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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: JUL 02 2012 OFFICE: TEXAS SERVICE CENTER



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: SELF-REPRESENTED

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 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 request 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 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 California corporation that seeks to employ the beneficiary as a 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.

In support of the Form I-140 the petitioner submitted a supplemental statement dated November 20, 2009, which contained relevant information pertaining to the petitioner's eligibility, including an overview of the petitioner's business and descriptions of the beneficiary's foreign and proposed employment. The petitioner also provided supporting evidence in the form of financial and corporate documents pertaining to the petitioner and its claimed foreign parent entity.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued two notices of intent to deny (NOID), one on April 16, 2010 and the other on June 10, 2010. In the first NOID, the director determined that the record lacked adequate job descriptions for the beneficiary's foreign and proposed employment. The director further noted that some of the duties attributed to the beneficiary's employment in the United States could not be deemed as qualifying within a managerial or executive capacity. In the second NOID, the director noted that a response to the first NOID was not received and thus determined that the record was still lacking adequate job descriptions with regard to the beneficiary's foreign and proposed positions. The director reiterated prior observations, stating that the descriptions provided were overly general and failed to establish that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity.

The record shows that the petitioner did not respond to either notice.

Accordingly, after reviewing the record again, the director concluded that the petitioner failed to establish that the petitioner would employ the beneficiary in a qualifying managerial or executive capacity. The director therefore issued a decision dated October 12, 2010 denying the petition.

On appeal, the petitioner submits a brief, indicating that U.S. Citizenship and Immigration Services (USCIS) created confusion by first issued a notice approving the petitioner's Form I-140 and following up that notice with an adverse decision denying the same Form I-140. The petitioner asserts that there is no evidence on the record to suggest that the beneficiary is not eligible for the immigrant classification sought and further asserts that the director purposely overlooked evidence of eligibility.

While the AAO takes note of an apparent USCIS oversight in prematurely issuing an approval notice, the record nevertheless shows that the director intended to inform the petitioner of various key evidentiary deficiencies, as evidenced by the director's issue of not one, but two NOIDs. Both NOIDs focused on job descriptions and both found that the information provided was not sufficient to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. The AAO finds that the petitioner's arguments fail to properly supplement the record with crucial information concerning the beneficiary's proposed position with the U.S. entity. The discussion below will provide an analysis of the relevant submissions and will explain the underlying reasoning for the AAO's decision.

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 to be addressed in this proceeding is the beneficiary's employment capacity in his proposed position with the petitioning U.S. entity. Specifically, the AAO will examine the record to determine 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.

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 petitioner did not provide a response to either of the two NOIDs that were previously issued. Therefore, the AAO will not accept any evidence that the petitioner now submits on appeal to address deficiencies that were previously discussed in either NOID. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

In 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). The AAO also finds that it is appropriate and often necessary to consider other relevant factors, such as the petitioner's organizational hierarchy, which shows the complexity of a given entity and the beneficiary's placement in relation to other employees, as well as the petitioner's overall staffing, which allows the AAO to gauge the extent to which the petitioner is able to relieve the beneficiary from having to focus the primary portion of his time on the performance of non-qualifying operational tasks.

The petitioner submitted an initial statement dated November 20, 2009 and a subsequent statement dated April 10, 2010, both containing information about the beneficiary's proposed employment with the U.S. entity. The first statement broadly indicated that the beneficiary would oversee and coordinate commercial operations, forge business relationships with customers and distributors and engage in contract negotiations, monitor consumer performance and look for marketing opportunities, and assign sales and determine inventory requirements.

Without further explanation, it is unclear how forging customer relationships, negotiating contracts, and engaging in the marketing of the petitioner's services can be deemed as tasks in a qualifying managerial or executive capacity within the statutory definitions.

In reviewing the petitioner's April 10, 2010 statement, the AAO finds that the petitioner reiterated much of the information that was provided in the earlier supporting statement and further noted that the beneficiary would have authority to recruit, hire, train, and fire employees, implement policies, and make executive decisions. While this information indicates that the beneficiary would enjoy a high degree of discretionary authority, it does not establish that the beneficiary would allocate his time primarily to the performance of tasks within a qualifying managerial or executive capacity.

Additionally, while the AAO does not concur with the director's adverse finding on the basis of the petitioner's staffing levels, given that the petitioner has not provided information concerning its organizational hierarchy or the beneficiary's placement therein, the fact remains that the record indicates that non-qualifying operational tasks will, to some degree, comprise the beneficiary's proposed employment. That being said, 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 the 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).

The director twice made an effort to elicit crucial information about the beneficiary's managerial role and daily job duties. As the petitioner failed to provide the requested information, the AAO cannot conclude that the beneficiary's proposed position with the U.S. entity would be within a qualifying managerial or executive capacity. On the basis of this determination the instant petition cannot be approved.

Furthermore, while not previously addressed in the director's decision, the AAO finds that the petitioner has failed to 1) establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity or 2) provide evidence of its claimed qualifying relationship with the beneficiary's foreign employer.

With regard to the beneficiary's foreign employment, the petitioner indicated that the beneficiary performed a number of non-qualifying tasks, including developing contracts with potential clients, making sales presentations, engaging in contract negotiations, consulting clients, and seeking out product improvements and business opportunities. The information provided does not establish that the beneficiary allocated the primary portion of his time to tasks of a qualifying managerial or executive nature.

With regard to the petitioner's qualifying relationship with the beneficiary's foreign employer, the AAO notes that the regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right

and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

Although the petitioner provided bank statements, business invoices, and its own corporate and business documents in support of the Form I-140, none of these submissions establishes that the beneficiary's foreign employer is the parent entity in an alleged parent-subsidary relationship. 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)).

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.