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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

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

[Redacted]

B4

FILE: [Redacted] OFFICE: NEBRASKA SERVICE CENTER Date:

JAN 14 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 matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Florida corporation that seeks to employ the beneficiary as its president and CEO. 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 conclusion 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 conclusion and asserts that the petitioner met the preponderance of the evidence standard in establishing that it would employ the beneficiary in an executive capacity. Counsel also indicates that the appeal is intended to encompass the denial of the beneficiary's Form I-485 and that of the beneficiary's spouse and child. However, the regulation at 8 C.F.R. § 245.2(a)(5)(ii) states, in pertinent part: "No appeal lies from the denial of an application [to adjust status under section 245 of the Act] by the director, but the applicant, if not an arriving alien, retains the right to renew his or her application in proceedings under 8 CFR part 240."

The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L 107-296. See DHS Delegation Number 0150.1 (effective March 1, 2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). The AAO only has jurisdiction over adjustment applications "when denied solely because the applicant failed to establish eligibility for the bona fide marriage exemption contained in section 245(e) of the Act." 8 C.F.R. § 103.1(f)(3)(iii)(JJ) (as in effect on February 28, 2003). As the applicant's Form I-485 does not fall within our jurisdiction, the only matters that will be addressed in this decision are those that deal directly with the petitioner's eligibility to classify the beneficiary as a multinational manager or executive.

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 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 beneficiary, on behalf of the petitioner, submitted a statement of the proposed employment describing the beneficiary's proposed position with the U.S. entity.¹ The director also provided evidence establishing the petitioner's purchase of a restaurant establishment as well as the restaurant's payroll and tax documentation.

On January 20, 2009, the director issued a request for additional evidence [REDACTED] instructing the petitioner to provide a supplemental statement further describing the beneficiary's proposed employment, including a list of the proposed job duties, the types of employees supervised, and the level of authority of the beneficiary's immediate supervisor. The director also asked for the petitioner's organizational chart depicting the beneficiary's position in relation to other employees within the hierarchy.

In response, [REDACTED] operations manager of the petitioner's restaurant establishment, provided a letter dated April 10, 2009 on behalf of the petitioner, expanding the beneficiary's original job description which was provided in support of the Form I-140. [REDACTED] listed the four criteria discussed in the statutory definition for executive capacity and identified the various duties and responsibilities to illustrate the four individual criteria.

The first criterion—directing the management of the organization or its major components—would include directing and coordinating the petitioner's financial and budgeting activities, analyzing company operations to determine whether financial and operational objectives are being met, and directing and coordinating all activities associated with production, pricing, sales, and distribution of products and services. The beneficiary's financial and budgeting responsibilities would include reviewing financial reports provided by [REDACTED], the operations manager, and [REDACTED] the restaurant supervisor and [REDACTED] direct subordinate. Based on his analysis of the financial reports, the beneficiary would provide instructions on how to maximize returns on investments and increase efficiency and profitability. The beneficiary will also review profit statements offered by the company's accountant and direct the managerial staff to make any necessary cost reductions and policy changes. Lastly, the beneficiary will review management and operating reports provided by the operations manager, restaurant supervisor, and the restaurant staff and floor manager to ensure that production, pricing, and sales are optimal to increase profits.

In addressing the second criterion—establishing organizational goals and policies—[REDACTED] stated that the beneficiary will receive weekly reports from the above mentioned restaurant management staff in order to formulate policies for future implementation. The beneficiary will also set annual goals for the subordinate staff to ensure optimal operation.

Next, [REDACTED] addressed the third criterion of executive capacity—exercising wide latitude in discretionary decision-making. He stated that the beneficiary will receive only general supervision from the petitioner's and the foreign parent entity's board of directors. [REDACTED] stated that the beneficiary will have discretionary authority to negotiate and approve contracts with suppliers, distributors, and state and federal agencies, to appoint department heads or managers, and to delegate responsibility to staff members.

¹ As the director included this job description in the May 22, 2009 decision denying the petition, the AAO need not repeat this information in the current discussion.

Lastly, with regard to the fourth criterion—establishing that the beneficiary will receive only general supervision from higher level executives— again indicated that the beneficiary would receive a certain level of supervision from the petitioner's and the foreign parent entity's board of directors.

Per request in the the petitioner's organizational chart was also provided. It depicts the board of directors at the top of the petitioner's organizational hierarchy, followed by the beneficiary as the company's president and CEO. The chart depicts the petitioner's counsel, the operations manager, and the petitioner's accountant as the beneficiary's three direct subordinates. The remainder of the staff consists of a hierarchy of restaurant personnel, including a restaurant supervisor and a staff and floor manager, both subordinate to the operations manager, a kitchen staff supervised by the kitchen manager, who is subordinate to the restaurant supervisor, and a wait staff supervised by the head waiter, who is subordinate to the staff and floor manager.

After reviewing the documentation submitted, the director determined that the petition did not warrant approval and therefore issued an adverse decision dated May 22, 2009. The director found the beneficiary's job description to be overly vague and further noted that the petitioner's organizational chart does not establish that the petitioner has achieved a level of organizational complexity that would warrant the services of an employee who would primarily carry out job duties in a managerial or executive capacity.

