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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: **MAY 18 2009**
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IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

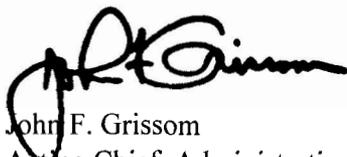
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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.¹ The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Texas corporation engaged in the sale of gifts, novelties, decorations, ornaments, and glassware. It seeks to employ the beneficiary as its vice president in charge of business development. 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 upon the finding that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On appeal, counsel disputes the director's conclusion and submits a brief in support of her 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

¹ The record shows that the petitioner previously filed another Form I-140 on behalf of the same beneficiary. The director denied that petition and the appeal that the petitioner subsequently filed was dismissed by the AAO on March 21, 2006. Although the AAO granted the petitioner's motion to reopen and reconsider its prior decision, the prior decision to dismiss the appeal was affirmed.

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 calls for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record 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 Part 5 No. 2 of the Form I-140 the petitioner claimed four employees at the time of filing and submitted documents as well as a letter dated June 20, 2007 in support of the petition. The letter contains the following list of the beneficiary's proposed job responsibilities:

- Responsible for the expansion of [the petitioning entity];
- Plan and develop the US investments, analyze market trends, set strategic planning goals and be responsible for the sales efforts;
- Responsible for operating the business in all material aspects including payments of all debts, payment of employee salaries, employee taxes, and keep the business and its activities in full compliance with all licensing regulations of [the petitioner] ;
- Responsible for formulating policies regarding sales and marketing;
- Responsible for hiring and firing personnel

On February 21, 2008, the director issued a request for additional evidence (RFE) informing the petitioner that the documentation originally submitted in support of the Form I-140 was insufficient to establish eligibility for the immigration benefit sought on behalf of the beneficiary. The director instructed the petitioner to provide the following documentation to assist U.S. Citizenship and Immigration Services (USCIS) in determining the beneficiary's employment capacity in the proposed position in the United States: 1) a detailed description of the beneficiary's proposed day-to-day duties; 2) the petitioner's organizational chart illustrating its staffing levels and the beneficiary's position with respect to others within the entity; 3) a statement detailing each employee's full- or part-time status with the petitioner, as well as each employee's educational level, date of hiring and termination (where applicable), and Forms W-2 for 2005, 2006, and 2007; and 4) the petitioner's quarterly wage statements for three quarters in 2007 and the fourth quarter of 2006.

In response, the petitioner provided a letter from counsel dated March 29, 2008 in which counsel explained that a copy of the original support letter from June 20, 2007 was being resubmitted as a means of responding to the director's request for a description of the beneficiary's duties. It is noted that no further information regarding the beneficiary's prospective employment was provided.

The petitioner also provided an organizational chart illustrating a four-tiered organization consisting of six employees. The beneficiary was shown as the employee directly subordinate to the company's president. The beneficiary's direct subordinates were shown as two store managers, each with a cashier/stocker as his/her direct subordinate. The petitioner also complied with the director's request for tax documents by providing the 2007 Forms W-2 that were issued to each of its employees as well as the requested quarterly wage statements. The AAO notes that, while the petitioner provided a Form W-2 for each of the employees listed in its organizational chart, with the exception of the beneficiary, who is not currently employed by the petitioner, it is clear, based on the petitioner's second quarterly wage report for 2007, that the petitioner had only three paid employees during the

time period when the Form I-140 was filed. Despite the director's request that each of the petitioner's quarterly wage reports be accompanied by the supplement that identifies each employee by name and social security number, this document was not provided for this highly relevant quarterly wage report.

In a decision dated June 27, 2008, the director denied the petition. The director reviewed the information provided in the petitioner's various tax and wage documents as well as the organizational structure illustrated in the petitioner's organizational chart. The director also considered the petitioner's claim that it now has four store locations and ultimately determined that, based on the limited staffing it had available at the time of filing, the petitioner would not be able to employ the beneficiary in a primarily managerial or executive capacity.

On appeal, counsel discusses the term "function manager," suggesting that it is applicable to the beneficiary's proposed U.S. employment. However, the record does not support counsel's assertion. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be 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).

In the present matter, it appears that counsel's reliance on the term "function manager" results from the petitioner's apparent lack of a sufficient support staff. In lieu of a detailed description of the beneficiary's proposed job duties, counsel makes numerous references to unpublished AAO decisions, which are not precedent case law and therefore are not binding on the AAO or any USCIS employees in the administration of the Act.

