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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: **JUN 06 2012**

OFFICE: TEXAS SERVICE CENTER

FILE: [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:

[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 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 with the field office or service center that originally decided your case by filing a 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, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Texas corporation that seeks to employ the beneficiary as its vice 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.

The petitioner did not provide evidence in support of the Form I-140, which the petitioner electronically filed on September 29, 2005. Therefore, the director issued two subsequent notices of intent to deny (NOID)—one dated November 2, 2005 and the other dated January 19, 2006. In the first NOID, the director instructed the petitioner to provide, in part, a detailed description of the beneficiary's proposed employment, including a job offer statement specifically listing the beneficiary's daily job duties and the percentage of time the beneficiary would allocate to each job duty.

The petitioner's response included a statement from counsel dated November 29, 2005 in which counsel provided a list of eleven of the beneficiary's duties and general responsibilities. The petitioner also provided a job offer letter dated November 21, 2005, briefly describing the beneficiary's proposed employment, and a separate pie chart, which included a percentage breakdown allocating 25% of the beneficiary's time to directing and managing the company; 20% to establishing goals and policies; 15% to supervising and controlling subordinate employees; 15% to hiring and firing employees; 10% to overseeing the preparation of inventory reports; 10% to reviewing financial reports, revenues, and expenses; and 5% to establishing and achieving marketing goals.

In the subsequent NOID, the director once again addressed the issue of the beneficiary's proposed employment, instructing the petitioner to submit a specific job description, which would list individual job duties and the amount of time the beneficiary would allocate to each task. The director asked the petitioner to provide evidence to establish that the beneficiary would not spend his time primarily performing non-qualifying job duties that are necessary to produce a product or provide a service. Additionally, the director asked the petitioner to provide its organizational chart identifying the beneficiary's position as well as the position titles and names of the other employees. In an effort to verify the information offered in the chart, the director also instructed the petitioner to provide IRS Form W-2s or 941s showing that the petitioner in fact has five employees as claimed in the organizational chart.

The petitioner's response included a supplemental job description in which counsel claimed that the beneficiary would oversee operations of two retail stores that are owned by the petitioning entity. The petitioner submitted an organizational chart identifying a total of six employees—a company president, a vice president, one store manager, and three cashiers. It is noted that the beneficiary was identified in the proposed position of vice president. The petitioner also provided 2005 Form W-2s issued to five employees (not including the company's president) and its 2005 federal unemployment tax return, which shows a total of \$85,200 paid for employee services. Part II of the Form 940 shows that the petitioner paid \$27,000 in taxable payroll expenses in the State of Texas and another \$20,000 in taxable payroll expenses in the State of Arkansas for a total of \$47,000 in payroll expenses. It is noted that, according to the information provided in the Form W-2s that were issued by the petitioner, the total amount of wages the petitioner paid in Arkansas totaled \$25,200 and the wages paid in Texas totaled \$60,000.

After reviewing the record, the director concluded that the petitioner failed to establish eligibility and therefore issued a decision dated October 22, 2009 denying the petition. The director determined that the petitioner failed to establish that the foreign entity continues to do business abroad or that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

On appeal, counsel submits a brief disputing both of the director's adverse findings and asks the AAO to consider additional supporting evidence.

After considering the supplemental documentation, the AAO finds that the petitioner has submitted sufficient evidence to establish that the petitioner's affiliate overseas continues to do business. As such, the AAO hereby withdraws this ground as a basis for denial and will focus instead on the second ground cited in the denial—the beneficiary's employment capacity in his proposed position with the U.S. entity.

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.

As noted above, 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.

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 will then consider this information in light of other relevant factors, such as the petitioner's organizational hierarchy, the beneficiary's position therein, and the petitioner's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks.

The petitioner failed to provide an adequate description of the beneficiary's proposed employment within the context of the petitioner's convenience store business, which consists of one retail outlet with two claimed employees and another retail outlet, in a different state, with a staff of three employees. Although the beneficiary's job descriptions repeatedly focused on the beneficiary's discretionary authority in managing,

directing, planning, and formulating plans and policies, the petitioner failed to clarify the beneficiary's specific role within the scope of two retail operations and provided little information that would explain how the beneficiary is relieved from having to primarily perform non-qualifying tasks when the petitioner employs only one store manager while operating two store locations in two different states. If [REDACTED] is employed as the store manager of the petitioner's Texas retail operation, it is unclear who manages the petitioner's second retail operation in the State of Arkansas. As the petitioner's wage and tax documents do not show the petitioner's president as having drawn a salary during any time in 2005 and in light of the petitioner's claim that the Arkansas store employs two cashiers, it would appear that the only individual available to manage the Arkansas store would be the beneficiary himself. Supervising non-managerial or non-professional employees would not qualify as employment in a qualifying managerial or executive capacity. *See* section 101(a)(44)(A)(ii) of the Act.

