

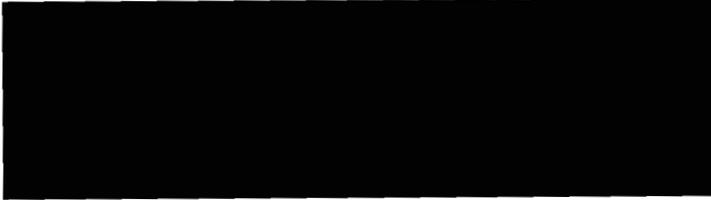
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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FILE [REDACTED] OFFICE: TEXAS SERVICE CENTER
SRC 06 077 51328

Date: FEB 16 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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The petitioner appealed the matter to the Administrative Appeals Office (AAO), where the appeal was dismissed. The matter is now before the AAO on motion to reopen and reconsider. The motion will be granted. However, the underlying decision dismissing the appeal will be affirmed.

The petitioner is a Texas corporation engaged in the business of providing security guard services. It seeks to employ the beneficiary as its training and development manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition based on the conclusion that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's employer abroad. The AAO concurred with the director's conclusion, but withdrew the director's underlying analysis, which the AAO determined had been based on an incorrect definition of the term "affiliate." *See* 8 C.F.R. § 204.5(j)(2).

The AAO further determined that the petitioner failed to establish that 1) the beneficiary was employed abroad in a qualifying managerial or executive capacity; 2) the beneficiary's proposed position with the U.S. entity would be in a qualifying managerial or executive capacity; and 3) the petitioner continues to operate as a multinational entity, which conducts business in two or more countries through a subsidiary or an affiliate, one of which is located in the United States.

On motion, the petitioner has submitted new evidence that addresses and overcomes the AAO's adverse findings with regard to the petitioner's qualifying relationship. Specifically, the new evidence is sufficient to explain and resolve what were perceived as inconsistencies concerning the petitioner's ownership and issuance of stock. The petitioner has also submitted sufficient evidence to establish that it has maintained its status as a multinational entity, which is an entity that, through its affiliate or subsidiary, conducts business in two or more countries, one of which is the United States. Therefore, the AAO finds that the petitioner has overcome the original basis for denial and has presented sufficient evidence to establish that it continues to meet the definition of multinational entity, an issue that the AAO introduced as a basis for denial in addition to the original basis.

Accordingly, this decision will focus on the two remaining issues cited in the AAO's decision. Specifically, the AAO will determine whether the petitioner has established that the beneficiary was employed abroad and whether he would be employed in his proposed position in a qualifying managerial or executive capacity.

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.

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.

The beneficiary's foreign employment was initially described in a letter from the president of the foreign entity dated June 14, 2005 as follows:

Please be advised that [the beneficiary] has been working for our Company [REDACTED] [REDACTED] since 1999 to The present day. [The beneficiary] has hold the position of [REDACTED]. In the position of [REDACTED] his duties included: supervision and control of bank accounts; develop and implement policies and procedures for company operations; supervision of the work performed by the security supervisors and investigator; training and handling of security supervisor; supervision of the performance of drug test analysis to determine which officers will be dismissed; and negotiation of new contracts with new clients.

With regard to the beneficiary's proposed employment in the United States, the petitioner provided only a brief statement at Part 5, No. 3 of the Form I-140, which states that the beneficiary: "Directs and manages the business operations of the company and supervision supervision [*sic*] of employees."

On March 17, 2006, the director issued a request for additional evidence (RFE) in which the petitioner was instructed to provide evidence establishing 1) that the beneficiary was employed abroad during the requisite time period, 2) that the beneficiary's employment during the requisite period was within a qualifying managerial or executive capacity, and 3) that the beneficiary's proposed employment with the U.S. entity would also be within a qualifying managerial or executive capacity. The petitioner was asked to provide a list of the beneficiary's daily job duties describing his foreign and proposed positions. With regard to the foreign position, the director instructed the petitioner to indicate the number of employees the beneficiary supervised as well as their positions and educational levels. With regard to the beneficiary's proposed position in the United States, the director asked the petitioner to supplement the list of daily job duties with the percentage of time that would be devoted to each duty.

