

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

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]

FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER Date: FEB 25 2011

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 \$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 petitioner subsequently filed a motion to reconsider. The director determined that the petitioner's submissions met the requirements of a motion to reopen and issued a new decision affirming the prior denial. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Washington corporation that seeks to employ the beneficiary as its executive manager. 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 affirmed the denial on motion based on the conclusion that the petitioner failed to establish that the beneficiary's proposed employment would be in a managerial or executive capacity.

The petitioner now appeals the director's latest decision and submits a brief from counsel, who challenges the director's decision, citing prior AAO decisions in support of his assertions.

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, the petitioner submitted a document titled "Organizational Chart," which includes the following description of the beneficiary's proposed position with the U.S. entity:

[The beneficiary] is responsible for the entire management and structure of the US Corporation. Conducting and transacting business activities like management, sales, purchases, marketing, negotiating with clients, handling banking matters, hiring or firing of the employees with the help of junior staff. Instrumental in negotiating key contracts with large customers, vendors and clients, negotiating with buyers/sellers. Supervising quality controls/ [sic] obtaining super quality material etc.

The job description further indicated that the beneficiary works a 50-hour work week, which includes both executive and non-executive job duties such as hiring and firing employees, conducting business research and marketing, developing marketing strategies, interacting with clients, setting financial goals, and preparing performance reports. The petitioner also provided brief job descriptions for an assistant manager, a general administrator, and an office assistant.

On January 6, 2010, the director issued a request for evidence (RFE) in which the instructions, in part, were to provide a detailed description of the beneficiary's proposed job duties and the percentage of time the beneficiary would allocate to each listed task. The petitioner was expressly cautioned against providing generalizations, but rather was instructed to list the actual daily tasks the beneficiary would perform. The petitioner was also asked to list the beneficiary's subordinates, briefly provide their job descriptions, and discuss their educational degrees. Additionally, the petitioner was asked to provide its organizational chart illustrating the beneficiary's position with respect to other employees within the hierarchy.

In response to the director's request, the petitioner provided the following description of the beneficiary's proposed employment:

Main duties are primarily concerned with all of [the petitioner]'s [p]roject development and marketing of products. The Beneficiary is supervising business research [and] marketing, developing marketing strategy and managing the business. He is working full time to maintain, ongoing business relationships, and management. [The beneficiary] has powers to hire or fire employees in the US organization. [He] primarily directs the management of the organization by exercising wide latitude in discretionary decision-making, establishing goals and policies of the organization and receives only general supervision or direction of the organization from the Indian parent company.

In lieu of the requested organizational chart depicting the beneficiary's placement within the organization, the petitioner listed the following nine positions in addition to that of the beneficiary: bookkeeper, assistant manager, cashier, two cooks, a purchase assistant, a pizza delivery person, a truck driver, and a truck cleaner/assistant driver. The petitioner indicated that all nine employees report directly to the beneficiary.

In an April 5, 2010 decision, the director determined that the petitioner's submissions failed to establish that the petitioner would employ the beneficiary in a qualifying managerial or executive capacity. The director duly noted the petitioner's failure to comply with certain key RFE instructions, including the request for a detailed description of the beneficiary's proposed daily job duties and the percentage of time that would be allocated to supervising subordinates. The director also noted that the petitioner failed to provide the requested organizational chart depicting the beneficiary's placement within the petitioner's staffing hierarchy and noted that while the petitioner claimed that an organizational chart was being submitted in response to the RFE, the requested document was not found among the petitioner's submissions.

On motion to reconsider,¹ the petitioner submitted the requested organizational chart, which depicted the beneficiary as head of the organization with the assistant manager, a bookkeeper, a purchase assistant, a

¹ Although counsel refers to the petitioner's initial Form I-290B filing as a motion to reopen and reconsider, the AAO notes that only the box for a motion to reconsider was checked off in the Form I-290B. As such, the AAO will treat the petitioner's filing as a motion to reconsider, not as a combined motion to reopen and reconsider.

cashier, and an unspecified number of truck drivers as the beneficiary's direct subordinates. The petitioner also resubmitted the prior list of employees and their respective job descriptions. However, the record remained devoid of the requested list of the beneficiary's specific daily job duties and their respective time allocations.

Accordingly, in the most recent service decision dated July 28, 2010, the director affirmed the original decision in which she determined that the petitioner failed to establish that the beneficiary would be employed in a managerial or executive capacity. Although the director acknowledged the petitioner's prior approval of an L-1A visa petition filed on behalf of the same beneficiary, she noted that there are significant differences between the regulations that govern the filing of a Form I-129 for a non-immigrant petition and the filing of a Form I-140 for an immigrant petition such as the one that was filed in the present matter. The director properly informed the petitioner that U.S. Citizenship and Immigration Services (USCIS) 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. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988).

