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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

B4

[REDACTED]

DATE: DEC 09 2011

OFFICE: NEBRASKA SERVICE CENTER

[REDACTED]

IN RE: Petitioner:
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 \$630. 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 limited liability company that was organized in the State of Arizona. It seeks to employ the beneficiary as its president. 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 determination that the petitioner failed to establish that it had a managerial or executive capacity position to offer the beneficiary at the time the Form I-140 was filed.

On appeal, counsel disputes the director's decision and argues that the AAO should look beyond the petitioner's temporary staffing situation as it existed at the time the petition was filed.

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 it had the capability of employing the beneficiary in the United States in a qualifying managerial or executive capacity at the time the petition was filed.

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 letter dated April 12, 2008, which included the following list of the beneficiary's prospective list of job responsibilities:

- Direct and oversee the development of market research.
- Control the operating budget and direct all pricing and contract negotiations.

- Oversee the development of new products and customers in line with identified market opportunities.
- Guide the company to achieve annual sales targets through effective management.
- Establish financial policies and procedures essential to the management of the company for profitability and business continuity to improve the overall operation and effectiveness of the company.
- Evaluate the impact of long range planning and the introduction of strategies and regulatory interaction.
- Define, organize, manage, and report on client accounts.
- Responsible for technical leadership and business development.
- Define and delegate implementation strategy and executive [c]lient relations.
- Promote business development to North American businesses.
- Lead [the c]ompany to successful commercialization and open new emerging market opportunities.
- Will have discretion to hire and fire departmental personnel, will perform necessary training as needed, and will have full authority over all employees.

The petitioner also provided the petitioner with a copy of its organizational chart, which depicts the beneficiary at the top of the organizational hierarchy with an office manager, a systems manager, and a sales manager as his three direct subordinates. It is noted that in Part 5, Item 2 of the Form I-140 the petitioner indicated that it had three employees at the time of filing.

On March 19, 2009, the director issued a request for additional evidence (RFE), instructing the petitioner to provide the IRS Form W-2s that were issued in 2008.

In response, the petitioner provided the requested documentation. After assessing the information in the petitioner's 2008 Form W-2s, the director issued a notice of intent to deny (NOID) dated April 24, 2009. The director noted that, while it appears that the beneficiary currently occupies a position within a managerial or executive capacity, the evidence does not establish that the beneficiary was employed in such a capacity on April 15, 2008, the time of filing the petition. The director observed that the 2008 W-2s the petitioner submitted in response to the previously issued RFE indicated that the petitioner had no full-time employees in 2008 and thus lacked the requisite support staff to relieve the beneficiary from having to primarily perform non-qualifying job duties. The director provided the petitioner with time in which to respond to the NOID and asked the petitioner to provide evidence of wages paid to its employees in April and May of 2008,

including a Form 941 for the second quarter of 2008. The director pointed out that in April 2008 the beneficiary claimed to have a staff of five employees including himself. Based on this information, the director asked the petitioner to provide the names and job descriptions of its employees as of April 2008.

In response, the petitioner submitted a statement dated May 19, 2009 from its new counsel, who surmised that the director's key focus in issuing the NOID was the petitioner's lack of a support staff at the time the petition was filed. Counsel argued that the petitioner's lack of a support staff was only a temporary circumstance and asked the director to consider circumstances prior and subsequent to the filing of the petition.

Additionally, the beneficiary, on behalf of the petitioner, submitted a statement dated May 19, 2009. The beneficiary explained that he is not directly involved in the sales of his company's services. Rather, he indicated that the sales manager is responsible for generating sales leads as well as negotiating and servicing accounts. The beneficiary indicated that his role is to support and review sales results and recommend modifications for improved sales. The beneficiary then discussed the role of a quality assurance manager and generally stated that there are staff members who handle operations on a day-to-day basis. The beneficiary stated that he is responsible for developing strategic alliances with competitors in order to increase the petitioner's client pool, reviewing reports and proposals, dealing with accountants and attorneys, and setting and reviewing budgets to increase efficiency.

It is noted that the petitioner did not provide a copy of its 2008 first quarter Form 941.

On July 8, 2009, the director denied the petition concluding that the petitioner failed to overcome the adverse information cited in the NOID. The director observed that the petitioner's response to the NOID indicated a lack of a support staff at the time the petition was filed. Based on this information, the director determined that the petitioner's claim—that it had five employees at the time of filing—was inaccurate and further deduced that the petitioner was realistically unable to offer the beneficiary a managerial or executive capacity position at the time the petition was filed. The director rejected counsel's assertion that the petitioner's staffing circumstances prior to the filing of the petition were relevant in determining whether the petitioner was eligible for the immigration benefit sought.

On appeal, counsel reasserts his earlier argument, urging the AAO to consider that the petitioner's lack of a support staff at the time the Form I-140 was filed was only a temporary setback. Counsel points out that the petitioner had a support staff both prior and subsequent to the filing of the Form I-140 and further contends that the applicable legal criterion requires that the beneficiary "will" be employed in a managerial or executive capacity, not that the beneficiary must be employed in that capacity at the time the petition is filed.

