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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

PUBLIC COPY



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DATE: **JUL 07 2011**

OFFICE: TEXAS SERVICE CENTER

FILE:

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:



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 limited liability company organized in the State of Florida. It seeks to employ the beneficiary as its chief executive officer/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 four grounds of ineligibility. The director concluded that the petitioner failed to establish that 1) it has a qualifying relationship with the beneficiary's foreign employer; 2) the foreign entity continues to do business abroad; 3) the petitioner had been doing business for one full year prior to filing the petition; and 4) the beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, counsel challenges the director's decision, asserting that the director failed to properly review the supporting evidence.

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 first issue to be addressed in this proceeding is whether the petitioner has a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign and proposed U.S. employers are the same employer

(i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

* * *

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In the present matter, counsel provided a letter dated April 30, 2009 in support of the petition, asserting that the petitioner and the beneficiary's foreign employer are affiliate entities by virtue of being jointly owned by the beneficiary and his wife with each individual owning 50% of each entity. In support of this claim, the petitioner provided its own operating agreement in which Article V names the beneficiary and his wife and indicates that each individual owns 50 out of a total of 100 units. The same information was reiterated in Schedule K-1 of the petitioner's 2008 tax return. With regard to the beneficiary's foreign employer, the petitioner provided a translated document entitled [REDACTED] and a certified translation of the entity's commerce and partnership registration certificate, both of which indicate that 7,700 Euros were used to fund the foreign entity and name the beneficiary and his wife as the company's two managers. The petitioner also provided the foreign entity's articles of incorporation in which Article 8 indicates that of the 770 shares, the beneficiary and his wife equally own 385 shares.

In light of the above submissions, the AAO finds that the director erred in denying the petition based on the determination that the petitioner failed to establish a qualifying relationship with the beneficiary's foreign employer.

Similarly, after reviewing the record and making a totality of the evidence assessment, the AAO finds that the director provided a confusing analysis of the term "doing business" and misapplied the definition of that term with respect to the U.S. and foreign entities. Contrary to the director's determinations, the AAO finds that sufficient evidence was submitted to establish, by a preponderance of the evidence, that the petitioner, through the continued business of its foreign affiliate, continues to operate as a multinational entity, and that the petitioner itself, during the one year prior to the date the instant petition was filed, was doing business as a

franchise restaurant operation. Therefore, the AAO finds that the second and third grounds that were cited as bases for the director's adverse decision must be withdrawn.

Accordingly, the AAO will now address the remaining issue in this proceeding—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 counsel's April 30, 2009 support letter, he stated that the beneficiary spends 100% of his time establishing goals and policies, determining staff requirements and hiring and firing employees as needed, directing and coordinating budget and finances, reviewing performance data including sales reports, acting as the company's legal representative in all matters concerning the franchise relationship as well as matters involving governing authorities, and maintaining exclusive authority to review and approve contracts for supplies and services.

Additionally, the petitioner provided supporting evidence in the form of an organizational chart, which depicted the beneficiary at the top of the hierarchy with the general manager as his direct subordinate. The assistant manager is depicted at the next level in the hierarchy. He is shown as the general manager's subordinate. The four members of the kitchen staff and two cashiers are shown at the bottom tier of the hierarchy.

On June 3, 2009, the director issued a request for additional evidence (RFE), which addressed various issues. The beneficiary's proposed employment was one of several eligibility issues discussed in the RFE, which instructed the petitioner to provide evidence establishing that the beneficiary's proposed employment with the U.S. entity meets the statutory criteria for managerial or executive capacity. The petitioner was also asked to provide a detailed organizational chart, listing all of the petitioner's employees by name and position title and describing the job duties of each employee.

The petitioner's response included the following list of the beneficiary's duties and responsibilities as well as the percentage of time that would be allocated to each item:

- Responsible for establishing the policies, objectives, and activities of the company to ensure continuing productivity and profitability. Directs the implementation of corporate policies, objectives and activities through subordinate managers (60% of time spent)[.]
- Responsible for development and direction of the company's financial and budget activities (10% of time spent).
- Negotiates and approves on behalf of the company all contracts and agreements with suppliers and vendors of services (5%).
- Acts as the company's principal representative in all matters concerning regulation by federal, state, and municipal agencies. Responsible for reviewing and approving all financial reports, tax returns and other filings required of the company by federal, state and municipal authorities. (10% of time spent)[.]
- Directs all human resources activities of the company. Establishes policies for the general manager and assistant manager to follow in their day-to-day supervision of regular employees. Possesses the ultimate authority to decide whether to hire, discipline or fire any employee of the company. (10%)
- Legal representative of the company in all matters relating to the franchise relationship (5% of time spent).

In a decision dated October 21, 2009, the director denied the petition concluding that the job description the petitioner submitted failed to establish that the beneficiary would be employed in a qualifying capacity.

Although the AAO concurs with the director's overall conclusion, the director made various observations that the AAO finds irrelevant to a determination of the beneficiary's employment capacity. Specifically, the AAO finds that the director's discussion of the terms "agent" and "office" fail to adequately address the key issues that help to determine whether a proposed position satisfies the statutory criteria that apply to managerial or executive capacity.

Additionally, the director determined that the managers who are subordinate to the beneficiary perform daily operational tasks, indicating that such employees do not merit managerial job titles. The director's comment, however, indicates that the definition of managerial capacity was erroneously applied to the beneficiary's subordinates. The director's reasoning is not supported either by statute or regulation, which apply directly to the petitioner and the beneficiary on whose behalf the petition has been filed. As such, the AAO hereby withdraws the director's inappropriate comments.

Regardless of the flaws in the director's analysis of the beneficiary's proposed employment, the record indicates that the adverse conclusion was warranted.

In general, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. 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).

In the present matter, the petitioner stated that 60% of the beneficiary's time is and would be allocated to establishing policies and objectives and directing their implementation. Despite the fact that these vague job responsibilities are indicative of the beneficiary's level of authority and placement within the petitioner's hierarchy, they fail to establish what specific daily tasks the beneficiary would perform on a daily basis in the context of a fast food restaurant. In other words, the petitioner has not explained what specific tasks the beneficiary must execute within a restaurant setting in order to establish and implement policies and objectives. Without further explanation, it can be said that all managers, regardless of whether they perform tasks within a qualifying managerial or executive capacity, establish policies and objectives. The burden is on the petitioner to provide sufficient information to establish that the daily tasks performed by the beneficiary meet the statutory criteria 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). Here, the petitioner has not provided sufficient evidence to establish that the primary portion of the beneficiary's time would be devoted to the performance of job

duties within a qualifying managerial or executive capacity. Therefore, on the basis of this finding, the AAO concludes that the instant petition cannot be approved.

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.