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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

B4

FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER
LIN 07 052 51476

Date:

JUL 28 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).

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 California corporation that seeks to employ the beneficiary as its executive vice president. 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 two independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and 2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On appeal, counsel disputes both grounds of the denial, providing clarification regarding the beneficiary's role and the role of his subordinates during the beneficiary's employment with the foreign parent entity. After a thorough and comprehensive review of the petitioner's submissions, the AAO finds that sufficient documentation has been provided to establish that the beneficiary was more likely than not employed abroad in a qualifying managerial or executive capacity. Therefore, the AAO hereby withdraws the first ground as a basis for denial. However, the AAO cannot make a similar finding with regard to the beneficiary's proposed employment, which will be the primary issue addressed in this discussion.

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.

As stated above, the main issue in this proceeding calls for an analysis of the beneficiary's proposed job duties 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 November 14, 2006 in which a broad description of the beneficiary's proposed employment was provided. As the director incorporated key portions of the petitioner's position description into his decision, the AAO will not repeat the same information in the present decision. The petitioner also provided its organizational chart showing the beneficiary as the head of the U.S. entity, which appears to include two locations—a New York office and the main office headquartered in California. The New York office appears to be staffed with a single employee in the position of branch manager. Although a business development position and a purchasing and export position are included as prospective positions to be filled at the New York location, neither position was filled at the time the petition was filed. The petitioner's headquarters office is comprised of an accounting department, which shows a single employee, and an export/purchasing department, which identifies a purchasing control supervisor, an export license coordinator and purchasing employee, and an administrative employee.

On July 20, 2007, the director issued a request for additional evidence (RFE) instructing the petitioner to clearly define the specific job duties the beneficiary would be expected to perform in his proposed position with the U.S. entity. The petitioner was also asked to assign a time constraint to each of the listed job duties and to provide the job titles, job duties, and minimum position requirements that apply to the beneficiary's subordinate employees.

In response, counsel for the petitioner provided a letter dated August 21, 2007 in which he stated that the minimum requirements for administrative and sales positions are a high school education and 2-3 years of experience, while the supervisory and/or specialty positions may require a baccalaureate degree. Counsel listed all of the positions that were included in the previously submitted organizational chart as the beneficiary's subordinates. Counsel provided a brief delineation of the beneficiary's job duties, claiming that 20% of the beneficiary's time would be devoted to meetings and conference calls, operational management, and business development, respectively, for a total of 60% of the beneficiary's time. The remaining 40% of the beneficiary's time would be evenly distributed among human resources management, visiting vendors and approving final products, budgeting and financial reviews, and market research.

Counsel also attempted to provide a sample daily schedule for the beneficiary, claiming that after addressing daily correspondence, which generally consumes approximately an hour to an hour and a half, the beneficiary attends a 9 a.m. meeting with the purchasing control supervisor and branch manager. Counsel claimed that this meeting is followed by a conference call with the president and board of directors of the foreign entity to discuss sales and expenses, purchasing and exporting activities, and customer trends. Counsel further claimed that the beneficiary often has working lunches when he meets with vendors. After lunch, the beneficiary is claimed to either meet with clients or review reports prepared by the business development manager and branch manager.

On December 26, 2007, the director issued a decision denying the petition based, in part, on the finding that the petitioner failed to establish that it would employ the beneficiary in a qualifying

managerial or executive capacity. The director noted that a statement from counsel regarding the beneficiary's job duties is insufficient and further found that counsel's statements lacked the necessary degree of detail. *See* 8 C.F.R. § 204.5(j)(5), requiring that the petitioner provide a detailed description of the beneficiary's proposed job duties. Specifically, the director noted that while counsel assigned a percentage of time to each of seven general functions he used to describe the beneficiary's proposed employment, he failed to specify the tasks associated with such functions. With regard to counsel's attempt to describe the beneficiary's typical day, the director found that this description was also deficient, as it failed to identify the beneficiary's specific tasks in relation to the topics discussed during meetings and conferences. The director also found that the petitioner failed to establish that any of the beneficiary's subordinates are supervisory or professional employees.

On appeal, counsel asserts that the record is clear about the beneficiary's autonomy and authority in making all business decisions. Counsel further explains that the beneficiary assumes a decision-making role during meetings with customers and company employees. Counsel claims that the beneficiary decides the ultimate resolution or course of action to be taken and further states that there is no other employee within the petitioning entity that can assume this role.

Counsel's statements, however, are not persuasive in determining that the beneficiary's proposed employment with the U.S. entity would be in a qualifying managerial or executive capacity. While the beneficiary's discretionary authority is highly relevant to the present discussion, 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 id.* Precedent case law has firmly established that 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 director's adverse findings were primarily based on the deficient job description, not on the beneficiary's lack of authority. Thus, merely establishing that the beneficiary is at the top of the petitioner's organizational hierarchy and is the organization's top decision maker does not warrant approval of the petition. Rather, the petitioner has the burden of establishing that the primary portion of the beneficiary's time would be spent performing job duties within a qualifying managerial or executive capacity. 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).

Here, the director made a number of specific observations that were intended to point out the numerous deficiencies in the beneficiary's job description. A review of the petitioner's submissions indicates that the director's findings were accurate. Instead of assigning time constraints to specific daily tasks, counsel provided a percentage breakdown of general job responsibilities, which were accompanied by an inadequate attempt at providing a sample schedule of the beneficiary's daily activities. With the exception of indicating the amount of time that would be assigned to the morning administrative tasks, counsel failed to specify the length of time that would be consumed by the beneficiary's meetings with the purchasing control supervisor and branch manager. Counsel also failed to specifically discuss how frequently such meetings take place and how the beneficiary's oversight of the purchasing control supervisor and branch manager is a qualifying task, given the lack of evidence to establish that these employees are supervisory, professional or managerial,

regardless of what their position titles may indicate. There is also no clarification as to how often the beneficiary has conference calls with the president and board of directors or how much of the beneficiary's time is attributed to these conference calls on a weekly or daily basis. Additionally, counsel's claim that the beneficiary would review reports prepared by the business development manager and branch manager requires further explanation, as the record shows that the petitioner did not employ a business development manager at the time of filing. The AAO notes that 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). While counsel generally disputes the director's adverse findings, he simply fails to add any information to facilitate a meaningful understanding of the beneficiary's daily tasks, focusing instead on the beneficiary's degree of authority and the petitioner's need for the beneficiary to continue to fulfill his role as the head of the company. In summary, counsel's general claim on appeal, that sufficient information was provided to establish that the beneficiary's U.S. employment has been and will continue to be within a managerial capacity, is not corroborated by the evidence of record. As such, the AAO cannot approve the instant petition.

Furthermore, the record does not support a finding of eligibility based on at least one additional ground that was not previously addressed in the director's decision. Specifically, the regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner must establish that it has been doing business for at least one year prior to filing the Form I-140. 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." In the present matter, the Form I-140 was filed on December 11, 2006. Therefore, the petitioner has the burden of establishing that it was doing business as of December 2005. Although the record contains invoices and shipping documents from April through September 2006, this only accounts for six months of a 12-month period. The AAO also acknowledges the petitioner's submission of several tax returns, financial reports, and bank statements. However, these documents do not show the frequency of the petitioner's sales and/or shipping transactions. As such, the petitioner has not provided sufficient documentation to establish that it has been conducting business during the time period and in the manner prescribed by regulation.

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.