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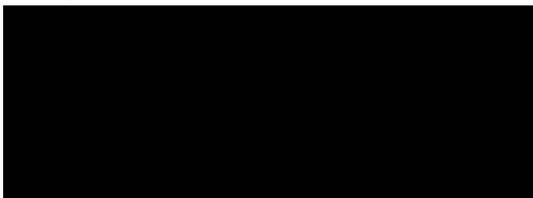
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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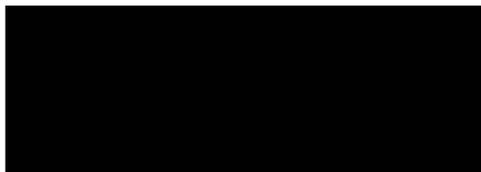
FILE: [REDACTED] OFFICE: TEXAS SERVICE CENTER
SRC 07 029 51436

Date: FEB 25 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 or reopen, 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 Pennsylvania corporation that seeks to employ the beneficiary as its president and chief executive officer. 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 its ability to pay the beneficiary's proffered wage and denied the petition. 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 in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The issue in this proceeding is whether the petitioner has the ability to pay the beneficiary's proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and

continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

At Part 6, Item 9 of the Form I-140, which was received by U.S. Citizenship and Immigration Services on November 13, 2006, the petitioner indicated that the beneficiary's proffered wage is \$106,800 annually. In support of the Form I-140, the petitioner provided an unaudited financial statement for the six-month period that ended on June 30, 2006. The petitioner also provided its 2005 tax return showing a net taxable income of negative \$1,006,792.

On July 23, 2007, the director issued a request for additional evidence (RFE) instructing the petitioner to provide documentation establishing its ability to pay the proffered wage that was specified in the Form I-140. The petitioner was given the option of submitting either its complete 2006 tax return with all schedules or, if the beneficiary had been previously paid by the petitioner, evidence of the salary/wage that was paid.

In response, counsel submitted a letter dated October 22, 2007 in which she stated that while the issue of the instant Form I-140 is currently pending, the foreign entity would pay the beneficiary's salary. Counsel further stated that the petitioner has net assets that are six times greater than the beneficiary's proffered wage and that the ability to pay is therefore evident. Additionally, the petitioner submitted its own corporate tax return for 2006 as well as the foreign entity's audited financial statement for 2006.

In a decision dated August 5, 2008, the director denied the petition concluding that the petitioner failed to establish the ability to pay the beneficiary's proffered wage. Based on a thorough analysis of the petitioner's 2005 and 2006 tax returns, the director determined that neither the net income nor the net assets in the submitted tax returns established the petitioner's ability to pay the proffered annual wage of \$106,800.

On appeal, counsel submits a brief, asserting that the director did not properly weigh the submitted evidence and that the decision was therefore erroneous. Counsel points out that 8 C.F.R. § 204.5(g)(2) allows the director discretionary review of additional evidence and urges the director to use his discretion to consider the petitioner's bank account records and payroll documents. Counsel contends that evidence of the petitioner's payment of employee salaries is an accurate indicator of the petitioner's ability to pay the beneficiary's proffered wage. Counsel's arguments, however, are not persuasive.

While counsel is correct in pointing out that the above regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation that is expressly specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioning entity. Therefore, the AAO does not find that the director erred in focusing his analysis on the information provided in the petitioner's tax returns. Furthermore, the AAO finds that counsel places undue emphasis on the business relationship between the petitioner and its foreign parent entity, which has paid and continues to pay the beneficiary's salary. More specifically, counsel relies on the parent/subsidiary relationship between the two entities in its attempt to meet the ability to pay requirement. However, regardless of the common degree of ownership and control shared by the two entities, the law does not allow U.S. Citizenship and Immigration Services (USCIS) to consider the foreign entity's financial status in determining the U.S. petitioner's ability to pay the beneficiary the proffered wage. As such, the foreign entity's audited financial statement, which the petitioner submitted in response to the RFE, will not be considered.

In reviewing the denial, the AAO finds that the director accurately summarized relevant portions of the petitioner's 2006 tax return, which supports the director's conclusion. Specifically, the director looked at the net income the petitioner had available during the pertinent period, keeping in mind that the petitioner did not pay the beneficiary's wages during that period. As stated in the director's decision, the petitioner's net income in 2006 was negative \$2,181,402, and therefore clearly was insufficient to cover the beneficiary's proffered wage. The director also reviewed the petitioner's assets, excluding depreciable assets, which cannot be considered as they will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. The director calculated the petitioner's net current assets by considering the year-end current assets, which are shown on Schedule L, lines 1 through 6, in light of year-end current liabilities, which are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. In the present matter, the director properly found that the petitioner's liabilities were \$134,641 greater than its assets in 2006 and that the petitioner therefore did not have any net current assets that could have been used towards payment of the beneficiary's proffered wage.

In light of the above, the AAO finds that the director properly concluded that the record lacks evidence to establish that the petitioner had the ability to pay the beneficiary's proffered wage at the time of filing, a burden that the petitioner must sustain on the filing date of the petition and continuing through the date the beneficiary adjusts his/her status to that of a permanent resident. 8 C.F.R. § 204.5(g)(2). Neither counsel's appellate brief nor the petitioner's additional submissions on appeal help to overcome the director's conclusion. Therefore, on the basis of this determination the instant petition cannot be approved.

Additionally, while not addressed in the director's decision, the AAO finds that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity. As stated above, the petitioner is required to establish that the beneficiary's proposed position would be within a managerial or executive capacity where the primary portion of the beneficiary's time would be spent performing job duties of a qualifying nature. 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 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, in support of the Form I-140, the petitioner provided a description of the beneficiary's proposed employment. The petitioner stated that the beneficiary would develop and implement business plans, objectives, and corporate policies; manage and support the company's software development and identify business opportunities; manage the company's finances by approving and implementing a business plan, allocating resources, and reviewing financial statements and reports; conduct feasibility studies; and supervise the management and professional staff.

The director determined that the above job description was insufficient to establish that the beneficiary's proposed position would be within a qualifying capacity. Accordingly, the director addressed this deficiency by including instructions in the RFE for the submission of a supplemental job description listing the beneficiary's specific job duties and the percentage of time that would be attributed to each duty. Although the petitioner provided a response letter dated October 17, 2007, which attributed a percentage of time to

general job responsibilities, the supplemental job description primarily consisted of restated portions of the previously submitted job description. The petitioner stated that 40% of the beneficiary's time would be devoted to planning and developing business objectives, strategies, and organizational policies; 35% of his time would be attributed to analyzing and evaluating existing business activity and product development; 10% of his time would be attributed to supervising and reviewing the work of subordinates; and the remaining 15% of his time would be devoted to meeting and communicating with senior executives to formulate and implement business policies. Although the petitioner restated other portions of the initially provided job description, no specific daily tasks were mentioned.

In the present matter, despite the beneficiary's placement at the top of the petitioner's organizational hierarchy, as illustrated in the organizational chart, the petitioner failed to provide a meaningful understanding of the specific tasks the beneficiary would perform on a day-to-day basis. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). While the beneficiary's discretionary authority is also material to meeting the statutory requirements, the actual duties themselves reveal the true nature of the employment. *Id.* As the petitioner failed to clarify the beneficiary's proposed employment by enumerating the daily job duties, the AAO cannot determine whether the beneficiary would be employed 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.

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.