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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

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U.S. Citizenship
and Immigration
Services



B4

DATE:

MAY 25 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 Texas. The petitioner seeks to employ the beneficiary as its President and CEO. 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 the beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, counsel disputes the director's decision and submits a brief discussing the beneficiary's role as the sole decision maker within the petitioning entity.

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 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 beneficiary submitted a letter dated August 5, 2008 in his capacity as the petitioner's president and CEO. The beneficiary stated that he holds the top-most position within the U.S. entity, supervises employees, and maintains responsibility over planning and developing the U.S. investment, overseeing the company's finances, and developing policies and objectives. He further stated that he would negotiate and supervise the drafting of purchase agreements, develop market strategies, hire personnel, lease equipment and facilities, oversee the petitioner's finances and legal processes, and develop and implement plans to ensure that the petitioner remains profitable. The beneficiary indicated that 25% of his time would be allocated to making management decisions, 15% to representing the company, 15% to financial representation, 10% to supervising daily operations, 15% to business negotiations, and 10% to organizational

development. The beneficiary focused on his position within the company's hierarchy as well as his decision-making authority and claimed that his duties are "Executive or Managerial" in nature.

On February 27, 2009, the director issued a request for additional evidence (RFE) instructing the petitioner to submit, in part, a detailed description of the beneficiary's proposed employment, including a list of the beneficiary's job duties and the percentage breakdown that would be allocated to each job duty. The petitioner was also instructed to discuss the beneficiary's subordinates, including their job titles, job duties, educational levels, and their respective positions within the petitioner's hierarchy.

In response, counsel submitted a letter dated April 1, 2009 in which he generally summarized the beneficiary's proposed position as one that involves planning, expansion, banking, budgeting, marketing, hiring and training employees, and increasing company sales. Counsel stated that the beneficiary is employed "at the highest executive level" which entails exercising discretionary authority to establish goals and policies and make decisions and supervising professional and managerial employees. This same information was stated repeatedly throughout counsel's response with great emphasis placed on the beneficiary's discretionary authority and his placement within the petitioner's organizational hierarchy.

Counsel also provided an organizational chart for Starco Oil Company, the entity in which the petitioner had acquired a 50% ownership interest, depicting the beneficiary as the company's senior-most executive with a vice president/general manager as his direct subordinate. The latter individual was shown as overseeing a sales and marketing manager, a retail manager, and an accountant. The next level on the chart included a purchase agent as the sales and marketing manager's subordinate, an assistant manager as the retail manager's subordinate, and a bookkeeper as the accountant's subordinate. Lastly, the store cashiers are depicted at the bottom of the hierarchy as the assistant manager's subordinates.

In a separate submission, the petitioner provided the following description of the beneficiary's proposed position:

Identifying, recruiting, and building a management team and staff. Hiring, discharging, and transferring employees according to work performance and production needs. Leasing equipment and retail service facilities. Negotiating and supervising the drafting of service agreements. Overseeing the legal and financial due diligence process and resolving any related issues. Developing trade and consumer market strategies based on guidelines formulated by the shareholders and directors. Preparing and analyzing reports on labor cost and production operations developing and implementing plans to ensure company's profitable operation.

On May 18, 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 found that the petitioner provided a deficient job description that relied on broad job responsibilities and the beneficiary's discretionary authority, yet failed to convey an understanding of what the beneficiary's specific daily tasks would be.

On appeal, counsel provides a discussion of the gas station and convenience store industry and briefly addresses the factors that the beneficiary must consider in an effort to ensure the successful operation of a convenience store. Counsel focuses on the beneficiary's discretionary power and executive authority,

asserting that the beneficiary delegates tasks to a senior management team to help develop a strategy that accounts for target markets and the petitioner's competitors. Counsel quotes and paraphrases the statutory definitions of managerial and executive capacity, contending that the beneficiary directs the management of the petitioner by overseeing the employees who carry out the daily tasks. The beneficiary's role in establishing goals and policies, supervision of managerial employees, and his wide latitude in discretionary decision-making are repeatedly emphasized. Counsel urges the AAO to consider the petitioner's reasonable needs and stage of development.

The AAO finds that counsel's arguments are not persuasive in establishing that the beneficiary's U.S. employment with the petitioning entity would be in a qualifying managerial or executive capacity.