Counsel also repeats the list of proposed job responsibilities that were originally provided in the June 20, 2007 support letter, asserting that the qualifying nature of the beneficiary's prospective employment is clear, given the nature of the petitioner's business. Contrary to counsel's assertion, there is nothing "clear" about the beneficiary's employment capacity, regardless of the nature of the petitioner's business. The fact that the director issued an RFE and expressly requested a more detailed description of the beneficiary's prospective employment is a direct indication of the lack of clarity regarding the job duties the beneficiary would be expected to perform. While counsel cites precedent case law establishing the significance of a specific list of job duties, she clearly fails to apply this precedent to her own client by encouraging the petitioner to comply with the director's request for a detailed job description, which 8 C.F.R. § 204.5(j)(5) also requires. See *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 beneficiary's job description is comprised entirely of broad job responsibilities and non-qualifying tasks. For instance, the first item mentioned is that the beneficiary is responsible for expanding the petitioning entity. However, the petitioner fails to elaborate on the specific tasks the beneficiary would undertake to meet this generalized business objective. Similarly, the petitioner fails to specify actual tasks associated with planning and developing investments or setting sales goals. Although the petitioner provides more insight into the beneficiary's administrative tasks, claiming that the beneficiary would pay all debt, employee salaries, and taxes, these operational tasks are non-qualifying. With regard to the beneficiary's formulation of sales and marketing policies, the petitioner has not provided examples of the types of policies the beneficiary would establish, nor is there any clarification as to who within the petitioner's hierarchy would carry out marketing-related job duties, as no marketing personnel were identified on the organizational chart at the time the petition was filed. That being said, while the AAO concedes that the beneficiary may be charged with hiring and firing all personnel, the petitioner's staffing size at the time of filing had not reached a level such that hiring and firing personnel could realistically consume a significant portion of the beneficiary's time. As the petitioner chose not to supplement the record with a more detailed description of the beneficiary's job duties, as requested in the RFE, the decision in the present matter will be based on the job description that was originally provided.

Counsel further contends that USCIS placed undue emphasis on the size of the U.S. business entity, overlooking the petitioner's ability to function efficiently with a small support staff. Counsel's contention, however, is entirely without merit. 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 acted appropriately in focusing his attention, at least in part, on the petitioner's staffing; as this factor is directly reflective of the petitioner's capability to relieve the beneficiary of having to primarily perform non-qualifying tasks. In the present matter, the petitioner's 2007 quarterly wage report for the second quarter shows that the petitioner had a total of three employees. As the petitioner failed to provide the requested supplement identifying the specific employees, the AAO is unable to determine which positions were actually filled. Regardless, the fact that the petitioner had only three employees at the time it filed the Form I-140 raises valid questions as to how the petitioner plans to operate multiple retail locations with only three employees, while employing the beneficiary in a qualifying managerial or executive capacity. The petitioner's claim that the beneficiary would primarily perform qualifying tasks is simply inconsistent with its level of organizational complexity and stage of development at the time of filing. This inconsistency, coupled with the petitioner's failure to explain exactly what job duties the beneficiary would perform under an approved petition, clearly support the director's determination that this petition cannot be approved.

Furthermore, while not addressed in the director's decision, the record indicates that the petitioner has not met the requirements specified in 8 C.F.R. § 204.5(j)(3)(i)(A), which states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive

position for at least one out of the three years prior to filing the Form I-140.² In the present matter, the petition was filed on June 21, 2007. The petitioner stated on the Form I-140 that the beneficiary has been in the United States since the year 2000. Therefore, she could not have been employed abroad during the requisite time period.

Additionally, even if the time period of the employment abroad were not an issue in the present matter, the petitioner has failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. Although the director issued an RFE expressly instructing the petitioner to provide a detailed analysis of the beneficiary's daily activities during her employment abroad, the petitioner failed to provide the requested information and instead merely resubmitted a copy of the June 20, 2007 support letter, which was as deficient in its lack of specific information about the beneficiary's tasks as the description of the beneficiary's proposed employment. Therefore, based on the above analysis, the AAO cannot conclude that the beneficiary was employed abroad during the requisite time period in a qualifying managerial or executive capacity.

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.

² The regulation at 8 C.F.R. § 204.5(j)(3)(i)(B) states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to her entry to the United States as a nonimmigrant to work for the same employer. Although the beneficiary is currently in the United States and claims to be performing services for the petitioner, she cannot be deemed as someone who entered the United States as a nonimmigrant for the purpose of being employed by the same employer. As such, the provisions of 8 C.F.R. § 204.5(j)(3)(i)(A) apply to the facts in the present matter.