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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

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[REDACTED]

DATE: JUL 11 2011 OFFICE: TEXAS SERVICE CENTER FILE: [REDACTED]

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

The petitioner is a Texas 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. The denial was largely based on the findings of the USCIS Fraud Detection and National Security Database (FDNS) investigation during which numerous anomalies were discovered regarding information that the petitioner provided in support of its Form I-140.

On appeal, counsel disputes the director's decision and addresses various adverse findings that the director cited in support of his adverse decision.

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 provided sufficient and credible evidence to establish that the beneficiary would be employed 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 an attachment to the Form I-140 the petitioner stated that the beneficiary's proposed position would include hiring and firing managers; supervising subordinate employees; reviewing and analyzing sales data; establishing and implementing policies; reviewing financial reports, budgets, and expense reports; managing the company; and overseeing marketing campaigns developed by subordinate managers.

On August 12, 2005, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a copy of its organizational chart complete with employee names and job titles as well as their

respective job descriptions. The petitioner was also asked to describe the beneficiary's specific daily job duties and the percentage of time that would be allocated to each job duty.

In response, the petitioner submitted a letter dated November 4, 2005 in which the petitioner included the following breakdown of the beneficiary's proposed position:

The [b]eneficiary will be employed as the [p]resident of the [p]etitioner . . . and will continue to be responsible for performing the following duties: hiring and firing managers, and twenty percent (20%) of his time supervising subordinate employees; ten percent (10%) for overseeing preparation of sales and inventory reports, and reviewing & analyzing sales data; ten percent (10%) negotiating lease agreements, fuel supply agreements, ATM machine contracts, pay phone contracts, store vending machine contracts and service contracts; twenty percent (20%) for establishing and implementing policies to manage and achieve marketing goals; twenty percent (20%) for reviewing financial reports, and reviewing budgets and expense reports prepared by subordinate employees; ten percent (10%) for managing the company, and overseeing marketing campaign developed by subordinate managers; and ten percent (10%) for locating additional retail locations for the [p]etitioner.

The petitioner also identified six employees, including the beneficiary as the petitioner's president, one operations manager, one assistant manager, and three cashiers as part of the organizational hierarchy at the time the response letter was issued. The petitioner's organizational chart reiterates this information, showing the beneficiary at the top of the hierarchy, the operations manager as his direct subordinate, an assistant manager as the direct subordinate of the operations manager, and the three cashiers as the assistant manager's subordinates.

The petitioner also provided documents addressing a number of other issues, including the petitioner's qualifying relationship with the beneficiary's foreign employer.

In a decision dated July 17, 2009, the director denied the petition concluding that the petitioner failed to submit evidence that is both credible and reliable to establish that the beneficiary would be employed in the position of president and that his time would be primarily allocated to job duties within a qualifying capacity. The director specifically addressed the contents of a service memorandum in which FDNS discussed the petitioner's tax and corporate documents as well as various anomalies between these documents and the petitioner's claim regarding the beneficiary's position with the U.S. entity. The director also questioned why, if [redacted] sold its mini mart to the petitioner as claimed, the Texas Secretary of State records continued to show [redacted] as an active corporation after the date of the asset purchase agreement. The director determined that the beneficiary's role as president was misinterpreted and questioned the reliability of the asset purchase agreement dated May 1, 2003 in which the petitioner was identified as the purchaser of a minimart belonging to [redacted]. Therefore, in addition to finding the petitioner statutorily ineligible, the director issued a finding of fraud based on the FDNS memorandum.

On appeal, counsel for the petitioner attempts to explain an inconsistency between the petitioner's state corporate documents, where the beneficiary was identified as the petitioner's vice president, and the petitioner's supporting documents, where the beneficiary was referred to as the company president. Counsel claims that while the beneficiary was initially the president of the petitioning entity at the time of the entity's incorporation, his position title changed after he sold 490 shares of the petitioner's stock to [redacted].

who was later appointed as the company's president. Counsel explains that the beneficiary did not notify either the immigration attorney or USCIS of this change in position titles.

Additionally, with regard to [REDACTED] active corporate status after its sale of assets to the petitioning entity in May 2003, counsel claims that [REDACTED] has filed corporate tax returns showing zero income and zero revenues "for the last several years." In support of this explanation, the petitioner provided Inayat's uncertified corporate tax returns for 2003-2005 and for 2007 and 2008.

