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U.S. Citizenship
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Services

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[Redacted]

FILE: [Redacted] OFFICE: NEBRASKA SERVICE CENTER Date: MAR 16 2010
WAC 07 262 51314

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

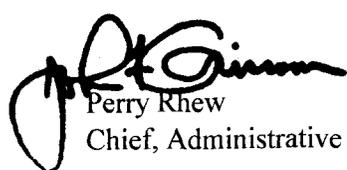
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:
[Redacted]

INSTRUCTIONS:

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, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a foreign entity licensed to do business in the State of Illinois. The petitioner seeks to employ the beneficiary as its president/managing director. 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 concluded 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 submits a brief, disputing the director's conclusion.

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 petitioner submitted a supplement titled "Nontechnical Description of Job," which included a list of the beneficiary's proposed duties and responsibilities. The list included numerous discretionary decision-making elements, such as implementing goals and objectives, overseeing budget planning and implementation and making budget-related recommendations to the board of directors, hiring and firing employees and directing them in fulfilling their respective roles within the U.S. entity, and ensuring that the following are in place: an annual evaluation system, a three-year plan for labor, expenses, and capital, cost effective personnel policies, and personnel recruiting, training, and retention programs. The beneficiary would also be responsible for overseeing marketing and promotion of products and services; overseeing any expansion, remodeling, and repair work; negotiating for factory/warehouse space; negotiating contracts for purchasing and leasing equipment; assisting managers with problem-solving; overseeing the development of staff compensation packages; supervising a project manager; and working with the finance manager to ensure cost control measures are in place.

The petitioner also provided its organizational chart, which depicts the U.S. entity as a two-tier organization headed by the beneficiary in his capacity as president/chief executive and financial officer. The chart depicts the beneficiary as having two subordinates, one in the positions of operations coordinator and financial manager and the other in the position of sales and purchasing manager.

On November 6, 2008, the director issued a request for additional evidence (RFE) instructing the petitioner to provide, in part, a more detailed description of the beneficiary's proposed employment, including a list of tasks the beneficiary would perform in fulfilling his daily responsibilities and the amount of time attributed to each of the listed tasks. The petitioner was also asked to provide all IRS Form W-2s issued to its employees (including the beneficiary) in 2007.

In response, the beneficiary, on behalf of the petitioner, provided a letter dated December 6, 2008, in which he provided a general description of his proposed employment and stated that 70% of his time is spent performing duties for the U.S. entity and 30% of his time is spent performing tasks for the foreign entity. As the director included the beneficiary's job description in the denial, the AAO need not repeat this information in the current decision. The petitioner also provided the requested W-2s for 2007 as well as a project progress log, which contains specific dates in 2008, descriptions of the various actions taken with regard to certain projects, and the initials of the employees who were responsible for taking the actions.

In a decision dated January 22, 2009, the director denied the petition concluding that the petitioner failed to adequately describe the beneficiary's daily job duties and therefore did not establish that the beneficiary would primarily perform tasks within a qualifying managerial or executive capacity.

On appeal, counsel disputes the director's conclusion, referring to the project progress log, which she claims includes a detailed breakdown of the daily activities performed by the beneficiary and his subordinates. It is noted, however, that the activity log's earliest activity was recorded as having taken place on August 4, 2008, which is more than one year after the Form I-140 was filed. A petitioner must establish eligibility 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). As the activity log described activities that took place after the petition was filed, it is unclear how this information is relevant in establishing the petitioner's eligibility at the time of filing.

Additionally, even if the AAO were to overlook the dates of the activities described in the activity log, the content of the activity log is insufficient to determine what actual tasks the beneficiary performed on a daily basis. More specifically, the log shows that the beneficiary did not participate in all of the activities that were listed and thus the list was ineffective in establishing what the beneficiary did on a daily basis. While it is understandable that the beneficiary does not participate in all activities listed in the log, it is the petitioner's burden to establish exactly what specific tasks the beneficiary would perform on a daily basis, which includes listing the tasks that the beneficiary would carry out when he is not engaged in activities that are listed in the log. 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). It is therefore of utmost importance for the petitioner to identify with sufficient specificity what the beneficiary would be doing on a daily basis. The director's RFE was clear in stressing the need for a detailed description of job duties. The director went even further by specifying the desired format, which was to include the percentage of time assigned to each listed job duty. As discussed above, the petitioner's response did not contain the requested, and required, information.

Counsel contends that the director reached an erroneous conclusion because he focused on the broad language found in the initial job description and overlooked specific details that described the beneficiary's proposed employment. However, counsel's reference to a detailed description of the proposed employment is unclear, particularly given that the director quoted, verbatim, the paragraph contained in the RFE response, where the petitioner provided supplemental information. While unclear, it appears that the director's reference to "specific details used to elaborate and describe the [b]eneficiary's position" may apply to the activity progress log that was included in the petitioner's response to the RFE. However, as stated above, the progress log does not satisfy the director's request.

Additionally, counsel asserts that the beneficiary will be acting in an executive *or* managerial capacity, failing to specify which capacity applies to the proposed position. A beneficiary may not be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for managerial capacity.

