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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



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER

Date: OCT 06 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:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 California corporation that seeks to employ the beneficiary in the position of vice president of international sales and marketing. 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 finding that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On appeal, counsel disputes the director's decision, asserting that the director misinterpreted the beneficiary's job description and failed to identify a basis for denial with sufficient specificity.

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 submitted sufficient evidence to establish that it would employ the beneficiary 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, [REDACTED] the president of the petitioning entity, submitted a support letter dated February 13, 2008 on behalf of the petitioner. [REDACTED] indicated that the beneficiary would be employed within a qualifying executive capacity and proceeded to list the components that comprise the proposed employment. As the director included key portions of the job description in the denial, the AAO need not repeat this information in the instant decision.

On January 28, 2009, the director issued a request for evidence (RFE) instructing the petitioner to provide, *inter alia*, a list of the specific daily tasks that will comprise the beneficiary's proposed employment accompanied by the percentage of time that will be allocated to each of the listed tasks. The petitioner was also asked to provide a detailed organizational chart illustrating the current staffing structure of the organization and listing the departments that comprise the entity as well as the job duties of the beneficiary's immediate supervisor and subordinate employees. Additionally, the petitioner was asked to provide work

schedules for the last two months based on the issue date of the RFE as well as quarterly wage statements for the last two quarters of 2007 and the first quarter of 2008 and IRS Form W-2s and/or Form 1099s for 2007.

In response, [REDACTED] submitted another letter on behalf of the petitioner. The letter, dated February 26, 2009, states that the beneficiary oversees four full-time employees and a six-person sales team. The positions titles of the full-time employees include a sales and marketing manager, an inventory control/order processing manager, an accounts receivable employee, and a financial controller. [REDACTED] provided the following hourly breakdown of the beneficiary's daily responsibilities:

1. General strategy planning discussions with [the p]resident: 1 hour per day
2. Managing office employees, dealing with problems, etc.: 1 hour per day
3. Brand development, design and marketing strategies: 3 hours per day
4. Product development, liaising with suppliers, market updates and fashion trends (includes reading and studying several local and international jewelry fashion magazines, contact with jewelry suppliers, and monitoring new trends): 2 hours per day
5. Discussions with sales agents to obtain feedback from the marketplace: 1 hour per day
6. Financial assistance and general management tasks: 1 hour per day

[REDACTED] restated the initially submitted job description referring to the original description as a representation of the beneficiary's specific job duties.

The RFE response also included the petitioner's organizational chart, which depicted [REDACTED] at the top of the hierarchy as the company president and the beneficiary's direct supervisor. The beneficiary's position is depicted as second in command with a sales and marketing manager, an inventory control/order processing manager, an accounts receivable employee, and a financial controller, followed by five independently contracted sales people as the beneficiary's subordinates.

In a decision dated May 1, 2009 the director denied the petition concluding that the job descriptions offered in support of the petition and in response to the RFE failed to establish that the beneficiary would primarily perform tasks within a qualifying managerial or executive capacity. The director found that the petitioner provided job descriptions with limited evidentiary value due to their overall lack of specific job duties. The director further found that the beneficiary does not oversee the work of supervisory, professional, or managerial personnel.

On appeal, counsel first asserts that the director's denial is deficient because it does not state with sufficient specificity the basis for denial per 8 C.F.R. § 103.3(a)(1)(i). The AAO finds that counsel's argument is without merit.

The objective of a notice of denial is to provide the petitioner or applicant with sufficient information explaining why the petition is being denied. In the present matter, the director notified the petitioner that a determination of ineligibility was based on the petitioner's failure to establish that the beneficiary would primarily perform tasks of a qualifying nature. The director went beyond that general determination, explaining further that the beneficiary's job descriptions lacked sufficient detail and that the beneficiary's subordinates could not be deemed as supervisory, professional, or managerial employees. The AAO finds that these statements adequately informed the petitioner of the findings that caused the director to deny the petition. Therefore, the denial satisfied the provisions specified at 8 C.F.R. § 103.3(a)(1)(i).