The AAO finds that counsel's explanations are not sufficient to overcome the director's adverse findings. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Precedent case law establishes that the unsupported assertions of counsel do not constitute independent objective evidence and are therefore insufficient to resolve the above described inconsistency. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In the present matter, although the petitioner provided [REDACTED] tax returns to support counsel's claim that the entity had been claiming zero income and revenues from 2004 going forward, none of the tax returns were certified and the tax returns from 2003-2005 were not signed either by the preparer of the document or by an officer [REDACTED]. As a certified tax return establishes that the entity had actually filed the tax returns as claimed, the AAO cannot overlook the fact that the petitioner has presented uncertified documents despite the fact that its credibility is being questioned due to other unresolved anomalies that the petitioner itself helped to create. The AAO therefore rejects the uncertified, and in some cases unsigned, tax returns as probative evidence and will give these documents no evidentiary weight. It is noted that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

The AAO further notes that even if the record were void of anomalies such as the ones described above, the submitted evidence nevertheless falls far short of establishing that the beneficiary would be employed in a qualifying managerial or executive capacity.

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 how the staffing hierarchy that was in place at the time the petition was filed would have been sufficient to support the beneficiary in a managerial or executive capacity.

In reviewing the beneficiary's job description, the record shows that the director was not satisfied with the description that was originally submitted and thus issued an RFE in order to elicit further information with specific details describing the beneficiary's daily job duties. Although the petitioner acknowledged the RFE instructions, the contents of the response containing the job description failed to address the director's express concerns regarding the beneficiary's job description. Rather than listing the beneficiary's specific job duties and assigning a percentage of time to each task, the petitioner merely provided a percentage breakdown and

applied it to the same job description that was initially submitted. No additional information was provided to further describe the beneficiary's proposed employment.

After reviewing the submitted job description, the AAO finds that the director properly assessed the information as lacking in sufficient detail. The AAO further notes that the percentage breakdown the petitioner provided in response to the RFE does not support the type of organizational hierarchy that was in existence at the time the petition was filed. Specifically, the petitioner indicated that 20% of the beneficiary's time would be spent hiring and firing managerial personnel. However, the petitioner's organizational chart shows that the petitioner employed no more than two managerial employees at the time of filing and both were located at a single retail location. While the petitioner may be justified in allocating such a considerable portion of the beneficiary's time to hiring and firing managerial personnel in the context of a more complex organizational hierarchy and a more prominent management structure, the petitioner's single retail store does not justify or support the petitioner's claimed allocation of time. Furthermore, any portion of the 20% that the beneficiary would spend supervising other company employees would not be deemed as qualifying employment as there is no evidence to indicate that cashiers in a minimart are professional employees.

Similarly, the AAO finds that the petitioner failed to justify its allocation of 20% of the beneficiary's time to establishing and implementing policies to achieve marketing goals. The petitioner provided no specific information to establish specifically what tasks the beneficiary would carry out on a daily basis that could be classified as "establishing and implementing policies" nor were any specific policies actually defined. That being said, the petitioner's claim that the beneficiary would merely oversee other employees in the development of a marketing campaign also lacks credibility due to the lack of marketing employees within the petitioner's organizational hierarchy. Neither the position titles nor the job descriptions of any of the petitioner's employees denote any marketing-related tasks, thus leaving the AAO to question who, if not the beneficiary, would be available to carry out these non-qualifying operational job duties. As marketing oversight would allegedly consume 10% of the beneficiary's time, the lack of marketing-related personnel to execute marketing tasks would fall squarely within the beneficiary's set of responsibilities.

Additionally, the AAO notes that such duties as negotiating leasing agreements as well as contracts for fuel supply, ATM machines, pay phones, vending machines, and various other supplies and services would fall within the category of daily operational tasks and would therefore not be deemed as qualifying managerial or executive tasks. This would indicate that, in addition to the questionable time allocations discussed above, the beneficiary would allocate another 10% of his time to performing tasks that are outside the realm of what is deemed as managerial or executive.

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, a critical analysis of the nature of the petitioner's business undermines the assertion that the subordinate employees would relieve the beneficiary from performing non-qualifying duties. Rather, based on the record of proceeding, it appears that at the time of filing the Form I-140 the petitioner lacked the

organizational complexity to ensure that the beneficiary's proposed employment would be principally composed of qualifying job duties in a primarily managerial or executive role. Therefore, regardless of the unresolved anomalies concerning the beneficiary's position title and its asset purchase from another corporation, the record indicates that the beneficiary would not primarily perform tasks within a qualifying capacity and therefore does not merit classification as a multinational manager or executive.

