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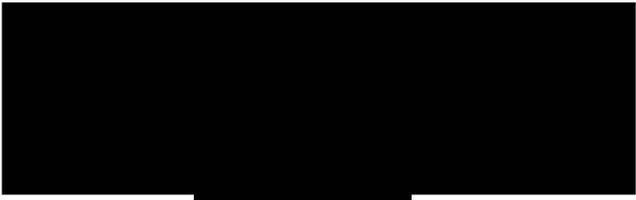
U.S. Department of Homeland Security
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Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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FILE: [Redacted]
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OFFICE: NEBRASKA SERVICE CENTER

Date: MAR 05 2009

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

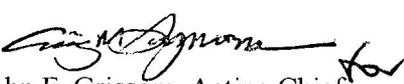
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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 was organized in the state of Florida and is engaged in the beverage manufacturing business. According to Part 6, Item 1 of the Form I-140, the petitioner seeks to employ the beneficiary as its CEO [Chief Executive Officer].¹ 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 on the basis of 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, the petitioner submits a brief, disputing both of the grounds that were cited in the director's decision, as well as additional documentation in support of its claims.

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

¹ The AAO notes that this information is inconsistent with subsequent claims made by the petitioner with regard to the beneficiary's proposed position title within the U.S. entity. The discrepancy will be fully addressed in the discussion to follow.

in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The primary issues in this proceeding call for an analysis of the beneficiary's job duties during her employment abroad as well as her proposed job duties in her prospective position with the U.S. petitioner.

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 October 30, 2006, which included job descriptions for the beneficiary's foreign and proposed positions. With regard to the beneficiary's employment abroad, the petitioner stated that the beneficiary was employed in the position of finance manager from February 1998 until October 2002 at which time the beneficiary entered the United States as a nonimmigrant. The petitioner further stated that the beneficiary's managerial and executive experience has enabled her to occupy the position of CEO with the U.S. entity.² As properly noted by the director, the petitioner provided no further information regarding the beneficiary's foreign employment.

With regard to the beneficiary's proposed employment with the U.S. entity, the petitioner provided a list of the beneficiary's responsibilities, which the director found to be overly broad and lacking in sufficient detail regarding specific daily job duties.³

In general, the petitioner claimed that the beneficiary would direct the personnel of the five departments that comprise its organizational hierarchy, which consists of 20 employees, while maintaining hiring and firing authority.

On July 26, 2007, the director issued a request for additional evidence (RFE) instructing the petitioner to provide, *inter alia*, specific lists of daily job duties that comprised the beneficiary's position abroad and those that would comprise his proposed position with the U.S. entity. The petitioner was further asked to assign a percentage of time to each of the enumerated tasks to establish the amount of time allotted to specific duties. The director cautioned the petitioner against lumping tasks together when assigning the percentages of time. Additionally, the petitioner was instructed to provide organizational charts for the foreign and U.S. entities illustrating the beneficiary's position with respect to her subordinates within each entity.

In response, the petitioner provided a letter dated August 29, 2007, listing the various documents appended thereto and responding to the director's various requests. With regard to the request for a description of the beneficiary's job duties abroad, the petitioner apportioned the beneficiary's time to the following: 15% to overseeing the purchasing manager and his subordinates; 20% to overseeing the account payables supervisor and his subordinates; 10% to overseeing the account receivable assistant; 25% to overseeing the banking assistant; 20% to compiling reports, preparing the weekly budget and the monthly, quarterly, and yearly financial statements; and 10% to meeting with the company's president.⁴ The petitioner also provided several organizational charts depicting the beneficiary's department with the foreign entity as well as the beneficiary's placement within the hierarchy of her department. The first chart shows that the finance department, which was headed by the beneficiary, was one of eight departments within the foreign entity's organization. The second chart depicts the beneficiary as the top-level employee within the finance department, her

² See FN 1.

³ As the director included the list of responsibilities in its entirety in the denial notice, the AAO need not repeat this information in the current decision.

⁴ See FN 3.

position being subordinate only to the foreign company's board of directors. As indicated in the beneficiary's job description, the chart shows that the beneficiary's subordinates included an account payables supervisor, a purchase manager, an account receivables assistant, and a banking assistant. It appears, that at least two of these subordinates were non-managerial, non-supervisory, and non-professional employees. The corresponding job description for the beneficiary's foreign employment shows that approximately 35% of her time was allotted to overseeing non-managerial, non-supervisory, and non-professional employees, thereby indicating that the supervisory tasks associated with overseeing these individuals should be classified as non-qualifying.

