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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

PUBLIC COPY

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[Redacted]

DATE: NOV 10 2011

OFFICE: TEXAS SERVICE CENTER

FILE: [Redacted]

IN RE: Petitioner:
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 [REDACTED] corporation that seeks to employ the beneficiary as its "president/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 it would employ the beneficiary in a managerial or executive capacity.

On appeal, counsel asserts that the beneficiary has the qualifications required for the proffered position and asks the AAO to reconsider the denial of the petitioner's Form I-129. The AAO notes that the petition that is being considered in the present matter is a Form I-140, which is an immigrant petition, not a Form I-129, which is a nonimmigrant petition. As counsel cited the filing receipt number that corresponds to the Form I-140 that is currently being adjudicated, it appears that his reference to the Form I-129 was an inadvertent error and need not be addressed beyond this point. Counsel's appellate brief and all relevant submissions will be addressed in the discussion below.

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 that will be addressed in this proceeding is whether the petitioner submitted sufficient 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 support of the Form I-140, the beneficiary submitted a letter dated December 23, 2008 in her capacity as the petitioner's president and CEO. The beneficiary stated that she holds the top-most position within the U.S. entity and in that capacity she will maintain responsibility over planning and developing the U.S. investment, executing and recommending personnel actions, placing a management team to run the operations, overseeing

the company's finances, and developing policies and objectives. She further stated that she would negotiate and supervise the drafting of purchase agreements, develop trade and consumer market strategies, hire personnel, lease equipment and facilities, oversee the petitioner's finances and legal processes, develop and implement plans to ensure that the petitioner remains profitable, supervise professional and managerial employees, and be responsible for budgeting and marketing.

On March 16, 2009, the director issued a request for additional evidence (RFE) instructing the petitioner to submit a detailed description of the beneficiary's proposed employment. The petitioner was informed that the job description that was previously provided in support of the petition was overly vague and did not clearly delineate the beneficiary's proposed day-to-day job duties. The petitioner was therefore asked to provide detailed evidence to substantiate that the duties the beneficiary would perform daily in her proposed position would primarily be within a managerial or executive capacity.

In response, counsel submitted a letter dated April 29, 2009 in which he 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 supervising professional and managerial employees and exercising discretionary authority to establish goals and policies and make decisions. This same information was stated repeatedly throughout counsel's response with great emphasis placed on the beneficiary's discretionary authority and her placement within the petitioner's organizational hierarchy. Counsel also provided a percentage breakdown to show that the beneficiary's time would be allocated in the following manner: 25% would be allocated to making management decisions, 15% to company representation, 15% to financial representation, 10% to supervision of the company's daily operations, 15% to business negotiations, and another 10% to organizational developments. The remaining 10% of her time was not addressed.

Counsel indicated that the beneficiary would be the key point of contact for the shareholders and directors of the parent company. He also provided a description of the petitioner's organizational hierarchy after its acquisition of the majority shares of the [REDACTED]. The president and vice president were depicted as the only executive-level employees, followed by the professional-level employees, which would include a management analyst and a public relations officer. The next level in the hierarchy would be comprised of one sales and one retail manager, both at the first line managerial tier, followed by a bookkeeper/clerk and a cashier at the clerical level, and ending with a cashier/stock person at the labor level. Counsel explained that the first line managers and assistant managers handle the administrative functions while the general manager, public relations officer, and the management analyst would be the professional employees who would directly answer to the beneficiary.

On May 15, 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 vague and generic job description that failed to convey an understanding of what the beneficiary's specific daily tasks would be.

On appeal, counsel provides a discussion of the 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 a team of managerial employees who in turn oversee those who carry out the daily tasks. The beneficiary's role in establishing goals and policies, supervision of managerial employees, and her wide latitude in discretionary decision-making are repeatedly emphasized. Counsel urges the AAO to consider the petitioner's reasonable needs and stage of development and asserts that the AAO has "specifically de-emphasized a company's size as a determinative factor in L-1 cases."