Counsel's arguments have been considered and weighed in light of the submitted evidence. The AAO concludes that counsel has failed to overcome the basis for denial. While counsel argues that the beneficiary is not required to actually be employed in the United States in a qualifying capacity at the time the petition is filed, a qualifying managerial or executive capacity position with the petitioning entity must nevertheless be available at that time. Counsel's argument suggests that U.S. Citizenship and Immigration Services should approve a petition based on speculation rather than on the basis of facts as they presently exist. Such an argument is neither valid nor is it supported by the Act or by the regulations that apply herein. While counsel and the petitioner may be frustrated at the circumstances that were set into motion when the beneficiary

disposed of his support staff, there was no law that required the petitioner to file the Form I-140 precisely at the time that it had no support staff and was unable to make a valid case for approving the petition. To the contrary, if, as counsel claims, the beneficiary believed that the petitioner's lack of staffing was only temporary, the I-140 petition should have been filed at a later date after the petitioner had the opportunity to hire new staff and establish that a qualifying managerial or executive capacity position was available.¹ In fact, based on the information submitted by counsel in his brief, the petitioner remained without a support staff from April 2008, when the Form I-140 was filed, until August 2008. The director had no way of knowing what changes the petitioner would undergo in the future, as there is no law or regulation that allows the director to approve an I-140 petition based on speculation of the petitioner's future circumstances.

In the present matter, the record shows that the petitioner had personnel, other than the beneficiary, prior to the date the petition was filed and despite the lack of a support staff at the time of filing the petition, the petitioner hired a new staff several months after the petition was filed. Therefore, if, as indicated in the petitioner's organizational chart, the petitioner required an office manager, a systems manager, and a sales manager to function at the desired level, the AAO is unclear who, if not the beneficiary, was carrying out the tasks assigned to those positions at the time of filing. While counsel asserts that the petitioner hired subcontractors, this fact alone is not sufficient to establish that the beneficiary was relieved from having to allocate the primary portion of his time to non-qualifying job duties. The petitioner must fully explain what tasks the subcontractors carried out in order to establish that the beneficiary was relieved from having to primarily carry out the petitioner's operational tasks, particularly those that were previously assigned to the office, systems, and sales managers. 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)).

In other words, where, as in the present matter, the petitioner has indicated that it functions with a support staff of three employees, it would be unrealistic to assume that the beneficiary's proposed employment would not be affected in the absence of those very employees. The AAO has no choice but to assume that when the petitioner temporarily lacks an office, a systems, and a sales manager the beneficiary would have to perform their respective tasks. While the AAO acknowledges that no beneficiary is required to allocate 100% of his time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to his/her proposed position. 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).

On review, the record as presently constituted is not persuasive in demonstrating that the petitioner was able to support the beneficiary in a primarily managerial or executive capacity position at the time the Form I-140

¹ The record shows that the petitioner filed another Form I-140 (with receipt number [REDACTED] on December 31, 2009. The record further shows that the petitioner failed to respond to an RFE that was issued on January 20, 2010 and on April 30, 2010 the director issued a decision denying the petition based on abandonment, a decision which the petition cannot appeal.

was filed. While the beneficiary's proposed job duties are admittedly a key element that USCIS considers in determining a petitioner's eligibility, this information must be considered in light of the petitioner's organizational hierarchy and the petitioner's overall ability to relieve the beneficiary from having to primarily perform its daily operational tasks. In the present matter, it is clear that the petitioner did not have the three-employee support staff that was claimed in the Form I-140. In fact, the beneficiary comprised the petitioner's entire staff at the time of filing. Counsel's many objections to the director's focus on the petitioner's organizational hierarchy at the time of filing the petition are not persuasive. Both the regulations and precedent case law instruct the director to make a determination of the petitioner's eligibility based on the facts and events that existed at the time the petition was filed. *See* 8 C.F.R. § 103.2(b)(1); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Absent adequate evidence establishing that the petitioner's organization at the time of filing the petition was capable of employing the beneficiary in a primarily managerial or executive capacity, the instant petition cannot be approved.

Here, counsel's primary argument focused on the petitioner's projected eligibility. As stated above, such factors would not be sufficient to establish eligibility at the time of filing. Counsel faults USCIS for narrowly focusing on a small window of time in determining eligibility. To do otherwise, however, would be to allow petitioners to base their respective eligibility claims on speculation of future circumstances and events that may or may not occur. The regulations are realistic in expecting each petitioner to base its eligibility claim on facts that actually exist when the petition is filed. Where, as in the present matter, the petitioner's staffing circumstances at the time of filing the petition indicated that the petitioner had not reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies would constitute significant components of the duties to be performed on a day-to-day basis. Therefore, based on the evidence furnished, the AAO cannot conclude that the petitioner had a qualifying managerial or executive capacity position available at the time of filing the petition and for this reason the director's decision will be affirmed.

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.