In response, the petitioner provided the foreign entity's organizational chart containing the names and position titles of the foreign entity's employees. It is noted, however, that while all position titles were listed in Spanish, the foreign entity's organizational chart was not accompanied by the certified English language translation required by 8 C.F.R. § 103.2(b)(3). It is also noted that the petitioner did not provide the requested list of the daily job duties the beneficiary performed during his employment abroad. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

With regard to the beneficiary's proposed position, the petitioner provided a letter dated June 8, 2006 from the company's president, who provided the following description of the prospective employment:

Since [the beneficiary] assumed his position as [REDACTED] for Dallas Region, He has single handily [*sic*] reduced overtime by 4.5% which resulted in the saving of over \$11,000.00 per year. [The beneficiary] has also reduced officer turn over [*sic*] by implementing officer recognition programs

[The beneficiary's] contribution in percentage to the corporation is based on 19% of the overall service delivered. His duties are distributed amongst Operations 6%, Payroll Input 5%, Recruitment 3%, Supervision 3%, and Sales 2%. These percentages represent Dallas as 19% percent of the corporation operations.

The petitioner also provided its own organizational chart, which shows the beneficiary in two positions. The chart depicts the beneficiary at the top of the organization as one of its two shareholders and in the subordinate position as the company's legal representative. While the petitioner indicated at Part 6, No. 1 of the Form I-140 petition that the beneficiary's position title in his proposed position would be that of training and development manager, the petitioner's organizational chart identified the beneficiary as a stockholder and as the petitioner's legal representative. There is no indication that he has or would occupy the position of training and development manager. The beneficiary's direct subordinate is shown as "General Management," who is shown as overseeing the accounting department, the department of trade and sales, the department of operations, and the department of justice. The chart also includes a department of human resources and a department of quality control. However, it is unclear where within the petitioner's hierarchy these two departments are located. As such, it is unclear whether these two departments fall under the purview of the general management's supervision or whether they fall under the supervision of the accounting or trade and sales departments.

Although the director's denial dated August 15, 2006 did not issue any findings with regard to the beneficiary's employment capacity in his foreign and proposed positions, precedent case law has established that 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). Thus, the AAO was justified in noting the additional grounds for ineligibility, despite the director's apparent oversight.

The AAO notes that the director's RFE was clear in instructing the petitioner to provide a list of the beneficiary's daily job duties with regard to his foreign and proposed employment. While counsel opposes the AAO's findings, claiming that the AAO has undermined its role as an impartial party in this proceeding, the fact that the petitioner so obviously disregarded the director's reasonable request for relevant information strongly indicates that the AAO's findings were not only justified, but necessary, as the petitioner clearly failed to establish its eligibility. Contrary to counsel's assertions, the AAO's findings, which are entirely supported by the record, showed an awareness of the eligibility requirements and a thorough review of all supporting documentation. Counsel cannot argue that the AAO is not impartial simply because it conducted a thorough review of the record, which failed to support a finding favorable to the petitioner. The very purpose of conducting a *de novo* review is to determine whether an adverse decision, on any basis, was warranted.

Counsel's arguments appear to stem primarily from his objections to the AAO's proper adherence to the regulatory requirements for translations of foreign documents and the AAO's comprehensive review of the record on a *de novo* basis, which, as discussed above, is supported by precedent case law. In the present matter, at the time of the appellate decision, the record was severely deficient. It is the AAO's duty to point out any deficiencies and to render a decision accordingly. The AAO is prepared to withdraw its own prior findings based upon new evidence that has been properly submitted on motion.

