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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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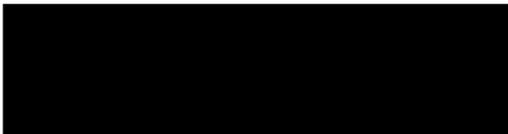
FILE: [REDACTED] OFFICE: TEXAS SERVICE CENTER
SRC 07 266 54298

Date: FEB 01 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:



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).

Perry 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 Florida 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 found that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity and denied the Form I-140 on that basis. On appeal, counsel disputes the director's finding and submits a brief with additional evidence.

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 established that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the Form I-140, the beneficiary, on behalf of the petitioner, submitted a letter dated May 30, 2007, stating that the petitioning entity had six employees at the time of filing. The same information was provided in Part 5, No. 2 of the petitioner's Form I-140. The support letter offered the following percentage breakdown of the beneficiary's proposed U.S. employment:

40% **Supervise managers and supervisors responsible for planning:** [the beneficiary] will supervise managers, making important decisions, and report

to the board of directors, far away from the day-to-day duties. This is one of the most important responsibilities as the President. He will supervise all the managers and supervisors in general activities; he will be responsible for guide[ing] and direct[ing] the managers or professionals who work for the company, to the achievement of our goals, in order to get excellent results in the success of the company such as the statistics, budget proposals, administrative results to compete and exceed other businesses in customer service, quality, and total satisfaction of our members and the general state and governmental institutions.

Directly supervise the General Manager: This manager will be the closest manager to the president. The president will give the instructions and directions directly to the General Manager who, together with him, will be in charge of the direction of all departments. They will work together in the supervision of all the business develops [sic] and financial activities that our company involves [sic] in order to achieve our goals.

Supervise Flight Scheduling Manager: [the beneficiary] will give instructions to the Flight Scheduling Manager. He will supervise the department in managing all aspects of the operational activities while providing the tools necessary to deliver high levels of service to their clientele. He will control the manager's performance; he also will develop and establish the logistic[s] in the domestic and international flights [sic] arrangements.

Directly supervise the Operational Manager: [the beneficiary] will apply all his professional skills in order to guide and advice [sic] this manager in the development of job assignments in the operational area, by helping overseeing and developing the coordination of operational activities within the region.

Responsible for supervising Administrative Manager: Supervise [the] administrative manager of the company planned [sic] and supervise the use of materials and [h]uman resources. He will give the instructions and directions to the Administrative Manager who will be responsible of [sic] executing the General Manager[s] directions of salaries approval, promotions, and demotions, selecting, hiring and reducing personnel under high standard skills [sic]. Control and supervise the sales numbers, sales projects, statistics and proposals to compete and exceed business in customer service, quality values, costs, and total satisfaction.

10% **Responsible for managing all personnel and staff:** [the beneficiary] will act as the head of the corporation. Every activity has to pass by his hands before being approved. He also will be responsible for the approval of salaries, promotions, removals, selecting, hiring, and reducing personnel under high standard skills.

- 10% **Directly [sic] Management and Supervision of the quality of job assignments:** [the beneficiary] will guide and advice [sic] the managers and supervisors in the development of job assignments and approve excellent quality results
- 10% **Management and supervision of all financing reports:** [the beneficiary] will direct and guide the financial department in all of its activities, by offering his professional advice for improving our sales. Some of the activities that he supervises are the costs, budget proposals to customers, the accountant projects evolution, monthly revenues, monthly office expenses, and functions in financing and accounting results, projects and reviews in order to provide higher customer satisfaction.
- 10% **Be responsible for controlling the organizational site of the business:** [the beneficiary] will be in charge of the Miami [o]ffice premises wherein he will be the managerial guide to the success of all our activities including the supervision of the corporate organization and the well flowing of the different departments of our company.
- 5% **Redirect and apply new standard policies:** [the beneficiary] will be an essential part in the renewal of the policies of our company and he will also apply all his executive knowledge in order to find the perfect way to reach our goals by providing the right tools of confidence, career advancement opportunities and appropriate training to the Miami personnel in charge.
- 10% **Present monthly potential possibilities to the Board of Directors:** [the beneficiary] will prepare some presentations to the board of directors in order to make a brief review of all our advances and goals . . . and all the new work proposals of new businesses that can be developed
- 5% **Supervise monthly sales figures and personnel:** [the beneficiary] will be aware of all the improvements as well as all the personnel of the company is [sic] involved in, until assignments are finalized and successfully closed in a quality manner.

The petitioner also stated that 85% of the beneficiary's time would be spent on "supervision and direction managerial control duties" and another 15% would be spent on "managerial supervision duties." No clear distinction was made as to which job duties apply to either of those categories. Lastly, the petitioner claimed to have seven "direct and indirect employees," including four managers as the direct employees, an accountant and an attorney as the two professional employees, and one indirect employee (whose job title was not disclosed) to assist the managers. The beneficiary repeatedly stated that he planned to be removed from the petitioner's day-to-day activities, which would be taken on by the subordinate employees. The supporting evidence also included the petitioner's organizational chart, which depicted the beneficiary at the top of the organizational hierarchy with the general manager as his direct subordinate along with an accountant and an attorney as the peripheral employees hired on an as needed basis. The chart indicates that the

general manager oversees the work of the flight scheduling manager and his assistant, an administrative manager, and an operational manager.

On April 22, 2008, the director issued a notice requesting additional evidence (RFE), including 2007 Forms W-2 for the petitioner's employees as evidence of its current staffing levels as well as a detailed breakdown of the job duties and responsibilities for each of the petitioner's paid employees.