Furthermore, counsel's assertion that the beneficiary directs expansion, which counsel contends is a major component or function, lacks sufficient supporting evidence. In order to establish that the beneficiary directs a major component or function, the petitioner must at the very least provide a detailed description of the beneficiary's daily tasks, a key element that is missing from the petitioner's record of proceeding. Additionally, U.S. Citizenship and Immigration Services (USCIS) may examine the petitioner's organizational composition in order to determine that the beneficiary primarily directs the component or function and does not primarily perform the underlying tasks associated with that function. 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). Here, the petitioner had a total of three employees at the time the petition was filed. While the petitioner's staffing is not the sole determining factor in determining whether the petitioner is eligible for classification as a multinational manager or executive, this factor can and should be examined, in conjunction with the beneficiary's job description, in order to gain a meaningful understanding of how the petitioner plans to relieve the beneficiary from having to primarily perform daily operational tasks. When a petitioning entity lacks organizational complexity and fails to delineate the beneficiary's proposed daily tasks, the AAO may question the likelihood that the petitioner has the capability to relieve the beneficiary from having to primarily perform non-qualifying tasks.

In the present matter, the petitioner has failed to provide a sufficient description of the beneficiary's proposed employment. Moreover, it is unclear how the broad statements provided initially in support of the appeal actually apply to the beneficiary in the scheme of the organizational hierarchy that existed at the time of filing. For instance, the petitioner stated that the beneficiary would work with the human resources manager to develop goals and strategies for staff relations. However, the organizational chart did not identify a human resources manager, nor is there any indication that a human resources manager was even required given the petitioner's organizational composition at the time of filing. The petitioner's claim that the beneficiary "[e]nsures the development of personnel policies," is similarly dubious, as the beneficiary's support staff consists of two employees. While the petitioner claimed that the beneficiary would ensure that the staff is adequately trained, it is unclear what kind of training the beneficiary's two subordinates would receive and who, if not the beneficiary, would actually provide the training material and train his two subordinates.

Next, the petitioner provided no explanation as to why the beneficiary is charged with supervising a project manager when there is no such position identified in the organizational chart. In other words, not only is the beneficiary's description overly broad, a finding that the director properly made, but after further evaluating the job description, the AAO finds that a number of the job responsibilities are inconsistent with the organizational hierarchy that the petitioner depicted in the chart. As stated above, the chart does not list a human resources manager or a project manager despite the fact that these positions are both mentioned in the beneficiary's job description, indicating that each would purportedly play a role in how the beneficiary would fulfill his daily responsibilities. 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).

In the present matter, the petitioner has neither acknowledged nor resolved the above described inconsistencies, thereby indicating that the job description offered in support of the petition is unreliable, as it is not based on the petitioner's organizational structure at the time the petition was filed. Despite counsel's dissatisfaction with the level of detail in the director's decision, the fact remains that the petitioner was adequately advised of the significance of a detailed description of the beneficiary's proposed job duties when an RFE was first issued. The petitioner was expressly asked to provide a list of specific tasks and to assign the percentage of time that would be attributed to each task. Neither the format nor the content of the petitioner's response was in compliance with these instructions. This deficiency alone is sufficient to warrant denial of the petition. *See* 8 C.F.R. § 103.2(b)(14). Moreover, the record indicates that the director's decision provided ample information to adequately advise the petitioner of the deficiencies that served as the bases for denial and therefore did not impede the petitioner in constructing a meaningful appellate brief and/or supplementing the record with additional information and/or evidence to cure the deficiencies. As stated above, the petitioner was duly notified that the beneficiary's overly general job description was the primary basis for denial. The fact that the director included a lesser degree of detail than what counsel would have preferred does not constitute error on the part of the director. Similarly, the director's use of identical language in multiple Form I-140 denials is not in itself erroneous if the language is relevant and applies to the given set of facts in a particular Form I-140. It is clear that the language relied upon by the director is directly applicable to the facts presented by the petitioner.

Lastly, counsel asserts that the director erroneously accused the petitioner of "attempting to circumvent the intent of the visa category" under which the current Form I-140 was filed. Again, counsel's argument is without merit. While the director briefly commented on the petitioner's ownership scheme, questioning whether Congress intended to extend the multinational manager or executive immigrant visa category to beneficiaries with majority ownership in the entities that were petitioning for them, there is no indication that the director's observation was in any way a contributing factor in the adverse decision. Rather, the director was clear in stating that the denial was directly based on the finding that the petitioner failed to establish that the beneficiary's proposed employment would be within a qualifying managerial or executive capacity. As discussed above, the petitioner has not overcome the director's basis for denial. Therefore, the petition cannot be approved.

Furthermore, while not previously addressed in the director's decision, the record indicates that the petitioner has not presented sufficient evidence to establish that it has satisfied the provisions of 8 C.F.R. § 204.5(j)(3)(i)(D), which states that the petitioner must establish that it has been doing business for at least one year prior to filing the Form I-140. The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means

"the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office." In the present matter, the petitioner has provided an unaudited financial statement for 2006; a copy of its tax return for the year during which the Form I-140 was filed; photocopied photographs of the petitioner's business premises; and letters from business contacts. However, these documents are not sufficient to establish that the petitioner has engaged in the sale and distribution of metal goods on a regular, systematic, and continuous basis. While the letters from the petitioner's business associates establish that the petitioner has made business contacts, these letters do not establish that any sales were ultimately made, as they are not supported by any sales invoices. 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)).

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.