As previously determined, the petitioner has failed to provide the beneficiary's list of daily job duties associated with his position abroad, despite the RFE's express request for such information. Although the petitioner now provides a supplemental description and percentage breakdown for the beneficiary's employment abroad, the petitioner was previously put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. As the petitioner failed to submit the requested evidence in response to the RFE, the AAO will not consider the supplemental information for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighbena*, 19 I&N Dec. 533 (BIA 1988). Accordingly, the AAO maintains its earlier finding that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity as required by 8 C.F.R. § 204.5(j)(3)(i)(B).

With regard to the beneficiary's proposed employment with the U.S. entity, while the petitioner did provide some information regarding the beneficiary's proposed employment in response to the director's RFE, it primarily ignored the RFE's instruction for a list of the beneficiary's proposed daily job duties accompanied by the percentage of time that would be devoted to each task. Rather than clearly enumerating each of the beneficiary's proposed job duties and indicating each duty's time allotment, the petitioner provided a brief statement which did not list any specific job duties. The regulation at 8 C.F.R. § 204.5(j)(5) clearly instructs the petitioner to provide a valid job offer in which the beneficiary's prospective job duties are clearly described. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient, as the regulations require a detailed description of the beneficiary's daily job duties. Case law precedent reiterates the regulatory requirement for a detailed job description, establishing 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).

On motion, the petitioner provides a supplemental job description with a percentage breakdown, which indicates how the beneficiary's time would be distributed. The petitioner stated that 25% of the beneficiary's time would be spent supervising and training subordinate managers, security supervisors, and security officers. This claim, however, is not supported by the petitioner's organizational chart, which was submitted earlier in response to the RFE. The chart showed that the beneficiary's only immediate subordinate is a general manager. The chart made no indication that the beneficiary would have other subordinates and in fact actually indicated that the general manager, a position that was not assigned to the beneficiary, would supervise various departments that comprise the petitioning entity. 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).

Although the petitioner further indicated that the beneficiary would spend 27% of his time "Serving at the highest level of the organization behind the President and Vice President," the petitioner failed to list any of the job duties that explain how the beneficiary would serve at this level within the organization. Furthermore,

the AAO notes that the organizational chart that was submitted in response to the RFE did not list a president or vice president as being part of the petitioner's personnel composition, thus giving rise to further doubt the reliability of the information provided in the organizational chart. As stated above and in the AAO's earlier decision, the petitioner is expected to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

The petitioner further stated that 20% of the beneficiary's time would be spent exercising discretion over daily logistics and operations; another 15% of his time would be spent planning, developing, and recommending policies and procedures regarding security personnel; and the remaining 13% of his time would be spent establishing monetary compensation and promotion potential of the security personnel. None of these statements provide a description of the actual job duties the beneficiary would perform on a daily basis. The petitioner provided no description of what is involved in "logistics and operations." The petitioner has also failed to provide any specifics as to the types of policies and procedures the beneficiary plans, develops, and recommends; nor did the petitioner explain the specific actions the beneficiary takes in his effort to plan, develop, and recommend policies and procedures. Lastly, while the petitioner states that 13% of the beneficiary's time would be attributed to establishing employee salaries and promotions, it is unclear how this responsibility qualifies as a daily job duty rather than something the beneficiary would engage in on an intermittent or as-needed basis.

In summary, even though the AAO has given full consideration to the supplemental job description provided on motion, the petitioner has failed to provide an accurate and reliable account of the specific job duties that would occupy the beneficiary's time on a daily basis. 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). In light of the petitioner's failure to provide an adequate description of the beneficiary's proposed job duties, the AAO is unable to make any determination as to the nature of the job duties that have occupied or would occupy the primary portion of the beneficiary's time. As such, the AAO cannot affirmatively conclude that the beneficiary would primarily perform duties within a qualifying managerial or executive capacity in the proposed position in the United States, or that he did so in his previous position in El Salvador.

In accordance with the above analysis, this 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. Here, the petitioner has not sustained that burden.

ORDER: The previous decision to dismiss the appeal dated March 31, 2009 is affirmed.