

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B4



FILE: [REDACTED]
LIN 06 276 51567

OFFICE: NEBRASKA SERVICE CENTER

Date: MAR 04 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 Florida corporation operating as an automotive services provider. The petitioner seeks to employ the beneficiary as its 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 the finding that the beneficiary would not be employed in a managerial or executive capacity.

On appeal, counsel disputes the director's conclusions and submits a brief in support of his arguments.

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 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 September 19, 2006, which includes the following description of the beneficiary's proposed employment with the U.S. entity:

With [the U.S. entity] the [beneficiary] has hired, trained and supervised staff, directed the financial management of the company, and supervised the [s]ervice and [s]ales [d]epartments. [The beneficiary] has assembled and directs a team of

professional service providers, and directed[,] supervised and monitored the installation and application of computerized management systems integrating [the] supplier and customer needs and relations to insure maximization of [the petitioner's] average gross margins and profitability, while controlling operating expenses, and enhancing productivity and customer service. The [beneficiary] has established personnel and leave policy, and has engaged in executive decision making at the highest organizational level.

On August 15, 2007, the director issued a request for additional evidence (RFE) instructing the petitioner to provide, *inter alia*, further information regarding the beneficiary's proposed U.S. employment, including specific job duties and the employees to be supervised, if any. The petitioner was also instructed to provide its organizational chart illustrating the beneficiary's position in relation to others in the U.S. entity.

In response, the petitioner provided a letter dated August 29, 2007, which included the following duties and responsibilities:

1. The [beneficiary] directs the management of the U.S. subsidiary. In the capacity of president, the [beneficiary] has directed the start[-]up and operations of a complete automotive service repair business. [She] has full authority to hire and fire personnel and engages in executive decision[-]making at the highest level. The [beneficiary] assembled a team of professional service providers in accounting, information technology and legal and environmental compliance to professionally anchor the business operations. The enterprise is divided into marketing/business development and service operations. . . .

[T]he day[-]to[-]day management of the service operations are with the [s]ervice [m]anager [REDACTED], a professional automobile technician Mr. [REDACTED] is in charge of operations, customer service, scheduling, supervision and training of service staff. . . .

2. [The beneficiary] establishes the goals and policies of the U.S. subsidiary. As part of her overall responsibility of leading the organization, [she] establishes personnel policies, financial objectives and operational goals.

[The beneficiary] established the goal of achieving greater corporate automation, in furtherance of that objective, the transferee directed, supervised and monitored the installation and application of a computerized management system integrating our supplier and customer needs used by the [s]ervice [m]anager and his team that enhances staff productivity and communications inside and outside the enterprise.

[The beneficiary] formulated a corporate goal of leveraging skilled human resources and developing business and corporate clients in addition to private individuals. Reporting to her in [b]usiness development and [m]arketing [m]anagement since March 2006 is [v]ice [p]resident [REDACTED]. Mr. [REDACTED] key responsibilities include, together with [the beneficiary], creating marketing campaigns, the creation of

sales presentations and their delivery in the business community, networking to generate business, participating in business development events . . . , increasing corporate clients, contacts and business, [and] keeping abreast of market changes

* * *

3. [The beneficiary] exercises wide latitude in discretionary decision[-]making. The management team [consisting of the beneficiary, _____ and _____] meet on a weekly basis to exchange ideas

[The beneficiary] has ultimate responsibility [for the petitioner]. [She], in addition to having executive oversight of [the] [v]ice [p]resident and [s]ervice [m]anager in the exercise of their duties[,] is also ultimately responsible for the expansion and growth of [the petitioner] and for directing it in trying economic times. . . .

The petitioner also provided a copy of its organizational chart relaying the organizational hierarchy discussed in the above job description. The chart shows the beneficiary as the leader of the petitioning entity with the vice president and service manager as her direct subordinates. Although the chart also shows an administrative and service staff and shipping, maintenance, and related service providers at the bottom of the hierarchy, none of these alleged staff members are listed by name, nor is there any definitive information as to who actually oversees the work of these individuals, as both the vice president and the service manager are depicted as the supervisors of the employees at the lowest tier within the petitioner's organization.

On February 15, 2008, the director issued a decision denying the petition. In the supporting discussion, the director addressed the petitioner's organizational hierarchy, noting that the petitioner employed no more than five employees at the time of filing and that only three of those employees were specifically named in the petitioner's organizational chart. The director found that the petitioner is insufficiently staffed to relieve the beneficiary from having to engage in the various administrative tasks that are necessary to ensure the petitioner's daily operation.