That being said, it is important to note the significance of providing a detailed job description, which is required by regulation at 8 C.F.R. § 204.5(j)(5) and is among the key factors that U.S. Citizenship and Immigration Services (USCIS) will examine in determining whether a beneficiary's position fits the definition of managerial or executive capacity. Published case law reiterates the need for a detailed job description, finding 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). The director adequately stressed the significance of a detailed job description by issuing an RFE that expressly instructed the petitioner to provide a list of the beneficiary's proposed daily tasks and to assign each task the percentage of time that the beneficiary would spend performing it. The petitioner's response shows that the petitioner did not follow the specific instructions of the RFE. Instead of listing separate job duties and their respective percentages of time, the petitioner grouped job duties and responsibilities together and provided an hourly breakdown to illustrate the beneficiary's daily activities.

The AAO finds that the information provided was not sufficiently detailed and failed to adequately identify the beneficiary's specific tasks in light of the petitioner's organizational structure at the time of filing. For instance, the petitioner indicated that one hour of the beneficiary's time would be allocated to "[m]anaging office employees, dealing with problems, etc." The petitioner did not identify the specific tasks the beneficiary would perform in managing subordinates, it did not identify the specific problems the beneficiary would handle, nor did the petitioner identify what other specific tasks would be performed during that hour. The petitioner stated that the beneficiary would devote another three hours of his time to brand development and design and marketing strategies. However, the petitioner did not explain what specific tasks the beneficiary would perform or the beneficiary's actual role in developing the petitioner's brand and creating design and marketing strategies. In other words, would the beneficiary collaborate with subordinate employees and if so, what would be the beneficiary's tasks versus the tasks of others with respect to these general business objectives? The petitioner's claim that one hour of the beneficiary's time would be devoted to financial assistance and general management is equally vague, failing to define what is meant by "financial assistance" or "general management tasks."

The petitioner also indicated that two hours of the beneficiary's time would be devoted to product development, communicating with suppliers, and monitoring and updating fashion trends. However, these job duties are indicative of daily operational tasks. When considering the time spent performing these operational tasks in light of the above finding—that five hours of the beneficiary's day remains undefined by specific tasks—it becomes apparent that the petitioner has not established that the primary portion of the beneficiary's time would be allocated to managerial- or executive-level tasks.

In addition to addressing the provided job descriptions, the AAO finds it necessary to point out that the documentation submitted does not establish that the petitioner had the claimed number of full-time employees

at the time of filing. Specifically, the petitioner has indicated both in the support letter that accompanied the Form I-140 and in its organizational chart that the beneficiary has and would continue to oversee four direct employees of the company. These four employees are in addition to the beneficiary's own position and the position of president for a total of six employees. However, a review of the petitioner's first quarterly wage report shows that the petitioner reported wages for only three employees in February 2008, the month during which the petition was filed. 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). It is unclear which individuals were actually employed and which positions were filled at the time of filing the petition. As such, in addition to the ambiguous job description the petitioner provided in response to the RFE, the AAO questions the petitioner's overall ability to relieve the beneficiary from having to primarily perform non-qualifying tasks.

As indicated above, 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). The AAO will then consider this information in light of the petitioner's organizational hierarchy, the beneficiary's position therein, and the petitioner's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks. In the present matter, the AAO finds that the record lacks a comprehensive description of the beneficiary's day-to-day tasks and does not adequately establish the availability of support personnel who would perform the petitioner's daily operational tasks such that the beneficiary would be able to primarily focus on the performance of managerial or executive duties.

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 the instant case, the lack of adequate information explaining what specific tasks the beneficiary would perform in meeting his general job responsibilities precludes the AAO from being able to affirmatively conclude that the beneficiary would primarily perform managerial or executive duties. Therefore, on the basis of the above findings, the AAO concludes that the petitioner has failed to establish that the beneficiary would be employed in a managerial or executive capacity.

Additionally, while not fully addressed in the denial, the AAO finds that the petitioner failed to provide an adequate description of the beneficiary's employment abroad and therefore failed to meet the provisions of 8 C.F.R. § 204.5(j)(3)(i)(B), which 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 director specifically addressed this issue in the RFE by instructing the petitioner to provide a detailed analysis of the beneficiary's daily activities during his employment abroad. However, the petitioner failed to provide the requested information. Therefore, the AAO cannot conclude that the beneficiary was employed abroad 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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(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.