The petitioner indicated that the beneficiary would perform numerous non-qualifying job duties including conducting market research, recruiting and interviewing non-professional employees to work at the petitioner's various retail outlets, conducting feasibility studies, gathering competitor information, and negotiating contracts with vendors and distributors. The petitioner did not, however, indicate what portion of the beneficiary's time would be allocated to these non-qualifying tasks despite the fact that this information was expressly requested by the director in the second NOID. 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).

Furthermore, while the AAO has reviewed the percentage pie chart that the petitioner submitted in response to the first NOID as well as the separate percentage breakdown that the petitioner submitted in response to the second NOID, both breakdowns consisted almost entirely of broad job responsibilities, such as directing and managing the company, establishing its goals and policies, overseeing the preparation of inventory reports, or establishing and achieving marketing objectives. These general statements are insufficient as they fail to clarify what specific tasks the beneficiary would perform. It is noted 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).

Even in instances where the petitioner provides a detailed job description, this factor alone, without supporting evidence, is not sufficient. Merely providing a job description that describes a set of primarily qualifying tasks is meaningless if the organization that seeks to hire the beneficiary does not have the human resources to relieve that beneficiary from having to primarily perform non-qualifying operational job duties.

The record does not contain consistent, reliable documentation to establish precisely whom the petitioner employed at the time of filing the petition that would allow the AAO to assess the extent to which the petitioner was able to relieve the beneficiary from having to allocate his time primarily to the performance of non-qualifying operational tasks.

The petitioner's wage and tax documents contain various unexplained anomalies. While the record indicates that the petitioner issued Form W-2s to five employees in 2005, showing a total of \$85,200 paid in employee

wages and salaries, Part II of the Form 940, which the petitioner completed for 2005, shows that it paid \$27,000 in taxable payroll expenses in the State of Texas and another \$20,000 in taxable payroll expenses in the State of Arkansas for a total of \$47,000 in payroll expenses. The latter amount is significantly less than the sum total of the 2005 W-2s, which show that the total amount of wages the petitioner paid in Arkansas totaled \$25,200 and the wages paid in Texas totaled \$60,000. 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).

In light of the inconsistency described above, it is entirely unclear how many employees the petitioner had at the time of filing. Thus, not only is the petitioner's credibility undermined by its submission of inconsistent wage and tax documents, but the petitioner has failed to establish that it was ready and able to relieve the beneficiary from having to primarily focus on performing non-qualifying tasks associated with running a convenience store operation.

The AAO further notes that counsel's assertions on appeal are not supported by the evidence of record. For example, on page seven of his appellate brief, counsel asserts that the beneficiary will "supervise and control the work of the president and general manager, who will in turn be responsible for directing the work of subordinate managers . . ." This statement is contradicted by the organizational chart that was submitted in response to the second NOID, where the chart showed that the beneficiary's proposed position of vice president would be directly subordinate to the president, not the other way around. There is no evidence showing that the petitioner actually employed the individual named as president at the time the Form I-140 was filed, as this was the only individual in the organizational chart to whom a 2005 W-2 was not issued.

The petitioner's organizational chart identified only one store manager. Thus, counsel's claim that the petitioner had a position available where the beneficiary would oversee multiple store managers is simply not credible and is not supported by the evidence of record. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. 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 both counsel and the petitioner have made references to the petitioner's expanded operations, which include additional convenience stores that the petitioner did not operate at the time of filing, the petitioner's eligibility must be assessed based on facts and circumstances that existed at the time of filing. Thus, neither newly hired staff nor any additional stores that were not a part of the petitioning entity at the time the petition was filed may be considered for the purpose of determining the petitioner's eligibility. 8 C.F.R. § 103.2(b)(1); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The AAO cannot reach a favorable conclusion without a job description that adequately describes the proposed employment and reliable documentary evidence to support the claims being made. Although the director attempted to elicit necessary information by issuing notices that expressly instructed the petitioner to list the beneficiary's specific job duties with applicable time allocations, the petitioner did not provide a response in the requested format. Instead, the petitioner assigned a percentage breakdown to general job responsibilities and failed to assign time constraints to the more detailed list of duties that were provided as a separate document. Given that the beneficiary's time would be allocated to both qualifying and non-qualifying tasks, the time element is crucial for the purpose of determining whether the beneficiary would *primarily* perform tasks within a qualifying capacity. In light of the significant deficiencies that have been

discussed in this decision, the AAO finds that the petition does not warrant approval and the director's decision will be affirmed.

Additionally, while not previously addressed in the director's decision, the AAO finds that the petitioner failed to provide sufficient evidence that the beneficiary's employment abroad was within a qualifying managerial or executive capacity.

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 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.