

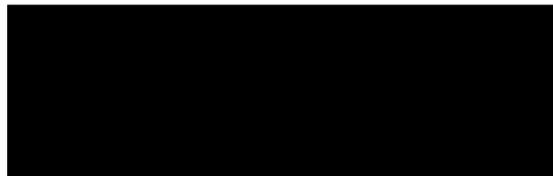
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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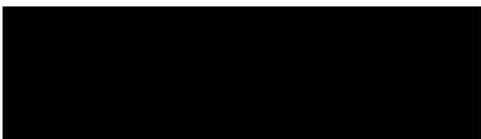
B4

FILE: [REDACTED] OFFICE: TEXAS SERVICE CENTER Date: **MAR 18 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:



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 Florida corporation that seeks to employ the beneficiary as its general 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 denied the petition based on two independent grounds of ineligibility: 1) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity; and 2) the petitioner failed to establish its ability to pay the beneficiary's proffered wage.

On appeal, counsel disputes both of the above adverse findings and provides a brief addressing each ground. In examining the totality of the circumstances that have been presented in the instant matter, the AAO finds that the beneficiary's compensation of an amount that was less than the proffered wage at the time the Form I-140 was filed does not preclude the petitioner from establishing its ability to pay. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The AAO believes that sufficient evidence has been submitted to establish that, in fact, the petitioner did have the ability to pay the beneficiary's proffered wage at the time of filing and that the petitioner's offer of employment was bona fide. As such, the AAO hereby withdraws the second ground as a basis for denial.

Accordingly, the remainder of this decision will focus primarily on the beneficiary's proposed employment and whether sufficient evidence has been submitted to establish that the conditions of such employment satisfy the statutory definition of managerial or 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.

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 3, 2008, which includes the following description of the beneficiary's proposed employment with the U.S. entity:

Specifically, [the beneficiary] will perform the duties of a Manager, which includes overseeing, managing, coordinating activities as well as planning, directing, and formulating

policies and goals of our U.S. subsidiary company. This duty will take over eighty percent (80%) of her time. Specifically, she will oversee the management of the marketing budget and budget for business expansion of products and locations, through her assistant Amit Patel, a marketing research analyst/director of marketing.

The support letter further stated that the petitioner has hired two U.S. employees and has several independent contractors to assist the beneficiary in managing the U.S. operation. Among the initial supporting documents, the petitioner provided its organizational chart, which names three partners and the company secretary at the top of the hierarchy, followed by the beneficiary in her proposed position as general manager. The chart shows a vacant position of assistant as the beneficiary's direct subordinate and a sales department containing one employee, a marketing department also containing one employee, and a billing department comprised of an independent contractor at the bottom of the staffing hierarchy.

On January 21, 2009, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a more detailed description of the beneficiary's proposed employment, specifying the beneficiary's job duties and explaining how the primary part of the proposed employment fits the statutory definition of managerial or executive capacity.

In response, a letter dated February 17, 2009 was provided with a percentage breakdown discussing how the beneficiary would allocate her time. Specifically, the petitioner stated that the beneficiary would be allocated 55% of her time to managing the company's budget and coordinating marketing research, which would be performed by the marketing analyst. The marketing analyst would provide the beneficiary with information to assist her in recommending which items to export to maximize the profit margin, the quantity of each shipment based on purchase patterns, the most efficient and cost-effective means of marketing the company, and sales quotas and goals for the sales and customer services employees. The petitioner also listed researching customer purchasing preferences and pricing as well as directing advertising, promotions, marketing, trade shows, and sales as part of the beneficiary's budgeting- and marketing-related responsibilities. The following was a breakdown of the remaining 45% of the beneficiary's time: 5% would be allocated to communicating with the company's owners regarding sales goals, profitability, and overall company management; 20% would be allocated to analyzing business and operating procedures and devising an effective method for international shipping; and 20% would be allocated to planning, directing, and coordinating quality control programs to ensure safe shipping of the petitioner's products. The petitioner indicated that the beneficiary relies heavily on the marketing analyst, whom she directly manages, to provide marketing conditions and local, regional, national, and international economic trends.

Additionally, the petitioner stated that the beneficiary does not directly provide customer or sales services. Rather, the beneficiary was said to manage one professional employee, two customer sales representatives and assistants, as well as independent contractors. The petitioner resubmitted its organizational chart and provided its 2008 IRS Form W-2 wage and tax statements for the beneficiary and three other employees.

The director denied the petition noting that the petitioner lacks the organizational complexity and staffing to warrant an employee who would primarily perform managerial- or executive-level tasks. The director also found that the description of duties lacked sufficient information about the beneficiary's specific job duties and the percentage of time that would be allocated to each task. In light of these findings, the director concluded that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity.

