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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**

[Redacted]

B4

FILE: [Redacted] OFFICE: TEXAS SERVICE CENTER Date: DEC 06 2010

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:
Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Jerry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Texas corporation that 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 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 conclusion and asserts that the underlying observations are erroneous. Counsel submits an appellate brief in support of his assertions.

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 provided sufficient evidence to establish that it would employ the beneficiary 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 beneficiary, on behalf of the petitioner, submitted an affidavit executed on May 19, 2008 in which she provided the following description of her proposed employment with the petitioning U.S. entity:

As [p]resident of the company, I represent [the petitioner]'s financial interests and oversee the business. I am responsible for the overall management of the company, including profit and loss accountability. In addition, I oversee product development, estimate inventory requirements, and project sales volumes based upon market and economic conditions.

I also establish, administer, and implement policies related to merchandising, purchase and sale contracts, marketing and sales, and business development. I review and analyze business reports and financial statements to determine the company's progress toward the goals I have established and seek to minimize any obstacles in the way of achieving those goals. I direct

and adjust financial plans to maximize returns and to increase overall productivity. I am responsible for solving complex business development and financial problems, and thus also arrange for legal and accounting services on behalf of the company. Lastly, I recruit and hire employees as business needs demand, and review the work and productivity of the workers currently in my employ.

The beneficiary also stated that the petitioner's staffing includes the beneficiary and two other employees—the beneficiary's husband, who has assumed the position of general manager, and a contracted sales and marketing manager, who was tasked with managing a new division and a team of sales representatives. The beneficiary stated that the general manager was working for the petitioner without compensation. The petitioner also provided its organizational chart, which depicted the beneficiary at the top-most position. The chart also identifies a general manager overseeing a sales and marketing manager, a warehouse staff, an administrative assistant, and designers. With the exception of the sales and marketing manager, who was specifically named, the chart contains no information as to who was providing the warehouse, administrative, and designing services.¹

On January 15, 2009, the director issued a request for evidence (RFE) instructing the petitioner to provide the names of its employees and list their respective position titles.

The beneficiary responded on behalf of the petitioner, providing a letter dated January 23, 2009, which stated that at the time of filing, the petitioner's staff included the beneficiary, her husband as general manager, and [REDACTED] as sales and marketing manager. The beneficiary claimed that since the filing of the petition, an additional employee had been hired to provide product design services. She further stated that [REDACTED] had left the company since the petition was filed and that as a result, the general manager was temporarily assuming the duties of the sales and marketing manager until the petitioner can hire a new employee to fill the vacant position.

On May 19, 2009, the director issued a decision denying the petition. The director observed that the petitioner had a staff of three employees and concluded that the company was not adequately staffed to relieve the beneficiary from having to primarily perform non-qualifying tasks. As such, the director concluded that the petitioner failed to establish that the beneficiary would be employed in a qualifying executive capacity, but rather that she would spend the primary portion of her time carrying out the petitioner's non-qualifying, daily operational tasks.

On appeal, counsel challenges the director's decision, pointing out several typographical errors in the director's decision. Specifically, counsel noted the director's reference to the instant immigrant petition as a nonimmigrant petition and observed that the director used the incorrect male pronoun in reference to the female beneficiary. The director's errors, while regrettable, are not germane to the ground cited as the basis for denial and thus are not sufficient to warrant either remanding this matter back to the director or sustaining the appeal and approving the petition. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988).

¹ It is noted that, while [REDACTED] was identified on the chart as 45% owner of the petitioner, there is no indication that he takes or would take an active role in performing services for the company.

Counsel also notes that while the director did not include the statutory definition of managerial capacity in his decision, he nevertheless made an adverse finding based on his consideration of the definition despite the petitioner's claim that the beneficiary's proposed position would be within an executive capacity. Although counsel properly points out that the statutory definition for managerial capacity was not included in the decision, the AAO finds this to be the result of an unintentional oversight on the director's part rather than a purposeful omission. Counsel will find that U.S. Citizenship and Immigration Services (USICS) has had a long-standing history of considering the proposed employment under both statutory definitions, regardless of the petitioner's actual claim. This is done for the benefit, not to the detriment, of the petitioner. This way, even if the petitioner does not select the correct statutory definition, such harmless error is not dispositive, so long as the petitioner provides enough evidence to establish that the proposed employment meets the criteria of at least one of the two statutory definitions.

In reviewing the director's decision, it is clear that the director incorporated aspects of both statutory definitions in his discussion. On the one hand, the director concluded that the petitioner failed to establish that the beneficiary directs the management of an organization. However, the director also considered whether or not the beneficiary would oversee managerial, professional, or supervisory employees, which is a requirement under the definition for managerial capacity. Thus, the record does not indicate that the director failed to consider whether the proposed employment meets the definition of executive capacity.

Additionally, the AAO notes that, regardless of whether the petitioner is claiming that the proposed employment fits the definition of managerial capacity or the definition of executive capacity, the petitioner's organizational hierarchy and staffing can and should be considered. Merely claiming that the beneficiary would be employed in an executive capacity is not sufficient; the petitioner must provide supporting evidence to establish who is available, i.e., in-house staff or outside contractors, to carry out the daily operational tasks of the organization. If the petitioner employs no one but the beneficiary, the only logical conclusion that can be made is that the beneficiary performs both qualifying and non-qualifying tasks in order to ensure that the organization continues to function properly. In the present matter, the beneficiary stated that the only paid employee other than herself was a sales and marketing manager who has since left the organization. While the beneficiary claims that the general manager was able to assume various non-qualifying tasks of the organization, this individual is not compensated for any services, thus making it impossible to determine whether he is a bona fide employee of the petitioning entity. 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)).

