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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: **AUG 15 2012**

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]
SRC [REDACTED]

IN RE: Petitioner: [REDACTED]
 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:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 Florida company that is a “grocery retail store,” which seeks to employ the beneficiary as its President. 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.

On June 30, 2010, the director denied the petition concluding that the petitioner failed to establish that the beneficiary’s proposed employment with the U.S. entity would be within a qualifying managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review.

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 the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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 that 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. *See* 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the petitioner submitted sufficient evidence to establish 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.

In examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Published case law clearly 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). That being said, however, USCIS reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the petitioner's business, the employment and remuneration of employees, as well as the job descriptions of the beneficiary's subordinates, if any, and any other facts contributing to a complete understanding of a beneficiary's actual role within a given entity.

In the June 24, 2009 support letter, the petitioner explained that the petitioner is "engaged in the business of retail grocery store to the public." The petitioner also explained the duties of the beneficiary in the position of President as follows:

He sets up the company's goals and policies, confers with company officials to plan business objectives to develop organizational policies to coordinate functions and operations between divisions and departments, and establish responsibilities and procedures for attaining objectives. He receives activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions and direct and coordinate formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity. [The beneficiary] supervises all six (6) subordinates, including one (1) Vice President/General Manager, one (1) Operations Manager, one (1) Inventory Manager and their subordinates. He is in charge with authority of hiring, firing and promoting those subordinates he supervises.

In response to the director's request for evidence, the petitioner provided a breakdown of percentage spent on the duties to be performed by the beneficiary.

An analysis of the record does not lead to an affirmative conclusion that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. With regard to the proposed position, the petitioner provided a list of job duties performed by the beneficiary with a percentage breakdown which included broadly stated job responsibilities. Due to the overly general information included in the percentage breakdown, the AAO is unable to gain a meaningful understanding of how much time the beneficiary spent performing qualifying tasks versus those that would be deemed non-qualifying.

The job duties that will make up 30% of the beneficiary's time include "directs, develops and coordinates domestic and international marketing development and activities; sets up the company's goals and policies and manage all financial aspects of business." The petitioner's organizational chart did not identify any employees who actually assisted in the sales and marketing policies such as market research, marketing, and promotion programs. Thus, the beneficiary may be the one to carry out these operational functions, which are outside the parameters of what is deemed as being within a managerial or executive capacity.

The petitioner indicated that another 25% of the beneficiary's time will include "exercises authority in regard to hiring, firing, training, delegation of assignments according to capabilities, preferences

and goals, discipline, promotions, and remuneration; directs and coordinates activities of department to obtain optimum efficiency and economy of operations and maximize profits. It is unclear what specific tasks actually fall within this broad category. Merely using the term "exercised authority" to describe the beneficiary's function does not establish that the tasks the beneficiary performed were of a qualifying nature. The beneficiary's position description is too general and broad to establish that most of his time is spent on duties that are managerial or executive in nature. 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 daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will 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).

The petitioner indicated that for another 20% of his time, the beneficiary "reviews the financial performance of the company, controls the expenses according to accounting system and cost management regulations," and "confers with the V.P./G.M. on the financial results." Again, the petitioner did not provide detailed information of what is entailed in performing this task. 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 discussed below, the evidence does not indicate that the Vice President/General Manager listed on the organizational chart is actually employed by the petitioner since the petitioner did not prepare a Form W-2 for that individual in 2008.

The petitioner also indicated that for another 20% of his time the beneficiary "handles irregular problems that may occur from business operations by exercising discretionary authority over the day-to-day operations." The petitioner failed to explain what constitutes "irregular problems," and did not indicate whether this is a managerial or executive task. 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 daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will 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).

The job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will perform. While the petitioner has provided a breakdown of the percentage of time the beneficiary will spend on various duties, the petitioner has not articulated whether each duty is managerial or executive in nature.