Furthermore, while not addressed in the director's discussion, the AAO finds that the petitioner failed to establish that the beneficiary was employed abroad for one year during the relevant three-year period. The regulation at 8 C.F.R. § 204.5(j)(3)(i) states, in part, the following:

- A) If the alien is outside the United States, in the three years preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
- B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity[.]

The clear language of the statute indicates that the relevant three year period is that "preceding the time of the alien's application for classification and admission into the United States under this subparagraph." § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C). The statute, however, is silent with regard to aliens who have already been admitted to the United States in a nonimmigrant classification. In promulgating the regulations on section 203(b)(1)(C) of the Act, the legacy Immigration and Naturalization Service (INS) concluded that it was not the intent of Congress to exclude L-1A multinational managers or executives who had already been transferred to the United States from this employment-based immigrant classification. Specifically, INS stated the following with regard to the interpretation of the Congressional intent behind the relevant statutory provisions:

The Service does not feel that Congress intended that nonimmigrant managers or executives who have already been transferred to the United States should be excluded from this classification. Therefore, the regulation provides that an alien who has been a manager or executive for one year overseas, during the three years preceding admission as a nonimmigrant manager or executive for a qualifying entity, would qualify.

56 Fed. Reg. 30703, 30705 (July 5, 1991).

In other words, for those aliens who are currently in the United States in L-1A status, the relevant time period mentioned in the statute should be the three-year period preceding the time of the alien's application and admission as (or change of status to) an L-1A multinational managerial or executive classification.

In the instant matter, the record shows that the beneficiary departed his home country of India and entered the United States in August 2001 as a B-2 nonimmigrant visitor for pleasure. The record further shows that the entity that has petitioned to employ the beneficiary was not established until May 2002, more than eight

months after the beneficiary's arrival to the United States, and the beneficiary was not approved for an L-1 nonimmigrant visa until July 30, 2002, nearly one year after his arrival in the United States. Thus it cannot be concluded that the beneficiary entered the United States for the purpose of "working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas."

Accordingly, the beneficiary does not fit the criterion described in 8 C.F.R. § 204.5(j)(3)(i)(B) and must have his period of employment abroad analyzed under the criterion described at 8 C.F.R. § 204.5(j)(3)(i)(A), which states that the relevant three-year time period is that which falls within the three years prior to the filing of the instant petition. As the instant petition was filed on September 20, 2004 and it is well established that the beneficiary was present in the United States since prior to September 20, 2001, it cannot be concluded that the beneficiary was employed abroad during the relevant three-year time period, regardless of whether or not the petitioner is able to provide evidence of the beneficiary's qualifying employment abroad.<sup>1</sup>

Lastly, in its own independent review of the record, the AAO observed additional anomalies that were not specifically discussed in the director's decision. Namely, the AAO finds that the petitioner's claim indicating that it obtained loans in order to fund its purchase of [REDACTED] is lacking in credibility. The AAO bases its finding primarily on inconsistencies in the documentation that was submitted to support its claim. To explain more precisely, based on the asset purchase agreement in which [REDACTED] was named as the seller and the petitioning entity was named as the buyer, the closing date of the sale was to take place on May 1, 2003 at which time the petitioner was to pay \$25,000 with a promissory note to be executed in the remaining amount of \$195,000. On appeal, counsel claims that the petitioner obtained a loan of \$18,775 from [REDACTED] and an additional sum of \$20,000 from [REDACTED] in order to make the necessary down payment indicated in the asset purchase agreement. However, of the checks issued by [REDACTED] and the [REDACTED] neither was issued to the petitioning entity and both checks were issued on two separate dates in June 2003. In light of the dates on these checks, it is factually impossible for the petitioner to have used the borrowed funds for a May 1, 2003 closing date. Moreover, as neither check was actually issued to the petitioner, but rather to the beneficiary himself, counsel's claim is further undermined.

A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003). However, anytime a petition includes numerous errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after USCIS provides an opportunity to do so, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions.

In the present matter, this additional discrepancy further detracts from the credibility of counsel's explanation and from the validity of the petitioner's claim as a whole.

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

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<sup>1</sup> The AAO further notes that the foreign entity's payroll documents from August 2001 going forward do not list the beneficiary as one of its employees.

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.