On appeal, counsel makes a valid point in disputing the director's adverse finding that faults the petitioner for not providing a percentage breakdown with the supplemental job description, noting that the director did not expressly request such information. While the AAO agrees that the petitioner cannot be expected to provide evidence or information that is neither expressly requested nor required by statute or regulation, counsel is reminded that the burden to establish eligibility remains with the petitioner. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). Therefore, while the petitioner was not obligated in this instance to provide a percentage breakdown, the petitioner nevertheless maintains the burden of establishing that the primary portion of the beneficiary's time would be spent performing qualifying managerial or executive job duties. One way to meet this burden would be to specify the beneficiary's actual daily job duties and assign a time constraint to each task so that a quantitative analysis can be conducted to affirmatively determine that the beneficiary would allocate the primary portion of his time to qualifying tasks versus the non-qualifying ones.

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, the job description that was provided by the petitioner lacked the necessary degree of specificity to enable the director to make a determination as to the actual job duties that would be performed and the amount of time that would be allotted to tasks of a qualifying nature. 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. Published case law reiterates the significance of a detailed job description, establishing that the actual duties themselves will 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). Here, the petitioner indicated that 55% of the beneficiary's time would be allocated to managing the marketing budget and coordinating marketing research. However, general terms like "managing" and "coordinating" are meaningless without a specific list of tasks clarifying precisely how the management and coordination functions would be accomplished. Although the petitioner provided a list of six items in an attempt to expand on these broad terms, it is not entirely clear how the beneficiary's discretionary authority in determining the items to be imported from India and setting sales quotas would allow the beneficiary to manage the marketing budget and coordinate market research. There is simply insufficient information to draw a connection between the underlying tasks and the beneficiary's overall responsibilities. The petitioner also failed to fully explain what methods the beneficiary would employ and what underlying tasks she would perform on a daily basis to meet the ultimate goal of determining the most cost efficient way to market the company. Lastly, the petitioner indicated that the beneficiary would be involved in researching customer purchase preferences and competitor pricing as well as directing advertising via marketing promotions and trade shows. However, further clarification is necessary to determine the beneficiary specific role or her direct involvement with respect to these non-qualifying marketing-related tasks.

Furthermore, the petitioner was equally vague in stating that 20% of the beneficiary's time would be devoted to analysis of business and operating procedures and planning, directing, and coordinating quality control programs. Again, these are not specific job duties and thus require further explanation in order to enable U.S.

Citizenship and Immigration Services (USCIS) to determine the actual tasks the beneficiary would perform on a daily basis in order to fulfill these broad job responsibilities.

While the above analysis places a great deal of focus on the degree of specificity included in the beneficiary's job description, the AAO would like to add that this factor must be considered in tandem with other relevant information, including 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. The AAO finds that merely providing a job description that describes a set of primarily qualifying tasks is meaningless if the organization that seeks to hire the beneficiary does not have the human resources to relieve the beneficiary from having to primarily perform non-qualifying operational job duties. In the present matter, the record lacks sufficient evidence to establish that the petitioner was adequately staffed at the time of filing such that the beneficiary would be required to primarily perform tasks of a qualifying nature. Although the petitioner indicates that independent contractors would be used to staff the billing department, no evidence was submitted to substantiate the claim that contractors were actually hired to perform these operational tasks 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)).

The AAO further notes that while the petitioner provided a Form W-2 for [REDACTED] this individual was not listed on the petitioner's initially submitted organizational chart, thus indicating that he was not employed by the petitioner at the time of filing. The petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

In light of the analysis provided herein, the AAO cannot conclude that the petitioner was adequately equipped with a sufficient support staff to relieve the beneficiary from having to primarily perform the company's daily operational tasks at the time the petition was filed. While the petitioner may function and achieve financial success with the organizational structure that was in place at the time of filing, the beneficiary will not merit classification as a multinational manager or executive unless the petitioner is able to establish that it is ready and able, at the time of filing, to employ the beneficiary in a managerial or executive capacity where the duties to be performed in the proposed position would be primarily of a qualifying nature. Here, the petitioner has not provided sufficient evidence to warrant such a finding. Therefore, the instant petition cannot be approved.

Furthermore, the record does not establish that the petitioner meets the initial filing requirement specified at 8 C.F.R. § 204.5(j)(3)(i)(C), which states that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer. Although the petitioner has provided adequate documentation to establish the ownership of the foreign entity, the same cannot be said of the U.S. entity. The AAO acknowledges the petitioner's submission of its articles of incorporation which lists the initial officers and/or directors of the corporation. *See Articles of Incorporation, Article VII*. However, this information does not establish who owns the petitioning entity.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; *see also Matter of*

Siemens Medical Systems, Inc., 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595. As the record lacks the necessary evidence establishing who owns the petitioning entity, the AAO finds that the initial filing requirement that is specified at 8 C.F.R. § 204.5(j)(3)(i)(C) has not been met.

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 sustained that burden.

ORDER: The appeal is dismissed.