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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
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U.S. Citizenship  
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Services

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By

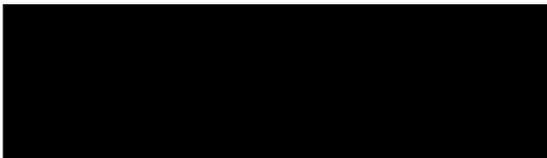
DATE: **MAY 17 2011** OFFICE: TEXAS SERVICE CENTER



IN RE: Petitioner: SHREE INVESTMENT, INC. D/B/A SUNNY'S FOOD AND GAS  
Beneficiary: SHAISTA BUDHWANI

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 Texas corporation that seeks to employ the beneficiary as its director. 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, counsel disputes the director's decision and provides a supplemental percentage breakdown of the beneficiary's proposed employment.

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 establishing 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.

Although the petitioner provided a letter dated November 26, 2007 in support of the Form I-140, a description of the beneficiary's proposed employment was not included in the letter. Rather, the letter listed the supporting documents the petitioner was submitting, including a copy of the petitioner's organizational chart in which the beneficiary was depicted as the head of the company with the petitioner's manager as her direct subordinate. An assistant manager is depicted as the manager's direct subordinate and two cashiers are shown as the assistant manager's direct subordinates. The chart also shows that the beneficiary oversees one employee at the [REDACTED] and four additional employees at [REDACTED].

On May 28, 2008, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a statement describing the beneficiary's proposed job assignment, including the specific job duties to be performed and the percentage of time that would be allocated to performing each task. The petitioner was also asked to provide the job titles, job descriptions, and educational levels of the beneficiary's subordinate(s).

In response, the petitioner provided a letter dated June 24, 2008 which contained the following percentage breakdown describing the beneficiary's proposed employment:

- Directing and coordinating [the petitioner]'s financial and budget activities in order to fund operations, maximize investments, and increase efficiency (20%);
- Conferring with board members, organization officials, and staff members to discuss issues, coordinate activities, and resolve corporate issues (15%);
- Analyzing operations to evaluate performance of [the petitioner] and its' [sic] employees in meeting [the] company's objectives, and determining areas of potential cost reduction, program improvement, and policy changes (10%);
- Directing, planning, and implementing policies, objectives, and activities of [the petitioner] in order to ensure continuing operations, to maximize returns on investments and increasing productivity (20%);
- Preparing budgets for approval, including those for funding and implementation of programs (15%); and
- Directing human resources activities, including the approval of human resource plans and activities, the selection of directors and other high-level staff, and establishment and organization of major departments (20%).

The letter also stated that the beneficiary would be responsible for overseeing the work of two managers, an assistant manager, four cashiers, and one janitor.

On June 16, 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 noted what he perceived as a discrepancy between the number of employees indicated in the 2006 quarterly tax statements that petitioner previously submitted and the position titles that were enumerated in the petitioner's June 26, 2008 response to the RFE. The director also noted that the petitioner issued only five IRS Forms W-2 in 2005.

While the AAO agrees with the director's overall decision to deny the petition based on the petitioner's failure to establish that the beneficiary would be employed in a qualifying capacity, the director erred in his reliance on irrelevant documents in his underlying analysis. Specifically, the director referred to 2006 quarterly tax reports and the 2005 W-2s despite the fact that the Form I-140 in the present matter was filed on December 5, 2007. Precedent case law has established that a 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 case law precedent, the AAO finds that the director's references to documents that reflect the petitioner's staffing prior to the filing of Form I-140 are not relevant for the purpose of determining whether the petitioner was capable of employing the beneficiary in a qualifying managerial or executive capacity at the time of filing the petition.

Rather, when examining the beneficiary's executive or managerial capacity in the proposed position the AAO finds that the petitioner's description of the job duties is a primary concern. *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 petitioner's initial description of the beneficiary's proposed employment is not a comprehensive description of the beneficiary's day-to-day tasks and therefore would have been insufficient to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. On appeal, however, the petitioner has provided a supplemental job description that the AAO will now address. Specifically, the petitioner categorized the job description into five elements—administration, finances and accounting, personnel and human resources, business development/marketing, and retail and wholesale operations—each of which included a list of various tasks and job responsibilities and the percentage of time the beneficiary would allocate to each item. The petitioner allocated 10% of the beneficiary's time to administration, which included establishing goals and business strategies for 3% of the time, directing, planning, and implementing policies and objectives for 4% of the time, and preparing and submitting progress reports to the parent entity for another 3% of the time. In evaluating this portion of the job description, the AAO finds that two of the elements are overly broad and fail to specify actual job duties, while the third element—preparing progress reports—is not on its face indicative of a qualifying task.

