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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**



B4

DATE: OCT 31 2011 OFFICE: NEBRASKA SERVICE CENTER



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, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Delaware corporation that seeks to employ the beneficiary as the senior director, SAP corporate alliance. 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 observed that the petitioner failed to provide requested information regarding the job duties the beneficiary performed during his employment abroad and denied the petition based on the conclusion that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

On appeal, counsel disputes the director's decision and supplements the record with previously requested evidence.

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 beneficiary was employed abroad 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, [REDACTED] CEO of the petitioning entity, provided a letter dated May 31, 2007 on behalf of the petitioner. [REDACTED] stated that the beneficiary was employed abroad in the position of director of business development and alliance and provided the following job overview:

He was responsible for strategic partnerships as well as reseller and OEM channel. Specifically, the beneficiary was responsible for moving company and partner eco-system from platform to solution selling, and building sustainable business relationships through vertical value propositions He restructured and extended partner channels, and sold with the Enterprise Account Managers and Partners.

On January 13, 2009, the director issued a request for additional evidence (RFE) instructing the petitioner to provide, in part, a detailed description of the beneficiary's specific day-to-day job duties and the percentage of time the beneficiary allocated to each job duty.

Although the petitioner responded to those portions of the RFE that addressed the beneficiary's proposed employment, no information was provided with regard to the beneficiary's employment abroad. It is noted that 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). The only evidence the petitioner provided that pertained to the foreign entity was the foreign entity's organizational chart which depicted a regional manager at the top of the hierarchy overseeing four directors and an "enterprise sales" position. The beneficiary was shown as one of the four directors overseeing a partner manager, a channel set assistant, and a territory sales position. Although the petitioner was asked to provide information about the job duties and job qualifications of the beneficiary's subordinates, no such information was provided, thus precluding the director from being able to determine whether they were managerial, supervisory, or professional employees. It is noted that a managerial position title, such as the one assigned to the partner manager, does not establish that the position itself was that of a managerial employee, as there is no indication that this individual was managing or overseeing other employees.

On May 7, 2009, the director denied the petition concluding that the petitioner did not comply with the request to provide information pertaining to the beneficiary's employment with the foreign entity and thus failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity as statutorily required.

On appeal, counsel asks the petitioner to review newly submitted evidence pertaining to the beneficiary's foreign employment. Counsel asserts that the director did not previously allow sufficient time in which to gather and submit the requested information.

The AAO finds counsel's assertion to be unpersuasive and will not withdraw the director's decision.

First, the issuance of an RFE or notice of intent to deny (NOID) and the time period allowed for the response to either notice are matters of discretion to be determined by U.S. Citizenship and Immigration Services (USCIS) at the time the RFE or NOID is issued. 8 C.F.R. § 103.2(b)(8)(ii). As such, counsel has no legal basis upon which to challenge the time period that the petitioner was allowed in which to produce the requested information.

Second, the petitioner's response to the RFE contained no evidence to establish that the petitioner intended to provide the requested information with regard to the beneficiary's foreign employment. In other words, the petitioner did not request additional time or make any effort to submit the requested information at any time prior to the issuance of the denial. In fact, the record shows that the letter that the petitioner submitted in support of the appeal (containing information about the beneficiary's foreign employment) is dated May 27, 2009, which is approximately three weeks subsequent to the issuance of the denial. There is no evidence to show that the same information could not have been submitted within the time period allowed by the RFE.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See*

8 C.F.R. §§ 103.2(b)(8) and (12). As noted previously, the petitioner's 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).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the beneficiary's foreign job description and the job descriptions of his subordinates, which have been submitted for the first time on appeal.

In examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties, 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). In the instant matter, the petitioner failed to provide a list of the job duties the beneficiary performed during his employment abroad. As such, the AAO is unable to conclude that the beneficiary's employment abroad consisted primarily of job duties that were within a qualifying managerial or executive capacity and on the basis of this conclusion the instant petition cannot be approved.

Additionally, while not addressed in the director's decision, the record lacks any evidence establishing that the petitioner and the beneficiary's foreign employer share common ownership and control that would constitute a qualifying relationship. *See* 8 C.F.R. § 204.5(j)(2). Although the petitioner claims that the petitioner is part of a group of companies that are owned by one common parent, the audited financial statements that were submitted in support of the Form I-140 do not establish that a qualifying relationship exists between the petitioner and the beneficiary's employer abroad as required by statute and regulation. *See* section 203(b)(1)(C) of the Act; *see also* 8 C.F.R. § 204.5(j)(3)(i)(C).

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.