With regard to the beneficiary's proposed employment, the petitioner provided a separate letter dated August 28, 2007, which included the following duties and responsibilities:

- Prepare monthly financial reports, rolling forecasts and annual budgets for [the petitioner]. Audit [to ensure] that the bills are correctly posted in the accurate accounts by the accounting supervisor.
- Manage and supervise the preparation and analysis of the operating budget and meet with the production manager regarding costs and productivity.
- Provide financial and operational analysis as required by the CEO[.]
- Prepare weekly budget with the weekly collection and payables[.]
- Direct financial analysis.
- Establish and coordinate permanent programs aimed at cost reduction and maximizing income.
- Direct research to document the best available tools of financial analysis and she will establish goals and policies for [the petitioner] to achieve these goals.
- Plan, design, and conduct research to aid in interpretation of economic relationships within U[.]S[.] sales and Latin American sales.
- Prepare annual capital and operating budgets and amendments.
- Monitor and ensure compliance with those budgets and approving variations.
- Coordinate throw [sic] HHRR assistant the employee scheduling, payroll, overtime control, and the deterrence of absenteeism
- Supervises and manages the recruiting and interviewing process of candidates to fill vacant positions.
- Prepare the annual, quarterly and monthly financial [s]tatement reports for the CEO.

- Revise financial, accounting and internal auditing practices and activities.
- Recommend accounting policies to the accounting supervisor.
- Responsible for the accounting and auditing systems of [the petitioner].
- Interview, hire and train employee[s] for her department.
- Plan and prepare work schedules and assigns [sic] employees to specific duties.
- Prepare business plans.
- Responsible for training the financial staff and installing a sense of responsibility for compliance with [the petitioner]'s directives.
- Responsible for supervising various administrative and support functions including all banking operation[s] of [the petitioner].
- Revise tax report prepared by the [a]ccounting [s]upervisor
- Responsible for assuring that [the petitioner]'s essential policies relating to all phases of the accounting are carried out.

The petitioner also provided an organizational chart showing the beneficiary's role as finance manager at the top level within the hierarchy of the finance and accounting department. The chart shows an accounting supervisor, a human resource assistant, and an administrative assistant as the beneficiary's direct subordinates. The job descriptions and educational levels of the subordinates are also provided, showing that neither the human resource assistant nor the administrative assistant can be deemed as managerial, supervisory, or professional employees.

Lastly, the petitioner provided a brief percentage breakdown showing that the beneficiary's time is broken down as follows: 25% is allotted to overseeing the accounting supervisor; 15% is allotted to overseeing the account payables assistant; 10% is allotted to overseeing the account receivables assistant; 5% is allotted to overseeing the human resources assistant; 10% is allotted to overseeing the administrative assistant; 25% is allotted to negotiating prices with vendors, preparing monthly financial statements and weekly budgets; and updating the cost of goods sold; and 10% is allotted to meeting with the CEO to explain information contained in the reports.

On February 4, 2008, the director denied the petition, concluding that the petitioner failed to establish that the beneficiary's foreign and proposed positions can be deemed as qualifying within a managerial or executive capacity. With regard to the beneficiary's foreign employment, the director first noted that the beneficiary's claimed subordinates did not appear to be professional and further questioned the petitioner's initial claim stating that the beneficiary was the foreign entity's financial manager from February 1998 until October 2002. The director pointed out that the initial claim was vastly different from the explanation provided in response to the RFE, where the petitioner claimed that the beneficiary ultimately got promoted to the position of finance manager in January 2001 and

that she did not assume that position when she first commenced her employment for the foreign entity in 1998. The director further questioned how much of the beneficiary's time was devoted to her job during her last year of employment with the foreign entity in light of information indicating that the beneficiary was simultaneously attending a university during that time. Lastly, the director found that the beneficiary's job description does not establish that the beneficiary was employed abroad within a qualifying managerial or executive capacity.

With regard to the beneficiary's proposed position, the director focused primarily on an inconsistency between the petitioner's Form I-140 and accompanying supporting evidence and subsequent statements submitted in response to the RFE. More specifically, the prospective position was initially described as being that of a CEO, and the subsequent statements submitted in response to the RFE referred to the beneficiary's prospective position as being that of a finance manager, a position depicted as subordinate to the CEO. The director found that the position cited in response to the RFE constituted a material change from the position initially cited in the Form I-140 and ultimately concluded that the petitioner's failure to provide the requested additional information regarding the CEO position listed in the Form I-140 precluded U.S. Citizenship and Immigration Services (USCIS) from determining whether the beneficiary's prospective employment would be in a qualifying managerial or executive capacity.