On appeal, counsel provides restatements of the regulations that govern the filing of Form I-129 nonimmigrant petitions and claims that these eligibility factors are relevant in the matter at hand. Counsel's assertion, however, is erroneous as it appears to be based on the mistaken belief that USCIS conducts comprehensive reviews of the petitions that are filed by the same petitioner. To the contrary, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof. As such, each petition must stand on its own individual merits. USCIS is not required to assume the burden of searching through previously provided evidence submitted in support of other petitions to determine the approvability of the petition at hand in the present matter. Moreover, the probative value of the records of proceeding of prior immigrant and/or nonimmigrant petitions is limited, as any petition that was previously reviewed by a service center may have been approved in error as indicated above. Therefore, an approval of a nonimmigrant petition in no way guarantees that USCIS will approve an immigrant petition filed on behalf of the same beneficiary. Accordingly, the AAO notes that the regulations that address eligibility requirements for L-1A nonimmigrant petitions are not relevant in proceedings that deal with the eligibility of a petitioner in the filing of an I-140 immigrant petition.

Counsel also referenced numerous unpublished AAO decisions in support of his arguments. However, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. Moreover, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

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 record lacks a comprehensive description of the beneficiary's day-to-day tasks and does not adequately establish that the beneficiary's time would be primarily spent overseeing the work of managerial, supervisory, or professional employees. In reviewing the job description that was offered in response to the RFE, the AAO notes that the petitioner failed to respond to the director's request in 1) providing a detailed list of the beneficiary's actual daily tasks and 2) assigning an assessment of time to

each task to establish how much of the beneficiary's time would be spent performing tasks that are qualifying in nature versus those that are operational and thus non-qualifying.

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). In the present matter, despite the director's specific request that the petitioner not generalize the beneficiary's job description, the petitioner did just that by broadly stating that the beneficiary's job duties would involve project development and marketing. The petitioner provided no specific job duties that would be performed in the course of project development nor was any specific information provided to identify the beneficiary's actual role in marketing. Given the non-qualifying nature of performing general marketing-related tasks, specifics regarding the actual marketing-related duties the beneficiary would perform are particularly crucial. The petitioner went on to state that the beneficiary would supervise business research and marketing and the development of a marketing strategy. However, as there were no employees within the organization that were specifically assigned research or marketing tasks, it appears that the beneficiary would perform these non-qualifying job duties himself.

Furthermore, while the petitioner vaguely paraphrased portions of the statutory definition of executive capacity, no explanation was provided to clarify who, if not the beneficiary, would oversee the staff of non-managerial and non-professional employees that the petitioner employed at the time of filing. 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 the present matter, the petitioner provided no evidence and no information that would logically allow the AAO to conclude that the beneficiary's time would be primarily allocated to job duties within a qualifying managerial or executive capacity.

In summary, the record shows that despite being asked to provide relevant information about the beneficiary's specific daily job duties and the percentage of time that the beneficiary would allocate to each of his proposed tasks, the petitioner repeatedly provided overly generalized statements that focused on the beneficiary's discretionary authority and his placement at the top of the U.S. entity's organizational hierarchy. As stated above, both the organizational chart and the job duties assigned to the petitioner's subordinates indicate that the beneficiary's time would be primarily allocated to performing daily operational tasks and overseeing the work of a non-managerial and non-professional staff whose tasks are focused on serving the customers of a pizza restaurant. The petitioner has not demonstrated that it has reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties that the beneficiary would perform on a day-to-day basis.

Furthermore, while counsel made various references to the term function manager, the AAO notes that any time 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., identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). Here, the petitioner has not satisfied these key criteria. Therefore, based on the evidence furnished, it cannot be found that the beneficiary will be

employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Additionally, the record does not support a finding of eligibility based on grounds that were not previously addressed in the director's decision.

First, 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. 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 petitioner has not established that the beneficiary was employed abroad within a qualifying managerial or executive capacity.

Second, 8 C.F.R. § 204.5(j)(3)(i)(D) 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 Form I-140 was filed with USCIS on August 24, 2009. However, the petitioner has not provided evidence to establish that it has been conducting business on a "regular, systematic, and continuous" basis since August 24, 2008, or one year prior to the date of filing. *See id.*

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 grounds 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.