While the petitioner's reasonable needs and stage of development are factors to be considered, neither supersedes the petitioner's burden of having to establish that the beneficiary would primarily perform duties of a qualifying managerial or executive nature. 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). Although the beneficiary's job description is not the only factor that is considered in determining the employment capacity of the proposed position, this element is highly critical. Published case law has upheld the significance of a detailed job description, finding that the actual 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 has failed to provide an adequate description of the beneficiary's proposed employment within the context of the petitioner's business. Although the beneficiary's job description repeatedly focuses on his discretionary authority and attempts to establish that a support staff is available to relieve the beneficiary from having to execute the non-qualifying operational tasks, the petitioner fails to affirmatively establish just what specific tasks the beneficiary would perform, nor does the petitioner adequately explain the need for the multiple executive and management tiers that have been depicted in the organizational chart of a single gas station/convenience store. The description of the petitioner's organization as a rather complex organizational hierarchy depicting the beneficiary as the top-most executive is not sufficient to establish that the proposed employment would be within a qualifying managerial or executive capacity.

Furthermore, in examining the job description that was provided by the petitioner in response to the RFE, the AAO is entirely unclear as to how the beneficiary's job duties fit within the overall scheme of the petitioner's business operation. For instance, the petitioner indicated that the beneficiary would identify, recruit, and build a management team. However, the organizational hierarchy that was illustrated in the petitioner's organizational chart indicates that a management team was already in place at the time of filing the petition. The petitioner also claimed that the beneficiary would lease equipment and retail facilities. However, no explanation was provided as to the type of equipment the beneficiary would lease or how the leasing of equipment and retail facilities qualify as managerial or executive tasks. Similarly, the petitioner failed to explain how negotiating service agreements is a qualifying task or why this task is required in the context of the petitioner's business. The AAO is equally confused as to what types of legal and financial processes the beneficiary would oversee, as no further information was provided to qualify these and various other broadly stated job responsibilities.

In reviewing the information that has been provided, it appears that the petitioner has purchased a 50% ownership interest in a gas station/convenience store that was already in operation at the time of the said purchase. While the entity that was purchased appears to have had several employees to man and operate the retail operation, the petitioner itself is a separate legal entity. The record does not include documentation to establish whom, if anyone, the petitioner itself employs. 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)). As previously discussed, the beneficiary's job duties within the petitioner's current business structure are equally unclear. Despite numerous claims made by counsel and by the beneficiary, the AAO cannot assume that the proposed employment would be within a qualifying managerial or executive capacity merely based on the beneficiary's discretionary authority or his position with an organizational hierarchy.

In summary, the AAO cannot reach a favorable conclusion without a job description that adequately describes the proposed employment. Although the director attempted to elicit necessary information by issuing an RFE that expressly instructed the petitioner to list the beneficiary's specific job duties and to assign time allocations to establish what percentage of time would be allocated to each job duties, the petitioner did not formulate the response within the requested format. The petitioner failed to enumerate the beneficiary's specific daily tasks and thus failed to establish how the beneficiary's time would be allocated. Given that the beneficiary's time would be allocated to both qualifying and non-qualifying tasks, the time allocation is essential to determine precisely how much of his time the beneficiary would spend performing tasks that are not within a qualifying 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, in light of the petitioner's failure to provide an adequate job description for the proposed employment, the AAO lacks the necessary information that could serve as a basis for a favorable conclusion. As such, the AAO cannot affirmatively conclude that the beneficiary would be employed in a qualifying managerial or executive capacity.

Furthermore, the record does not support a finding of eligibility based on additional grounds that were not previously addressed in the director's decision.

First, 8 C.F.R. § 204.5(j)(3)(i)(B) states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to his entry into the United States as a nonimmigrant to work for the same employer. In the present matter, the AAO similarly finds that the record lacks an adequate description of the beneficiary's foreign job duties. As previously stated, an adequate job description is essential for the purpose of determining whether the beneficiary's position primarily involves the performance of tasks within a qualifying capacity. The fact that this crucial information has not been presented in the present matter precludes the AAO from making a favorable finding with regard to this issue.

Second, 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner must establish that it has been doing business for at least one year prior to filing the Form I-140. The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "the regular, systematic, and continuous provision of goods and/or services by a firm,

corporation, or other entity and does not include the mere presence of an agent or office." The Form I-140 in the present matter was filed on August 13, 2008. However, the record lacks sufficient evidence to establish that the petitioner was doing business as of August 13, 2007. As noted earlier, 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. at 165.

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.

Accordingly, 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.