On appeal, the petitioner submits an appellate brief dated April 1, 2008 addressing the director's various concerns. With regard to the beneficiary's employment abroad, the petitioner asserts that the beneficiary had the discretionary authority to open and close bank accounts and to sign contracts on the company's behalf. However, in examining the executive or managerial capacity of the beneficiary, 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 job description provided by the petitioner is deficient and is not in compliance with the director's request. Despite the director's specific request for the petitioner to list the beneficiary's job duties separately and to assign a time allotment to each individual duty, the petitioner assigned a percentage breakdown to general job responsibilities leaving the AAO to question how much time was spent performing specific job duties, many of which cannot be deemed as qualifying. As previously noted, the petitioner indicated that 35% of the beneficiary's time was purportedly spent supervising an account receivables assistant and a banking assistant. However, the petitioner has not established that either of these positions was managerial, supervisory, or professional.

The petitioner also stated that another 20% of the beneficiary's time was allotted to preparing various financial reports and working on the company's weekly budget. However, the petitioner did not establish these duties to be outside the realm of daily operational tasks. This assessment establishes that at least 55% (or a majority) of the beneficiary's time was potentially allotted to non-qualifying 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). Thus, without even addressing the remaining portions of the job description, which includes additional non-qualifying tasks, the AAO cannot conclude that the beneficiary spent the primary portion of her time within a qualifying managerial or executive capacity.

Additionally, the petitioner failed to address the director's valid concern regarding the discrepancy in the beneficiary's position title during her employment abroad. More specifically, the director properly raised the issue of the beneficiary's position and whether she was ready and able to take on a primarily managerial or executive role with the foreign organization at the age of 18 when she was still attending a university. Although the petitioner responded to this concern by stating that the beneficiary was promoted a number of times before she ultimately obtained the position of finance manager in 2001, this explanation is inconsistent with the original claim, which was that the beneficiary was the finance manager within the foreign entity from 1998 until her departure in 2002. 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). Consequently, the inconsistency in the beneficiary's position title inevitably leads the AAO to further question the job duties the beneficiary performed during her employment abroad. Accordingly, based on this initial finding, the AAO cannot approve the petitioner's Form I-140.

The petitioner is equally unsuccessful in establishing that the beneficiary's prospective U.S. employment would primarily involve job duties within a qualifying managerial or executive capacity. First, as properly pointed out by the director, the petitioner has perpetuated a significant inconsistency with regard to the actual position title offered to the beneficiary. Namely, while the petitioner initially stated in the Form I-140 that the beneficiary was being offered the position of CEO, the petitioner responded to the RFE by referring to the proffered job title as that of finance manager and provided a job description that is considerably different from the one provided initially in support of the petition. As previously stated, the petitioner must resolve any inconsistencies with competent objective evidence. *Id.* In the present matter, instead of providing such evidence, the petitioner merely claims that the beneficiary's proffered job title is that of CFO, or chief financial officer, rather than CEO, thereby suggesting that this was a harmless typographical error.

However, the AAO cannot deem the petitioner's explanation to be reasonable in light of the fact that the job description offered in support of the initial petition was entirely different from the one that accompanied the new job title in the petitioner's response to the RFE. Thus, the error was not merely a typographical one with regard to the job title. Rather, the inconsistency goes beyond the job title and includes a completely different set of duties and responsibilities. The petitioner has provided no explanation or documentation to resolve this discrepancy, which significantly undermines the petitioner's already questionable credibility. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Second, even if the AAO were to overlook the above inconsistency and consider the new job description provided in support of the position of CFO, the AAO cannot overlook the fact that the petitioner failed to comply with the director's express request for a list of specific job duties accompanied by the percentage of time that would be spent performing each task. Rather, the petitioner provided a list of duties and responsibilities unaccompanied by the required time allotments, thereby giving USCIS no information as to the time that would be spent performing the qualifying tasks versus the non-qualifying ones. When a job description includes both qualifying

and non-qualifying tasks, such as the job description offered in response to the RFE, information about the time to be devoted to specific tasks is crucial for the purpose of being able to assess whether the qualifying tasks would occupy the primary portion of the beneficiary's time. The petitioner's failure to provide this information also precludes the AAO from being able to conclude that the job duties associated with the position of CFO primarily involve tasks of a qualifying nature. Therefore, for this additional reason, 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 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

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.