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U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

B4



FILE: [REDACTED]
SRC 07 265 54849

OFFICE: TEXAS SERVICE CENTER

Date: **JAN 08 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)

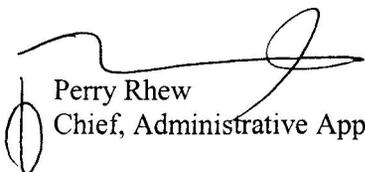
ON BEHALF OF PETITIONER:



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 reopen or 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 engaged in the import, export, and wholesale of paint and paint products. The petitioner seeks to employ the beneficiary as vice president of the import/export department. 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 two independent grounds of ineligibility: 1) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity; and 2) the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer. On appeal, counsel disputes the director's decision and submits a brief in an attempt to overcome the adverse findings. The AAO has reviewed the record in its entirety and finds that the petitioner has submitted sufficient evidence to establish that the requisite qualifying relationship exists between the beneficiary's foreign and U.S. employers. As such, the second ground cited above is hereby withdrawn as a basis for denial. From hereon, the AAO will focus on the remaining ground for denial—the beneficiary's employment capacity in the proposed position with the U.S. entity.

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 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.

At the time of filing the Form I-140, the petitioner submitted a supplement to Part 6, Item 3, which included the following supplement to the non-technical description of the beneficiary's proposed employment:

In [the proposed] position, [the beneficiary] directs and coordinates the activities of our import/export department. He aids the Corporate President in formulating and administering

all policies and procedures relative to import/export operations [The beneficiary] participates in formulating and administering all company policies and developing long-range goals and objectives in so far [sic] as import/export operations are concerned. He has the authority to direct and coordinate the activities of other employees . . . in order to assure the attainment of revenue goals and objectives, which he participates in establishing. He reviews and analyzes the import/export activities, costs, operations, and provides forecast data to myself and other senior executives . . . so that we may determine his department's progress toward agreed upon revenue goals and objectives. He reviews and discusses with me and others required changes or modifications in revenue goals and objectives in light of actual economic conditions.

Furthermore . . . [the beneficiary] is the executive directing the negotiation of contracts with foreign customers, whether they'll be manufacturers/exporter of paints and related products, or wholesale or retail customers abroad. His department negotiates with foreign customers. This department expedites import/export correspondence, bid requests, and credit matters. His department directs the conversion of our paint products from U.S. to foreign standards and specifications, in order to insure efficient use of our products under foreign conditions. His department arranges shipping details, such as export licenses, customs declarations, and packing, shipping and routing of product[s]. His department is in charge of the preparation of foreign language technical sales materials. [The beneficiary]'s department expedites all import/export arrangements and maintains current information on import/export tariffs, licenses, and restrictions. He is able to call upon any employee here in South Florida, and also has authorization to continue to work with a number of employees involved in import/export operations at our parent's office in Valencia, Venezuela.

On August 13, 2008, the director issued a notice of intent to deny (NOID), informing the petitioner that additional evidence was needed in order to determine the petitioner's eligibility for the requested immigration benefit. Included in the director's notice was a request for the petitioner's organizational chart illustrating its current structure and the beneficiary's proposed position therein. The petitioner was also asked to provide a description of the beneficiary's position, including a list of his proposed job duties and the percentage of time assigned to each duty. Lastly, with regard to the proposed position, the petitioner was asked to disclose the number of subordinate managers/supervisors or other employees who report directly to the beneficiary as well as their job descriptions and educational levels.

In response, the petitioner provided a letter dated September 10, 2008 from counsel, who provided the list of exhibits that were being submitted by the petitioner and a preliminary explanation of the contents of each exhibit. Exhibit No. 19 included the following percentage breakdown describing the proposed position:

1. He directs and coordinates the activities of our import/export department. (Percentage 10%)
2. He aids the Corporate President in formulating and administering all policies and procedures relative to import/export operations, which are increasingly important to our company from a revenue point of view. (Percentage 15%)

3. He participates in formulating and administering all company policies and developing long-range goals and objectives in so far [sic] as important/export operations are concerned. (Percentage 10%)
4. He reviews and analyzes the import/export activities, costs, operations. (Percentage 10%)
5. He provides forecast data to myself and other senior executives (in Venezuela) so that we may determine his department's progress toward agreed upon revenue goals and objectives. (Percentage 5%)
6. He reviews and discusses with me and others [sic] directors required changes or modifications in revenue goals and objectives in light of actual economic conditions. (Percentage 5%)
7. He is the executive directing the negotiation of contracts with foreign customers, whether they'll be manufacturers/exporter of paints and related products, or wholesale or retail customers abroad. (Percentage 10%)
8. He directs the negotiation with foreign customers. (Percentage 5%)
9. He directs and supervises the expedite [of] import/export correspondence, bid requests, and credit matters. (Percentage 10%)
10. He directs and supervises the conversion of our paint products from U.S. to foreign standards and specifications, in order to insure efficient use of our products under foreign conditions. (Percentage 5%)
11. He directs and supervises shipping details, such as export licenses, customs declarations, and packing, shipping and routing of product[s]. (Percentage 5%)
12. He directs and supervises the preparation of foreign language technical sales materials. (Percentage 5%)
13. He directs and supervises all import/export arrangements and maintains current information on import/export tariffs, licenses, and restrictions. He is able to call upon any employee at our parent's office in Valencia, Venezuela. (Percentage 5%)

Counsel stated that the beneficiary does not supervise other employees and further explained that the beneficiary is responsible for all export-related functions.

