration
Services

B4

[REDACTED]

FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER

Date: DEC 30 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:

[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 or reopen, 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 limited liability company organized in the State of Illinois. The petitioner seeks to employ the beneficiary as its president and chief executive officer. 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 decision and submits a brief addressing the director's adverse findings.

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 petitioner submitted sufficient evidence to establish that it would employ the beneficiary 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, which listed the beneficiary's key responsibilities—financial management, sales and marketing management, procurement/vendor dealings/inventory management, administrative management, staff management, and general business expansion—and indicated the percentage of time the beneficiary would devote to each responsibility. The petitioner also discussed the types of job duties the beneficiary performed with regard to each of the six responsibilities. As the denial includes the primary portion of the job description the petitioner offered in support of the petition the AAO need not repeat this information in the current discussion.¹

On May 2, 2008, the director issued a request for additional evidence (RFE) acknowledging the initial job description offered in support of the Form I-140 and instructing the petitioner to provide a more detailed description of the beneficiary's proposed job duties. The petitioner was asked to assign a percentage of time to each of the beneficiary's job duties.

In response, the petitioner provided a letter dated July 16, 2008 in which the petitioner restated the job description that was previously offered in support of the Form I-140 and offered an additional job description according to the director's specifications. The supplemental job description included the following percentage breakdown:

1. Sales and Marketing Management (35%)

- Do price checks on the internet and from catalogs 5%
- Develop marketing and promotional material to attract new customers and promotional campaigns such as radio, magazine and newspaper advertisements. Develop and market new product lines 10%
- Develop and update new website to attract internet shoppers. 2.5%
- Update customer base with new customer details daily. 2.5%
- Meet with prospective, new and existing customers to develop relationships and promote new equipment, capabilities and range of products. 5%
- Attend a variety of networking events (weekly and monthly events) (10%)

2. Financial Management (30%)

- Meet with the Administration Manager to review[:]

¹ With regard to financial management, the first responsibility listed in the job description, the director omitted the portion of the job description that indicated that the beneficiary maintained banking contacts, supervised the bookkeeping functions to ensure reconciliation of bank statements, timely deposits, proper action regarding accounts payable and receivable, and timely execution of payroll. With regard to sales and marketing management, the beneficiary's second responsibility, the director omitted the portion of the job description that stated that the beneficiary would ensure client satisfaction and maintain and update the client database for targeted advertising purposes.

- bank statements to determine current cash flow[;] 5%
- accounts receivable to do age analysis and determine outstanding monies[;] 10%
- accounts payable to confirm correct pricing and settlement discounts as agreed upon with vendors[;] 5%
- approve payment of due accounts and sign checks issued for payment[;] 10%

3. Procurement/vendor dealings/inventory management (10%)

- Review, approve and order inventory and office supplies as requisitioned during the day. 2.5%
- Supervise checking of delivered inventory and office supplies with [the] Production and/or Administration Manager to confirm correct delivery and prices. Arrange with [the] Production and/or Administration Manager to have delivered items correctly allocated to inventory. 2.5%
- Meet with vendor's representatives to discuss delivery, prices, new product lines, etc. 5%

4. Staff management, Recruiting, Hiring and Training (15%)

- Arrange training of new and existing staff on new and existing equipment where required.
- Meet or accompany the Production supervisory regularly during the day to[:]
 - determine quality control,
 - discuss any operational issues[,]
 - ensure that production is running at an acceptable level[;]
 - ensure that he is updated on incoming orders so that he can schedule production,
 - determine inventory levels and requirements for current and upcoming orders[.] (10%)
- Regular liaison throughout the day with the Graphics Designer to ensure that [the] company is able to meet deadlines and that designs are suitable for equipment and set up in accordance with the customers' requirements. (5%)

5. Administrative Management (10%)

- Review and approve outgoing bids prepared by [REDACTED]
- Open and respond to emails by vendors and customers or forwarded by the Administration Manager, Production Supervisor, or Graphics Designer.
- Meet with the Administration Manager to review:
 - delivery and invoice summary of the previous day,

- outstanding orders to determine if [the] company is on track to meet deadlines, [and]
- orders received and inventory required for new orders[.] (10%)

In a decision dated October 31, 2008, the director denied the petition, concluding that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity. The director made a number of observations, including one about the petitioner's 2008 second quarterly Employer's Contribution and Wage Report as well as the amount of the beneficiary's compensation. The director found that the quarterly report indicated that all but one employee was employed on a part-time basis and further noted that the beneficiary's salary was not commensurate with that of a multinational manager or executive.

With regard to the first comment, the AAO notes that the Form I-140 in the present matter was filed on February 2, 2007. As the goal in the present matter is to establish whether the petitioner was eligible for the immigration benefit at the time of filing, the AAO questions the relevance of a 2008 quarterly wage report, which reflects salaries and wages paid more than one year after the petition was filed. The AAO also observes that while some of the salaries and/or wages are indicative of part-time employment, approximately eight of the thirteen individuals named in the report were shown as having been remunerated salaries that were commensurate with those of full-time employees. Therefore, the director's comment is neither relevant nor accurate based on the evidence submitted.

With regard to the director's finding concerning the beneficiary's salary, the AAO notes that there is no statutory or regulatory provision that requires a petitioner to meet a salary requirement for the beneficiary. Moreover, there is no precedent case law to support the idea that a beneficiary's proposed salary is indicative of whether the proposed job duties would be within a qualifying managerial or executive capacity.