The AAO finds that the petitioner has provided insufficient evidence to establish that [REDACTED] administrative and operational services for the petitioning entity. As such, the claim that the petitioner has adequate human resources to relieve the beneficiary from having to primarily perform non-qualifying job duties becomes more dubious. Although the beneficiary indicated that an additional employee was retained after the petition was filed, eligibility must be established 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). Thus, any changes in the organizational hierarchy of the petitioning entity that took place after the petition was filed are irrelevant for the purpose of determining the petitioner's eligibility at the time of filing.

In examining the executive or managerial capacity of the beneficiary, USCIS will look to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the instant matter, the beneficiary's job description is filled with general job responsibilities that fail to explain the extent of the beneficiary's daily involvement in qualifying and non-qualifying tasks. For instance, in the initial support affidavit, the beneficiary stated that she is held accountable for the company's profits and losses and that she establishes and implements policies regarding merchandising, contracts, sales and marketing, and business development. However, the beneficiary did not expressly state what specific job duties are associated with being accountable for the petitioner's profits and losses or what actual tasks are involved in establishing and implementing policies. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. Published case law also recognizes the significance of a detailed job description, finding that the actual duties themselves will 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). Without a clear and detailed job description conveying a meaningful understanding of the beneficiary's specific daily tasks, the AAO cannot conclude that the primary portion of the beneficiary's time would be allocated to the performance of managerial- or executive-level tasks.

Additionally, the beneficiary stated that she oversees product development, estimates inventory requirements, and projects sales volumes based on market and economic conditions. However, there is no information in the record indicating who actually develops the petitioner's products, who takes charge of the inventory on a daily basis, and who provides the beneficiary with the market research that is necessary to project sales volumes. There is no evidence in the record to establish that the beneficiary is relieved from having to perform these underlying non-qualifying tasks. While the AAO acknowledges that the beneficiary is not required to allocate 100% of her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to her proposed position. 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).

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* Here, the petitioner has not established how the beneficiary would be relieved of the day-to-day operations of the petitioner's business such that she could primarily focus on performing managerial or executive duties. Additionally, as previously discussed, the AAO finds that the petitioner failed to provide a detailed description of the beneficiary's proposed job duties. Accordingly, in light of these findings, the AAO concludes that the petitioner has failed

to establish that the beneficiary would be employed in a primarily managerial or executive capacity and for this reason the instant petition cannot be approved.

Furthermore, while not addressed in the director's decision, the AAO finds that the petitioner failed to establish that the beneficiary was employed abroad for one year during the relevant three-year period. The regulation at 8 C.F.R. § 204.5(j)(3)(i) states, in part, the following:

- A) If the alien is outside the United States, in the three years preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
- B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity[.]

The clear language of the statute indicates that the relevant three year period is that "preceding the time of the alien's application for classification and admission into the United States under this subparagraph." Section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C). The statute, however, is silent with regard to aliens who have already been admitted to the United States in a nonimmigrant classification. In promulgating the regulations on section 203(b)(1)(C) of the Act, the legacy Immigration and Naturalization Service (INS) concluded that it was not the intent of Congress to exclude L-1A multinational managers or executives who had already been transferred to the United States from this employment-based immigrant classification. Specifically, INS stated the following with regard to the interpretation of the Congressional intent behind the relevant statutory provisions:

The Service does not feel that Congress intended that nonimmigrant managers or executives who have already been transferred to the United States should be excluded from this classification. Therefore, the regulation provides that an alien who has been a manager or executive for one year overseas, during the three years preceding admission as a nonimmigrant manager or executive for a qualifying entity, would qualify.

56 Fed. Reg. 30703, 30705 (July 5, 1991).

In other words, for those aliens who are currently in the United States in L-1A status, the relevant time period mentioned in the statute should be the three-year period preceding the time of the alien's application and admission as (or change of status to) an L-1A multinational managerial or executive classification.

In the instant matter, the beneficiary explained in her initial support affidavit that she first entered the United States in 1999 as a student in the F-1 nonimmigrant visa category. The beneficiary stated that she was able to maintain her F-1 status after graduation by being awarded optional practical training, which led to the beneficiary's employment with [REDACTED]. The beneficiary claimed that she subsequently obtained employment with [REDACTED] at which time that employer filed an H-1B petition on the beneficiary's behalf. The beneficiary stated that her employment with the U.S. petitioner did not

commence until February 2005 when she was approved for a change of status to that of an E-2 nonimmigrant. Thus the beneficiary did not enter the United States for the purpose of "working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas." Accordingly, the beneficiary does not fit the criterion described in 8 C.F.R. § 204.5(j)(3)(i)(B). She also does not fit the criterion described in 8 C.F.R. § 204.5(j)(3)(i)(A) as she is not outside the United States and has been here since 1999. Therefore, she was not employed abroad within the three years preceding the filing of the petition on June 13, 2008.

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis). Based on the additional ground of ineligibility discussed above, this petition cannot be approved.

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.