Additionally, the petitioner provided its organizational chart as part of Exhibit No. 36, showing the beneficiary's position as being directly subordinate to the president. Although the chart does not list any individuals as the beneficiary's subordinates, the stores located in Venezuela and in Costa Rica are shown as being under his control. When considering this information in light of the above job description, it appears that the petitioner was attempting to establish that the beneficiary was in charge of the import/export function

with regard to all stores that are affiliated with the petitioner, including those stores that are located outside of the United States.

On or about September 30, 2008,¹ the director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The director noted that the petitioner failed to provide a comprehensive list of the beneficiary's proposed job duties, finding that, instead, the petitioner provided a list of general job responsibilities that suggest that the beneficiary would be engaged in various oversight and directorial activities. The director further commented on the lack of sufficient subordinate staffing and ultimately determined that the beneficiary would be required to primarily perform non-qualifying tasks.

On appeal, counsel vehemently disputes the director's findings, arguing that the director misinterpreted the organizational chart and erroneously assigned non-qualifying duties pertaining to the actual retail operation. Counsel explained that the petitioner actually has thirteen employees to carry out the retail related activities and that the beneficiary's main responsibility is the import/export function. Counsel states that the beneficiary is not a personnel manager and that any query addressing the educational levels of subordinate employees is irrelevant to the beneficiary's executive capacity position.

A thorough review of the record indicates that the petitioner's intent was to establish that the beneficiary manages an essential function rather than personnel. Therefore, the AAO finds that the director erred in his interpretation of the petitioner's organizational chart, which resulted in his erroneously raising questions about the beneficiary's subordinates, or lack thereof.

Notwithstanding the finding above, 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). It is noted that the actual duties themselves 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). 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.

In the present matter, the petitioner provided a job description that provided little information about the actual job duties the beneficiary has and would continue to carry out on a daily basis. Thus, even though the AAO will accept counsel's point about the beneficiary not being a personnel manager, a detailed description of job duties is still crucial for the purpose of determining whether the primary portion of the beneficiary's time would be spent performing qualifying job duties. As applied to the description offered by the petitioner, it is entirely unclear what specific job duties would be associated with directing and coordinating import/export activities or directing and supervising import/export correspondence, bid requests, credit matters, shipping details, preparation of foreign language materials, and making import/export arrangements. Combined, these

¹ Although the decision is dated July 29, 2008, service records show, and counsel properly asserts, that the date on the decision does not accurately reflect the date it was sent out. As counsel has provided evidence disputing the date on the decision, for the purpose of determining the timeliness of the petitioner's appeal, the AAO will accept September 30, 2008 as the date that the decision was issued.

responsibilities would consume approximately 35% of the beneficiary's time, and yet, the specific underlying tasks that are associated with these responsibilities are entirely unclear.

Additionally, the petitioner stated that 15% of the beneficiary's time would be spent formulating and administering policies and procedures relative to import/export, while another 10% of his time would be spent participating in the formulating and administering all company policies and developing long-range goals and objectives with regard to import/export. Without an explanation of the actual underlying tasks, it is unclear how the two types of policy-related responsibilities differ. Thus, another 25% of the beneficiary's time is accounted for using generalized terminology that fails to convey a true understanding of the means by which the beneficiary plans to engage in policy making. 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. Here, the AAO is entirely unable to determine the nature of the specific tasks that account for approximately 60% of the beneficiary's time. While the NOID expressly instructed the petitioner to list specific job duties, the petitioner failed to heed those instructions and instead merely altered the format of the initial job description, which was provided in paragraph form, breaking down individual job duties and itemizing them in numerical order exactly as they appeared in the paragraph. The implication in the director's NOID is that the petitioner's initial submissions were insufficient to establish that the petitioner meets the regulatory provisions. It does not satisfy the petitioner's burden of proof to simply resubmit a job description containing information that is nearly identical to what was previously submitted.

The AAO also notes that the record contains evidence that the beneficiary is performing day-to-day tasks related to the import-export function. Specifically, the record contains numerous e-mails from the beneficiary to customers relating to mundane tasks, such as sales payment, customs bonds, and shipping. Rather than "directing and supervising" the daily import/export functions, the evidence indicates that the beneficiary is actually performing these non-managerial tasks. 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).

Counsel further notes that this petitioner has filed two prior L-1A nonimmigrant visa petitions seeking to employ the beneficiary in an executive capacity. Counsel points out that both nonimmigrant petitions had been approved. The petitioner resubmitted a number of the documents that were previously included in support of the two prior L-1A petitions. While the AAO acknowledges that the job descriptions and company information submitted in support of the nonimmigrant petitions were virtually identical to the information submitted in support of the instant immigrant petition, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g., *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (DDC 2003); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that U.S. Citizenship and Immigration Services (USCIS) or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988). In the present matter, the AAO believes that the prior approvals of the petitioner's nonimmigrant petitions were erroneous as the petitioner has failed to establish that the beneficiary would be employed in the United States in a primarily qualifying capacity. Approving the instant petition based on the same deficient evidence would be equally erroneous. Therefore, counsel's reliance on the prior nonimmigrant petition approvals is misplaced and will not alter the AAO's determination.

Furthermore, while not previously addressed in the director's decision, the AAO finds that there is an additional basis for denial. Specifically, 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. Here, the petitioner claims that the beneficiary's employment abroad was virtually identical to his proposed employment in the United States. In light of the petitioner's submission of a deficient description, the AAO is unable to determine that the primary portion of the beneficiary's time during his employment abroad was spent performing tasks within 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.