In light of the above, the AAO hereby withdraws the director's inappropriate findings, which will have no bearing on the outcome in this proceeding. Nevertheless, a thorough review of the petitioner's submissions indicates that the director was ultimately correct in concluding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity.

On appeal, counsel states that the beneficiary is the petitioner's top-level executive with the highest degree of authority with respect to the company's operations. Counsel restates the job description that the petitioner provided in response to the [redacted] and contends that the director offered a limited analysis of the beneficiary's proffered employment, focusing primarily on the definition of managerial capacity without providing a similar evaluation of the beneficiary's job description within the context of the definition of executive capacity.

While counsel admittedly points out various weaknesses in the director's analysis, she fails to establish that the petitioner was eligible for the immigration benefit sought at the time the Form I-140 was filed. In examining the executive or managerial capacity of the beneficiary, the AAO 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 AAO finds that the job description the petitioner provided in response to the RFE was sufficient to convey a meaningful understanding of the types of job duties the beneficiary would carry out in his proposed position. However, the job description does not establish that the beneficiary's time would be primarily devoted to tasks of a qualifying nature. For instance, the petitioner stated that the beneficiary's main responsibilities would include sales and marketing management, inventory management through vendors, and administrative management. While the petitioner used the term "management" with respect to all three responsibilities, the petitioner cited primarily non-qualifying job duties in its explanation of how the beneficiary plans to fulfill these responsibilities.

More specifically, the job description indicates that the beneficiary would not merely manage the sales and marketing, but rather that he himself would actually carry out all the duties associated with creating the necessary marketing material to promote the petitioner's services. Similarly, the beneficiary's role with regard to inventory would not be limited to management, but rather would include actually contacting and meeting with vendors. The beneficiary would also perform various human resource and administrative tasks, including arranging training for personnel, composing and answering emails, and tracking customer orders to ensure that deadlines are being met.

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). While counsel points out that the beneficiary would not actually perform any of the tasks associated with providing customers with the finished printing product, there are other non-qualifying tasks that would be assigned to the beneficiary. Based on the percentages assigned to the beneficiary's non-qualifying tasks, the AAO cannot conclude that the primary portion of the beneficiary's time would be devoted to tasks within a qualifying managerial or executive capacity.

Lastly, despite counsel's assertion that the size of the petitioner's staff is not a determining factor in whether a beneficiary would primarily perform qualifying tasks, federal courts have generally agreed that U.S. Citizenship and Immigration Services (USCIS) "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Thus, the director's consideration of the petitioner's staff was not improper and, in fact, would have been justified, if the right information was considered, as an analysis of the petitioner's support staff enables USCIS to assess the petitioner's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks.

In the present matter, while the organizational chart submitted in response to the RFE clearly meets the requirements specified by the director, the chart does not help USCIS establish the petitioner's

staff at the time the petition was filed. Regardless of whether the petitioner's organization was adequately staffed at the time the [REDACTED] was issued, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel cites *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. First, the AAO notes that counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Mars Jewelers, Inc.*, where the district court found in favor of the plaintiff. With respect to *Mars Jewelers*, 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.

In *Mars Jewelers, Inc.*, the court emphasized that the former INS should not place undue emphasis on the size of a petitioner's business operations in its review of an alien's claimed managerial or executive capacity. The AAO agrees and has long interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. However, consistent with both the statute and the holding of the *Mars Jewelers*, the petitioner is required to establish that the beneficiary's position consists of primarily managerial or executive duties and that the petitioner will have sufficient personnel to relieve the beneficiary from performing operational and/or administrative tasks. The AAO emphasizes that our determination is based on the conclusion that the beneficiary is not primarily performing managerial duties; our decision does not rest on the size of the petitioning entity. 889 F.2d at 1472, n.5.

Section 101(a)(44)(C) of the Act requires the AAO to "take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function." Reading section 101(a)(44) of the Act in its entirety, the "reasonable needs" of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir., 2008).

In summary, despite counsel's numerous attempts to point out weaknesses in the director's analysis, such weakness cannot serve as a basis for sustaining this appeal and approving the petitioner's Form I-140. While the director's decision was flawed, the AAO must conclude that the director's ultimate determination was correct. As noted above, the petitioner must establish that the petitioner was eligible for the immigration benefit sought *at the time the Form I-140 was filed*. *Matter of Katigbak*, 14 I&N Dec. at 49. Based on the evidence and information submitted in the present matter, the petitioner has not established that the primary portion of the beneficiary's time would be devoted to

tasks within a qualifying managerial or executive capacity. Therefore, on the basis of this conclusion, the instant petition cannot be approved.

Additionally, beyond the decision of the director, the record lacks sufficient evidence to establish that the petitioner has met the filing requirement specified at 8 C.F.R. § 204.5(j)(3)(i)(D). The regulation requires the petitioner to establish that it has been doing business for at least one year prior to filing the Form I-140. Furthermore, 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."

Based on the petition's filing date of February 2, 2007, the above regulatory provision requires the petitioner to establish that it was doing business as of February 2, 2006, or one year prior to filing. Although the Form I-140 states that the petitioning corporation has been doing business since 1958, the Illinois Form LLC-5.5 indicates that the petitioner was not incorporated until April 26, 2006, only nine months before filing this petition. The AAO also notes that the petitioner purchased the printing business on December 21, 2006, or one month and twelve days before filing the petition. Accordingly, the petitioner has failed to establish that it had been doing business for at least one year prior to filing the Form I-140, a requirement under the law.

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).

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.