Next, the petitioner allocated 15% of the beneficiary's time to finances and accounting, which included directing and coordinating financial and budget activities for 3% of the time, setting financial goals and objectives for 3% of the time, preparing the annual budget for 2% of the time, providing information to the CPA and directing preparation of tax filings and creation of financial statements for 2% of the time, reviewing and approving tax filings and financial statements for another 2% of the time, and reviewing purchase proposals and the business's sales and overseeing capital funding arrangements with local banks for the remaining 3% of the time. Similar to the shortfalls discussed above, this category as well was described using primarily broad terminology that fails to convey a meaningful understanding of the specific tasks the beneficiary would perform. For instance, it is entirely unclear how the beneficiary would direct and coordinate financial and budgeting activities or what specific actions the beneficiary would carry out in order to set financial goals and objectives.

Furthermore, while the petitioner indicated that the beneficiary would review purchase proposals and oversee capital funding arrangements, there is no indication, based on the petitioner's staffing, that the beneficiary would be relieved from actually composing the purchase proposals and seeking out the necessary capital funding, neither of which can be deemed as a qualifying task without further clarification. Similarly, the petitioner has not established that actually preparing the petitioner's annual budget is a qualifying task. Thus, the AAO finds that most of the elements in this category, or a total of 13%, either lacked the necessary degree of specificity or were indicative of non-qualifying tasks.

In discussing the personnel and human resources the business development/marketing categories, to which the petitioner allocated 15% and 40% of the beneficiary's time, respectively, the AAO similarly finds that each category contained non-qualifying elements as well as broadly defined business objectives that failed to specify actual tasks. Specifically, the petitioner attributed 2% of the beneficiary's time to recruiting and hiring staff and another 6% to of her time to overseeing staff performance in the personnel and human resources category. In reviewing the petitioner's staffing composition, the record shows that petitioner's cashiers are not

professional or managerial employees. It therefore stands to reason that overseeing the work of such employees would not be deemed a qualifying managerial or executive task. The petitioner also allocated 7% of the beneficiary's time to overseeing business expansion and implementing investment strategies, 15% to representing the company, negotiating contracts with bankers, suppliers, and realtors, and another 2% to reviewing new business opportunities and conducting feasibility studies within the business development/marketing category. However, these cannot be deemed as qualifying managerial or executive job duties. Namely, overseeing business expansion fails to specify any actual tasks that would be performed, while contract negotiation and execution of feasibility studies in the name of business expansion denote operational tasks rather than tasks performed in a qualifying managerial or executive capacity.

Lastly, the remaining category—retail and wholesale operations—to which the petitioner allocated 20% of the beneficiary's time, is similarly plagued with generalities and non-qualifying job duties. Specifically, while the petitioner indicated that 4% of the beneficiary's time would be spent directing business operations, no actual tasks were attributed to this broad job responsibility. The petitioner also indicated that 7% of the beneficiary's time would be spent negotiating contracts. However, as stated above, the petitioner has failed to establish that contract negotiation in the context of the petitioner's retail business can be deemed as a qualifying managerial or executive task.

Thus, simply based on an assessment of the newly submitted job description, it appears that at least 59% of the beneficiary's time has been accounted for with either undefined terms that fail to identify specific job duties or with duties that are deemed to be non-qualifying. 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 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).

Additionally, with regard to the petitioner's reference to two entities that are claimed to be affiliated to the petitioner, the AAO finds that no evidence has been provided to establish that either [REDACTED] or [REDACTED] is part of the entity that has filed the Form I-140 on the beneficiary's behalf. While either or both entities may somehow be affiliated to the petitioner, there is no corroborating evidence to establish that the alleged affiliates are part of the same entity that has petitioned for the beneficiary's immigrant-based employment. As such, none of the documents pertaining to these two entities, including their payroll documents or documents that show either entity's business activity, are relevant in the matter of the petitioner's eligibility.

In summary, after conducting a review of the beneficiary's proposed job description and the documents pertaining specifically to the petitioning entity, the AAO finds that the evidence does not warrant a favorable finding. As previously noted, the job description, which is a key element relied upon by U.S. Citizenship and Immigration Services in determining a petitioner's eligibility, lacked the necessary elements to conclude that the primary portion of the beneficiary's time would be allocated to tasks of a qualifying nature. As the statutory finding requires the petitioner to establish that the beneficiary would primarily perform in a qualifying managerial or executive capacity, this finding with regard to the deficient job description precludes the AAO from approving the instant petition.

Additionally, while not expressly addressed in the director's decision, the AAO also finds that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity as the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B) requires. While the director specifically instructed the petitioner to provide a detailed description of the job duties the beneficiary performed during her overseas employment and to assign a percentage of time to each enumerated task, there is no evidence that the petitioner complied with the director's request. 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). As the petitioner failed to provide specifically requested information that pertains directly to one of the initial filing requirements at 8 C.F.R. § 204.5(j)(3)(i), the AAO finds that the petition is not approvable on this basis as well.

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.