The AAO finds that counsel's arguments are not persuasive in establishing that the beneficiary's employment with the petitioning entity would be 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). 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 the beneficiary's discretionary authority and attempts to establish that a support staff comprised of managerial, professional, and non-professional personnel is readily 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. Furthermore, the petitioner has failed to adequately explain the need for a team of managers and executives in an organization whose chief concern appears to be the operation of gas station/convenience stores. Instead, the petitioner has described a rather complex organizational hierarchy in which the beneficiary is depicted as the top-most executive.

In fact, while counsel's RFE response listed some job duties which were attributed to the beneficiary's proposed position with the U.S. entity, the AAO is entirely unclear as to how those job duties fit within the overall scheme of the petitioner's business. For instance, the petitioner indicated that the beneficiary would identify, recruit, and build a management team. In light of the fact that the petitioner purchased ownership interest in businesses that were already established and operational, it stands to reason that management teams were already in place. The petitioner also claimed that the beneficiary would lease equipment and retail facilities. 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 how this task is required in the context of the petitioner's gas station/convenience store operation. The petitioner has not shown what types of legal and financial processes the beneficiary would oversee, as no further information was provided to qualify these broad job responsibilities.

In reviewing the information that has been provided, it appears that the petitioner purchased a 50% ownership interest in a corporation that operates several gas station/convenience stores, all of which were already in operation at the time of said purchase. While the gas station/convenience store operations that were purchased had employees, the petitioner itself is a separate legal entity. The record does not include documentation to establish whom 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 her elevated 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 expressly instructing the petitioner to list the beneficiary's specific job duties, the petitioner's response lacked substance and did not satisfy the director's request. The petitioner failed to enumerate the beneficiary's specific daily tasks and thus failed to establish how the beneficiary's time would be allocated. While the AAO acknowledges that no beneficiary is required to allocate 100% of his/her 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 has not been provided with the necessary information concerning the job description. 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 her entry to 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. As this crucial information has not been presented, the AAO is precluded from issuing 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 January 9, 2009. In light of the filing date of the petition, the petitioner must establish that it was doing business as of January 9, 2008. The record shows that the petitioner does not meet this filing requirement.

Although counsel's statements include numerous references to various subsections of 8 C.F.R. § 214.2(l), the AAO notes that the provisions cited therein pertain to the filing of a nonimmigrant petition seeking classification of the beneficiary as an L-1 intracompany transferee. Counsel specifically made references to the "new office"

petitioner which 8 C.F.R. § 214.2(l)(1)(ii)(F) defines as an organization that has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year. The regulations pertaining to nonimmigrant petitions do not apply in the present matter where the petitioner filed an immigrant visa petition. Although the AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity as well as the term "doing business," the filing requirements for each classification are significantly different. One distinction is the new office provision that is incorporated into the regulations pertaining to Form I-129 nonimmigrant visa petitions. A thorough review of the regulations at 8 C.F.R. § 204.5(j) shows that there is no similar provision that applies to the immigrant visa classification being sought by the instant petitioner. To the contrary, 8 C.F.R. § 204.5(j)(3)(i)(D) expressly states that the petitioner must provide evidence to show that it has been doing business for at least one year prior to the filing of an I-140 petition. Thus, any entity that would fall under the heading of "new office" as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F) would be ineligible for the approval of an immigrant visa petition. As such, the petitioner in the present matter is not afforded the benefit of the new office regulations.

The documents submitted in support of the petition in the present matter show that the petitioner was formed as a corporate entity only five and a half months prior to the filing of the instant petition, thus making it factually impossible for the petitioner to have been doing business prior to the date of its own creation. The fact that the petitioner acquired an ownership interest in an entity that had been doing business during the relevant one-year period does not alter the fact that petitioner itself was not, and could not, have been doing business during that very time period.

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.