

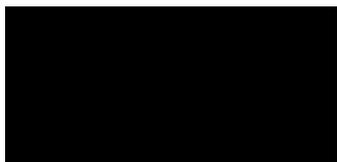
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY



84

DATE: JUL 07 2011

OFFICE: TEXAS SERVICE CENTER



IN RE: Petitioner:
 Beneficiary:



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: SELF-REPRESENTED

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

The petitioner is a New Jersey corporation that 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 would employ the beneficiary in a managerial or executive capacity.

On appeal, the petitioner disputes the director's decision and contends that the record establishes that the beneficiary would be employed in a qualifying executive capacity.

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 letter dated March 16, 2009, stating that in his role as president of the U.S. entity the beneficiary has set the plan and strategy to ensure success of the U.S. operation. The petitioner stated that the beneficiary performs managerial duties and is responsible for "increasing the business, taking major decisions about the business, and meeting with business houses for getting clients, meeting with [b]ankers, planning, budgeting, etc." The petitioner claimed five employees at the time of filing and indicated that additional employees would be hired when the volume of business increases.

On May 22, 2009, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a supplemental description of the beneficiary's proposed employment, listing the beneficiary's daily

job duties and the percentage of time that would be allocated to each duty. The director also instructed the petitioner to provide its organizational chart depicting the beneficiary's position within the hierarchy and to include a work schedule and job descriptions for the petitioner's employees.

In response, the petitioner provided a statement dated June 30, 2009, which included the following list of duties and responsibilities:

- Plan, organize, direct, control and evaluate the operations of Gas [sic] station[.]
- Establish or implement policies and procedures for [the] staff[.]
- Plan and control [the] budget and inventory[.]
- Monitoring pricing of [c]rude oil on Daily [sic] basis.
- Study market research and trends to determine consumer demand, potential sales volumes and effect of competitors' operations on sales[.]
- Defining goals and target of sale[s] on [a] monthly basis and reviewing the target on [a] weekly basis on the basis of actual sale[s].
- Policy making based upon like [sic] what is the margin for that period . . . and if margins are high you can make policy to increase the sale[s] by dropping the price.
- Meeting with big companies (key accounts) to open account with Gas [sic] station.
- Managing the [k]ey accounts[.]

The petitioner also provided brief job descriptions for the four claimed gas station employees—director, sales manager, accountant, and assistant—claiming that all four are employed on a full-time basis. The AAO notes that the petitioner did not provide the employees' work schedules. The petitioner did, however, provide its organizational chart, depicting the beneficiary at the top of the hierarchy, followed by the director, who is shown as overseeing the accountant and sales manager. The assistant is depicted at the bottom of the chart as the subordinate of the sales manager.

In a decision dated August 27, 2009, the director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The director summarized the job description that was provided in response to the RFE, finding that the information was overly broad and thus failed to convey an understanding of what the beneficiary would actually be doing on a daily basis. The director also considered the nature of the petitioner's business as well as the underlying organizational hierarchy and found that the petitioner has not established that it is able to employ the beneficiary in a primarily managerial or executive capacity.

On appeal, the petitioner asserts that the director's decision is erroneous and claims that the beneficiary would be employed in an executive capacity. In support of this claim, the petitioner points to the beneficiary's role as the sole discretionary decision-maker. More specifically, the petitioner stated that the beneficiary made the

decision to start a custom brand of gasoline based on the brand name of the petitioner's foreign affiliate. The petitioner also indicated that the beneficiary makes decisions regarding policies, sales goals, and overall company objectives, including choosing which vendors that the company would deal with in purchasing gasoline as well as deciding to expand the business by starting a trucking company.

The petitioner further claims that the current staffing is reflective of its needs and is sufficient to allow the beneficiary to focus on setting company policies and performing "exclusive duties" that cannot be performed by any other staff member. Additionally, the petitioner points out that, because it operates only as a gas station, rather than a gas station/convenience store, no additional staff is necessary, nor does the petitioner require the beneficiary's efforts in carrying out daily operational tasks.

The AAO finds that the petitioner's assertions are not persuasive in overcoming the basis for denial.

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). A detailed description of actual daily job duties is crucial, as the 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 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.

A review of the job description offered by the petitioner indicates that the director properly determined that the record lacks a comprehensive description of the beneficiary's day-to-day tasks. It is noted that reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient. As indicated above, a detailed description of the beneficiary's daily job duties is required in order for USCIS to determine that the proposed employment would be within a managerial or executive capacity.

In the present matter, the petitioner has provided a job description that is overly vague and lacks the time constraints that the director requested. While the beneficiary's discretionary authority is clearly conveyed when considering his role as the primary policy- and decision-maker, the record shows that the beneficiary would assume job duties that would be deemed as operational and therefore non-qualifying. More specifically, the petitioner indicated that the beneficiary would monitor oil prices, conduct market research, and act as the primary account manager in that he would both meet with potential client companies and manage existing accounts. The petitioner has failed to establish precisely how these operational tasks fit within the definition of managerial or executive capacity.

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 an effort to determine how much of the beneficiary's time would be allocated to managerial- or executive-level tasks, the director's RFE expressly instructed the petitioner to assign a percentage of time to each of the beneficiary's proposed job duties. The petitioner failed to comply with this request, thus leaving a key issue unresolved. Failure to submit requested evidence that

precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Despite the petitioner's claim that the beneficiary does not engage in the performance of non-qualifying tasks, this claim alone is insufficient without adequate supporting evidence. *See 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)).

After reviewing the totality of the record, including the beneficiary's job description, the petitioner's organizational and staffing structures as well as the nature of the petitioner's business, the AAO finds that the evidence does not support a favorable finding. As discussed above, the beneficiary's job duties have not been defined with sufficient clarity, nor have time constraints been assigned, which would enable the AAO to gauge how much time the beneficiary would allocate to the qualifying versus the non-qualifying tasks. With the exception of the accountant, the petitioner's staffing is limited to what appear to be gas station employees, despite what their position titles may indicate. While the petitioner claims that the current staffing suits its current organizational needs, it is unclear that this organization either has either the need or the ability to support a primarily managerial or executive employee.

In summary, the record simply does not support the claim that the beneficiary would primarily perform tasks within a qualifying managerial or executive capacity. Therefore, on the basis of this finding, the AAO cannot approve the instant petition.

Furthermore, while not expressly addressed in the director's decision, the AAO finds that the record fails to establish that 1) the beneficiary was employed in a qualifying managerial or executive capacity pursuant to 8 C.F.R. § 204.5(j)(3)(i)(B); 2) the petitioner continues to operate as a multinational entity; and 3) the petitioner was doing business for one year prior to filing the petition pursuant to 8 C.F.R. § 204.5(j)(3)(i)(D).

With regard to the beneficiary's employment abroad, the record lacks information establishing what job duties the beneficiary performed and who, if anyone, he supervised during such employment. As such, the AAO cannot conclude that the beneficiary primarily performed tasks within a qualifying managerial or executive capacity during his employment with the foreign entity.

With regard to the petitioner's claimed foreign affiliate, the record lacks sufficient evidence to establish that the foreign entity continues to do business on a regular, systematic, and continuous basis. *See* 8 C.F.R. § 204.5(j)(2) for a definition of *doing business*. While the foreign entity's business invoices were submitted, none were dated beyond the date the instant Form I-140 was filed.

Lastly, with regard to the petitioner's business activity, the petitioner indicated on appeal that "operations were started mainly in April 2008," thus indicating that the petitioner was likely not to have been doing business as of March 2008, or one year prior to the filing of the petition.

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.

Page 7

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.