The director also discussed the petitioner's quarterly wage report for the fourth quarter of 2005, which the petitioner submitted initially in support of its Form I-140. Although the director did not mention the wage report for the subsequent quarter, which the petitioner also provided in support of the Form I-140, the AAO notes that both documents list the same two employees, i.e., the beneficiary and the service manager. The AAO further notes that the service manager's wages in both quarterly wage reports indicate that he was compensated a wage commensurate with that of a part-time employee. Neither document establishes whom the petitioner employed at the time the Form I-140 was filed, and the petitioner has not provided its quarterly wage report for the relevant time period. That being said, the AAO acknowledges that the director did not expressly request any of the petitioner's quarterly wage reports and therefore will not make any dispositive determinations of fact on the basis of the petitioner's failure to submit documents that were not specifically required by regulation and that were not expressly requested. However, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In the present matter, the petitioner has

not provided any objective documentation establishing whom it employed at the time the petition was filed. As such, the AAO cannot accurately gauge how capable the petitioner was to employ the beneficiary in a primarily managerial or executive capacity at the time of filing. 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).

On appeal, counsel for the petitioner asserts that the director "discounts" the petitioner's compliance with the RFE in providing the requested information. Counsel's assertion, however, fails to account for the content of the petitioner's submissions and the fact that the petitioner's response, despite being in compliance with the director's request, indicates that the petitioner is not eligible for the immigration benefit in the present matter. Counsel is reminded that merely complying with the RFE does not automatically ensure that eligibility has been established. In fact, the petitioner's response and all of the information previously submitted must first be analyzed in light of statutory and regulatory requirements prior to making an informed determination regarding the petitioner's eligibility.

Counsel further argues that the director did not put the petitioner on notice with regard to submission of evidence. This statement indicates that counsel equates an RFE with a notice of intent to deny (NOID), whose express purpose is to inform an applicant or petitioner of the specific grounds for an intended denial of an application or petition. The AAO notes, however, that an RFE and a NOID are two distinct documents with two different purposes. While an RFE often has the effect of informing the petitioner of deficiencies in the record that may lead to the denial of a petition, its express purpose is to illicit further evidence. Specifically, 8 C.F.R. § 103.2(b)(8)(ii) states the following:

If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

As indicated in the above provisions, the director is not required to issue a request for further information in every potentially deniable case, as it is not the purpose of an RFE to inform the petitioner of the potential grounds for denial.

Although the NOID is issued for the express purpose of informing the petitioner of grounds of ineligibility, there are no regulations specifically requiring the director to issue a NOID in the present matter. In fact, it appears that the director's issuance of an RFE in the instant case was discretionary and that it was issued for the purpose of eliciting further information about the beneficiary's intended job duties and the petitioner's overall organizational structure. The petitioner admittedly complied with the director's request. However, a comprehensive review of the new and previously submitted documents indicate that the petitioner was ineligible to classify the beneficiary as a multinational manager or executive, as it did not establish by a preponderance of the evidence

that the primary portion of the beneficiary's time would be spent performing tasks of a qualifying nature.

That being said, counsel asserts that the director's denial was erroneous as it was entirely based on the petitioner's staffing structure. Counsel further argues that the director failed to give due consideration to the petitioner's reasonable needs and overall stage of development as instructed in 8 C.F.R. § 204.5(j)(4)(ii). However, the petitioner's needs and stage of development do not serve to override the petitioner's legal burden of having to establish that the beneficiary would primarily perform duties of a qualifying managerial or executive nature. Moreover, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that 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)). The director's discussion of the petitioner's staffing in the present matter was appropriate and suggests that the director had valid concerns regarding the petitioner's ability to relieve the beneficiary from having to primarily perform non-qualifying tasks. The petitioner's submissions in response to the RFE merely confirmed the director's uncertainties.

Additionally, while the director did not specifically address the beneficiary's job descriptions, the AAO notes that the information conveyed therein strongly indicates that at the time the petition was filed, the beneficiary's intended position primarily involved the performance of non-qualifying tasks. For instance, in its response to the RFE, the petitioner expressly stated that the beneficiary, together with the vice president, would create marketing campaigns and sales presentations, and assist in making the sales presentations and network to generate more business from corporate clients, none of which can be deemed as qualifying tasks. While the petitioner also stated that the beneficiary would maintain hiring and firing discretionary authority, there is no indication that a significant portion of the beneficiary's time would be spent exercising these powers, particularly given the lack of organizational complexity of the petitioning entity. Although the petitioner also referred to a team of professional service providers, the record is devoid of documentation establishing the identities of the individuals that comprise this team, nor is there any evidence indicating that the petitioner employed individuals to provide the services at the time the Form I-140 was filed.

In summary, neither the beneficiary's job description nor the petitioner's organizational structure at the time the Form I-140 was filed establish that the beneficiary's proposed employment would primarily involve the performance of qualifying tasks. As such, the AAO concludes that the petitioner has failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity in his proposed position with the U.S. entity.

Additionally, while not addressed in the director's decision, the AAO notes an additional ground for the petitioner's ineligibility. Specifically, the record lacks sufficient documentation to establish that the petitioner is a multinational entity, which requires that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States. See 8 C.F.R. § 204.5(j)(2). Doing business is defined by regulation as 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. *Id.* In the present matter, while the petitioner has provided documentation to establish that the foreign entity had been doing business prior to the time the petition was filed, there is insufficient evidence to establish that the foreign entity continued to engage in the regular, systematic, and continuous provision of goods and/or services beyond the time the Form I-140 was filed. As previously stated, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

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.