In response, the beneficiary provided a letter dated May 19, 2008 in which he stated that he supervises seven employees total, including four managerial employees at the petitioning company and three managerial employees at a related company. The beneficiary restated the prior claim that 85% of his time would be spent on managerial control duties and another 15% would be spent on managerial supervision duties. Again, however, no clear distinction was made as to the specific job duties that fall under either category. Also submitted were a number of the petitioner's quarterly federal tax returns, including the quarterly return for the 2007 third quarter during which the petitioner's Form I-140 was filed. It is noted that according to this document, the petitioner had only two employees during the relevant time period.

On July 24, 2008, the director issued a decision denying the petitioner's Form I-140. The director noted that while the beneficiary claimed six employees under his direct or indirect control, no evidence was provided to establish the wages being paid to the claimed employees. The director also observed the petitioner's failure to comply with the request for employee Form W-2 statements for 2007 and, after reviewing the petitioner's personal tax return for 2007 and comparing that with the figures in the petitioner's 2007 corporate tax return, concluded that the petitioner failed to provide corroborating evidence to show that any of the beneficiary's claimed subordinates were paid a bona fide wage at the time of filing. The director went on to discuss the beneficiary's deficient job description, which focused heavily on personnel management but failed to provide specific information about any qualifying-level tasks.

On appeal, the beneficiary provides a letter dated August 22, 2008 in which he discusses his key role as the founder and president of the U.S. entity. Counsel argues that in issuing adverse findings regarding the lack of a full-time support staff, the director failed to take into account that what may have appeared as part-time salaries for support personnel was really a reflection of only a portion of the salaries paid in 2007. Counsel explains that this change was put into place when a decision was made to "give more operative power to the petitioner." However, counsel fails to fully explain what is meant by "operative power" or what the petitioner's status of operation was prior to the alleged alteration.

With regard to counsel's claim that the petitioner's employees were paid full-time salaries during only a portion of 2007, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In the present matter, counsel's claim is not supported by corroborating evidence establishing exactly when the alleged change went into effect and whether it took place prior to the filing of the Form I-140. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971), establishing that a petitioner must establish eligibility at the time of filing. Therefore, the petitioner must establish that its staffing at the time of filing was sufficient to support the beneficiary in a qualifying managerial or executive position. It appears that the director's

purpose in discussing the wages of the support staff was to point out that a limited part-time staff may not be sufficient to relieve the beneficiary from having to primarily perform non-qualifying tasks. That being said, the AAO finds it noteworthy to point out that the petitioner's third quarterly federal tax return for 2007 shows that only two employees were paid wages during the time period in which the filing of the Form I-140 took place. Therefore, it appears that there is a significant inconsistency between the petitioner's claim in the I-140 itself, which indicates that six people were employed at the time of filing, the petitioner's response to the RFE in which the beneficiary claimed to have supervised seven employees at the time of filing, and the quarterly tax return indicating that only two employees were employed at the time of filing. 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). The fact that the petitioner failed to provide evidence resolving this inconsistency and establishing exactly whom it employed at the time of filing gives rise to doubt as to whether the petitioner was adequately staffed at the time of filing such that it was able to relieve the beneficiary from having to primarily perform non-qualifying tasks. It is noted that both statute and case law have clearly established 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).

Additionally, counsel asserts that the director failed to take into account all of the employees working for the petitioner's U.S. affiliate, arguing that the personnel employed by [REDACTED] is also under the beneficiary's supervision. Counsel's argument, however, is unpersuasive and fails to properly focus on the petitioner and the beneficiary's proffered position with the petitioning entity. While the beneficiary may supervise employees who work for an affiliated entity, his supervisory duties for any entity other than the petitioner are not part of the position being offered in the Form I-140 that is currently being adjudicated. Therefore, the beneficiary's possible job duties with the other entity are irrelevant for the purpose of determining the beneficiary's eligibility in the present matter.

Lastly, when examining the executive or managerial capacity of the beneficiary, the AAO 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, counsel failed to address the director's valid criticism of the beneficiary's deficient job description that was provided by the petitioner in support of the Form I-140. The director properly focused on the generalities that fail to reveal what actual tasks the beneficiary would be performing in his proposed position. While the petitioner generally indicates that the beneficiary's discretionary authority fits the definition of managerial or executive capacity, these definitions are meant to serve only as guidelines to be applied to a specific list of duties, as it is the actual duties themselves that 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). Here, the petitioner provides a lengthy discussion where the same idea, i.e., the beneficiary's role as supervisor over employees and company policies, is repeatedly restated without any context establishing how these generalities apply to the petitioner's air transportation services business. For example, the petitioner previously stated that 40% of the beneficiary's time would be devoted to supervising the following employees:

managers and supervisors, the general manager, the flight schedule manager, the operational manager, and the administrative manager. The only point that the petitioner manages to make with any degree of clarity is that the beneficiary will have discretion as to the tasks these managers would perform. However, it is entirely unclear what specific daily tasks the beneficiary would perform in his supervisory role. The remaining portion of the job description is equally devoid of substance as it again focuses on the beneficiary's supervisory role without any further explanation as to the means by which the supervision would be implemented.

In summary, the record lacks adequate documentation establishing whom the petitioner employed at the time the Form I-140 was filed or what specific job duties the beneficiary would perform within the organizational hierarchy that was in place at the time of such filing. Without these crucial elements, the AAO finds that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity at the time the Form I-140 was filed.

Furthermore, the record does not support a finding of eligibility based on at least one additional ground that was not previously addressed in the director's decision. Namely, 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 his entry to the United States as a nonimmigrant to work for the same employer. In the instant matter, the record is equally lacking in sufficient information about the beneficiary's job duties abroad as it is regarding the beneficiary's proposed position with the U.S. entity. Thus, the AAO cannot conclude with any degree of certainty that the beneficiary was employed abroad 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.