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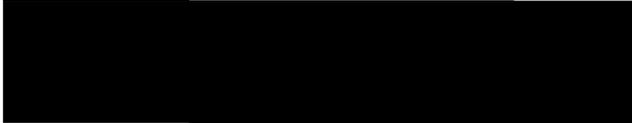
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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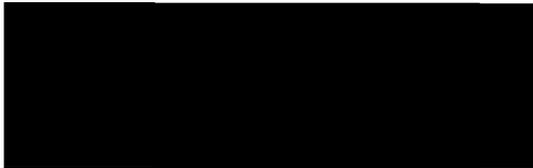
Petitioner:

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 Florida corporation that seeks to employ the beneficiary as its president/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 three grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; 2) the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity; and 3) the petitioner failed to establish its ability to pay the beneficiary's proffered wage.

On appeal, counsel disputes the director's decision, urging the AAO to focus on the beneficiary's role and function within the petitioner's organization rather than the size of its staff. Counsel also contends that the beneficiary was employed abroad in a qualifying managerial capacity. As neither counsel nor the petitioner have disputed or addressed the director's adverse finding with regard to the petitioner's ability to pay, the AAO finds that the petitioner, in effect, concedes the third ground as a basis for denial. The two remaining grounds for denial as well as counsel's submissions on appeal will be addressed in a full discussion to follow.

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 two remaining issues in this proceeding call for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the beneficiary was employed abroad and whether he 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 support of the Form I-140, no information was provided to describe the job duties involved in either the foreign or the U. S. position.

Accordingly, on July 1, 2008, the director issued a request for additional evidence (RFE) instructing the petitioner to provide evidence of the beneficiary's foreign employment as well as a statement from the foreign entity listing the beneficiary's job duties and his subordinates as well as their respective position titles and job duties. The director also instructed the petitioner to provide a definitive statement from the U.S. employer listing all of the beneficiary's duties and subordinates as well as the subordinates' position titles and brief job descriptions.

The petitioner's response included two letters—one from the vice president of the beneficiary's foreign employer regarding his employment abroad and another signed by the beneficiary in his capacity as the petitioner's president with regard to his employment with the U.S. entity. In the letter addressing the beneficiary's foreign employment, ██████████ stated that the beneficiary served as the foreign entity's president and chief executive officer, who supervised the business. The letter indicated that the beneficiary's direct subordinates included two engineers, an accountant, and a treasurer. The letter briefly discussed the roles and responsibilities of the foreign entity's employees, but provided no further information about the job duties performed by the beneficiary.

The letter that addressed the beneficiary's proposed employment also stated that the beneficiary's proposed position with the U.S. entity would be that of president, who would be responsible for business planning and implementation, making executive decisions, promoting the company's goals, and achieving target profits. The beneficiary further stated that a vice president, a secretary, and an accountant all report to him at the present time.

On May 29, 2009, the director issued a decision denying the petitioner's Form I-140. The director determined that the job description the petitioner offered with regard to the beneficiary's foreign employment was overly vague and therefore failed to establish that the beneficiary primarily performed managerial or executive tasks. With regard to the beneficiary's proposed employment with the U.S. entity, the director noted that at the time the Form I-140 was filed the petitioner claimed that its staff was comprised of a total of two employees. The director determined that the petitioner appears to have been insufficiently staffed at the time of filing to have had the capability to relieve the beneficiary from having to primarily perform non-qualifying tasks.

On appeal, counsel asserts that the beneficiary fills the role of a function manager thus making the issue of whether the beneficiary manages other staff members irrelevant. Counsel asserts that the beneficiary is responsible for managing an essential function and describes the beneficiary's position as one that involves managing the petitioning entity, training employees, reviewing financial statements and activity reports, keeping inventory records, and tracking orders. Counsel also states that the beneficiary is "responsible for the entire store team and sales in the store, including, [sic] customer service, merchandising, operations, and execution of store and company standards." Counsel contends that the job description that the director previously deemed as vague "clearly documents the beneficiary's role."

After reviewing the record and counsel's arguments on appeal, the AAO finds that the counsel has failed to overcome the grounds for denial.

First, with regard to the beneficiary's employment abroad, the AAO notes that counsel has not effectively addressed the director's adverse finding. Although counsel generally states that the beneficiary was employed abroad in a qualifying managerial capacity, the record has not been supplemented with any information about the specific job duties the beneficiary performed during his employment abroad. Published case law supports

the pivotal role of a clearly defined job description, as 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); *see also* 8 C.F.R. § 204.5(j)(5). Therefore, without the highly relevant information regarding the beneficiary's job duties, the AAO cannot conclude that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

Next, with regard to the beneficiary's proposed employment with the U.S. entity, the AAO finds that counsel's assertion that the beneficiary would serve as a function manager is unpersuasive. The AAO acknowledges that the term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be 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 this matter, rather than specifically defining the beneficiary's essential function, counsel provides a list of broad job responsibilities and business objectives. 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 job duties. 8 C.F.R. § 204.5(j)(5). As previously noted, published case law places great value on a definitive description of the job duties in order to determine whether the beneficiary would be employed in a qualifying capacity. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Counsel's claims that the beneficiary "is responsible for the entire store team" and that the beneficiary would hire, direct, and develop the petitioner's sales team are entirely contrary to the general role of a function manager. While counsel is correct in stating that personnel management is not the function manager's concern, merely claiming that the beneficiary would serve as a function manager does not relieve the petitioner from having to address valid concerns regarding an overall lack in support staff. Here, the record simply lacks any evidence to support counsel's claim. The AAO notes that the unsupported assertions of counsel do not constitute evidence. *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).

While counsel objects to the director's reference to staffing size in discussing the beneficiary's employment capacity, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Simply put, the petitioner cannot claim that the beneficiary would manage a function without providing adequate evidence to establish who within the petitioner's organizational hierarchy would perform the non-qualifying tasks that are related to that function.

In summary, the petitioner has failed to provide sufficient information about the key elements concerning the beneficiary's foreign and proposed employment. Without this relevant information, the AAO cannot conclude that the beneficiary's employment abroad and the proposed employment with the U.S. entity can be deemed as being within a qualifying managerial or executive capacity. In addition, the petitioner has not shown that it could pay the beneficiary's proffered salary of \$57,980 from its net income of \$10,803 as stated on the petition. Based on these three grounds of ineligibility, the AAO cannot approve the instant petition.

Further, while not previously addressed in the director's decision, the AAO finds that the petitioner has failed to meet the filing requirement discussed 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 provided stock certificate no. 3 showing the foreign entity as majority owner of the petitioner's issued shares, the photocopied stock certificate appears to have been altered, thus detracting from the document's probative value.¹ As such, the AAO finds that the single altered stock certificate is not sufficient for the purpose of establishing that the beneficiary's foreign and U.S. employers have a qualifying relationship.

The AAO also finds that the petitioner has not met the filing requirement discussed at 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." In reviewing the record, the AAO finds that the petitioner has not provided documentation to establish that the petitioner has engaged in on-going retail transactions for the requisite one-year time period commencing one year prior to the filing of the instant petition. Therefore, while this issue was also not addressed in the denial, the AAO finds that the petitioner is ineligible for the immigration benefit sought on this additional basis.

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.

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.

¹ The line containing the month of the issued stock certificate appears to have altered as evident by a break in the line on which the month was printed.