Additionally, the director determined that the evidence submitted does not establish that the beneficiary would be relieved of having to primarily perform operational tasks. He also found that the proposed employment does not fit the definition of managerial capacity, as the beneficiary would not oversee the work of professional, managerial, or supervisory employees.

In the appellate brief that was submitted in support of the appeal, counsel challenges the adverse findings that interpret the beneficiary's job description in the context of the statutory definition for managerial capacity. Counsel states that the petitioner has consistently maintained that the beneficiary's proposed employment is in an executive capacity. While the AAO acknowledges that counsel's argument is in fact based on the petitioner's own claims, it is noted that considering the beneficiary's proposed employment in light of both statutory definitions, i.e., the definition for managerial and executive capacity, is common practice in determining a petitioner's eligibility under section 203(b)(1)(C) of the Act. This is done for the benefit of the petitioner to ensure that no petitioner is adversely affected merely by choosing the wrong statutory definition in relation to the beneficiary. In other words, by considering the beneficiary's proposed employment under both statutory definitions, U.S. Citizenship and Immigration Services (USCIS) ensures that any possibility of qualifying for the desired immigrant classification has been explored and that no petitioner would be rendered ineligible simply by claiming executive capacity for an employee whose job duties more closely fit the statutory definition of managerial capacity or vice versa. There is no indication in the present matter that the director conducted his analysis only under the statutory definition for managerial capacity. In citing the statutory definition of executive capacity and later discussing the petitioner's organizational complexity and whether or not the beneficiary would be directing the management of an organization the AAO is satisfied that the director considered the beneficiary's proposed employment under both of the statutory definitions.

Counsel also relied on the U.S. Department of Labor's (USDOL) definition of chief executive in asserting that the beneficiary's job duties are qualifying. Counsel's argument, however, fails for two reasons. First, the USDOL's general definition of a chief executive does not reflect the specific job duties that would actually be performed by the beneficiary. Second, the USDOL's description of a chief executive is entirely unrelated to

the statutory definition of managerial or executive capacity in the immigration context, as the USDOL is not tasked with determining whether an alien merits employment-based immigrant visa classification under section 203(b)(1)(C) of the Act. Thus, counsel's reliance on information provided by USDOL is misplaced and does not establish what the beneficiary's proposed job duties are or whether the proposed employment meets either of the statutory definitions that apply to the matter at hand.

Counsel's focus instead should be on the job duties that are specific to the beneficiary's proposed employment with the U.S. entity. It is noted that 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, as 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). Nor can the petitioner satisfy its burden of proof by providing conclusory assertions regarding the beneficiary's employment capacity or by merely repeating the language of the statute or regulations.

In the present matter, the description of the beneficiary's job duties is too vague to convey a meaningful understanding of exactly what the beneficiary will be doing on a daily basis and how much of his time would be spent on qualifying tasks versus non-qualifying ones. For instance, while the petitioner indicated repeatedly that the beneficiary is responsible for reviewing reports provided by subordinates and for delegating instructions and responsibilities based on the contents in the reports, no specific information was provided to explain which factors affect the beneficiary's decisions or the specific types of tasks the beneficiary would delegate and to whom they would be delegated. A comprehensive job description should provide enough information to enable USCIS to gain a meaningful understanding of the types of tasks that comprise the beneficiary's days at work. Stating that the beneficiary would spend a significant portion of his time reading reports and delegating responsibilities based on the contents of those reports does not provide a realistic illustration of the beneficiary's daily job duties in the context of a restaurant business.

Additionally, while the beneficiary will be vested with a heightened degree of discretionary authority to negotiate and approve contracts and agreements with suppliers and distributors, the petitioner does not explain how such negotiation can be deemed as something other than an operational task. While the beneficiary's position within the petitioner's hierarchy and his level of discretionary authority are certainly factors that the AAO takes into account in determining the beneficiary's employment capacity, an ultimate decision cannot be made without a detailed description of the beneficiary's proposed job duties. *See* 8 C.F.R. § 204.5(j)(5). Here, the only information with any degree of specificity regarding the beneficiary's job duties involves reviewing reports and negotiating contracts with various suppliers and distributors. This information is insufficient to enable the AAO to draw any conclusions as to how the beneficiary spends his time at work on a daily basis.

Based on the information provided, it appears that the petitioner's main business concern is the operation of a single restaurant. It is unclear how, in the context of a restaurant setting, the beneficiary would be limited to performing primarily managerial or executive tasks or what those tasks would be. 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). Here, the petitioner has simply failed to provide sufficient information specifically identifying the beneficiary's actually daily tasks. In light of this deficiency, the AAO cannot conclude that the beneficiary's prospective employment would be in an executive or managerial capacity.

Additionally, while not addressed in the director's decision, the AAO finds that the petitioner has failed to meet the initial filing requirement discussed at 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." As stated above, the evidence of record indicates that the petitioner's main business concern is the operation of a single restaurant which the petitioner purchased on August 11, 2007 as evidenced by the bill of sale provided initially in support of the Form I-140. The Form I-140 itself was filed on November 5, 2007, or approximately three months after the purchase of the restaurant. The petitioner has provided no evidence to establish that it had been doing business prior to its purchase of the restaurant, thus indicating that it had not conducted business on a "regular, systematic, and continuous" basis for one full year prior to the date the petition was filed. *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 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 met that burden.

ORDER: The appeal is dismissed.