The petitioner also submitted an organizational chart that indicates the beneficiary as president who supervises the Vice President/General Manager, who in turn supervises the inventory manager who supervises the stocking clerk, and the operations manager who supervises the cashier/clerk and the accountant. In reviewing the Forms W-2 for 2008 and the organizational chart, the individuals employed were the president, the operations manager, the stock clerk and the accountant. The petitioner did not submit documentation evidencing that it actually employed the vice president/general manager, the inventory manager and the cashier as listed on the organizational

chart. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Although the director requested a copy of wage and tax statements for 2009, the petitioner did not provide this documentation. 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).

In response to the director's request for evidence, the petitioner submitted Form 1120, U.S. Corporation Income Tax Return, for 2008 that indicated a salary was paid to the beneficiary in the amount of \$35,040.00 and the petitioner paid \$58,350.00 in salaries and wages. The petitioner also submitted Form 1120, U.S. Corporation Income Tax Return, for 2009 that indicates the beneficiary received a salary of \$50,000.00 and the petitioner paid \$113,850.00 in salaries and wages. Although the petitioner appeared to pay more salaries and wages in 2009, the petitioner did not provide Forms W-2 or the Forms 941, Quarterly Wage Tax Returns, to indicate the individuals actually employed by the petitioner. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

In response to the director's request for evidence, the petitioner stated that the operating hours of the grocery store are 9:30 a.m. to 8:00 p.m. Although the petitioner did not indicate how many days a week the store is open, the AAO will assume that the grocery store, given the nature of the business, is open daily or at least six days a week. According to the Forms W-2 for 2008, the petitioner employed the president, the operations manager, the stocking clerk and the accountant. Without a cashier/clerk, it is not clear who will operate the cash register for a grocery store that is open from 9:30 a.m. to 8:00 p.m. The petitioner has not accounted for who is responsible for operating the store during the many operating hours when neither of the beneficiary's subordinates are available. The petitioner has not explained how the three employees other than the beneficiary are able to perform most or all of the day-to-day functions of ordering merchandise and supplies, arranging and stocking merchandise displays, cleaning the store, processing customer purchases of goods, reconciling daily cash register receipts, and many other routine duties associated with operating the business. Given the absence of employees who would perform the non-managerial or non-executive operations of the company, it is reasonable to conclude that the beneficiary would need to spend a significant portion of his time directly providing the services of the company or directly supervising employees performing cashier duties. *See Matter of Soffici*, 22 I&N Dec. at 165.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. As discussed above, the petitioner has not identified sufficient employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. The fact that the beneficiary has been given a managerial job title and general oversight

authority over the business is insufficient to elevate his position to a managerial or executive capacity.

The beneficiary's job duties, as described by the petitioner, are not indicative of an employee who is primarily focused on the broad goals and policies of the organization. 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). The petitioner has not established that the beneficiary is primarily engaged in directing and controlling a subordinate staff comprised of professional, managerial or supervisory employees, nor has it indicated that he is charged with managing an essential function of the petitioning organization. See section 101(a)(44)(A) of the Act. Therefore, the AAO is not persuaded that the beneficiary would be employed in a primarily managerial capacity.

Beyond the decision of the director, the record lacks a substantive job description establishing what job duties the beneficiary performed during his employment abroad. Therefore, the petitioner has not established that the beneficiary was employed by the foreign entity for at least one year in a qualifying capacity during the three-year period prior to the filing of the petition. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

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). Based on the additional grounds of ineligibility discussed above, this petition cannot be approved.

The AAO acknowledges that USCIS has previously approved an L-1A petition filed by the petitioner on behalf of the instant beneficiary. Many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant I-129 L-1 petitions. See, e.g., *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22; *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103. Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. Cf. §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427. Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; see also 8 C.F.R. § 214.2(l)(14)(i) (requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

Despite the previously approved petition, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act. Each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Based on the lack of required evidence of eligibility in the current record, the AAO finds that the director was justified in departing from the previous nonimmigrant petition approval by denying the instant petition.

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.