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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



By

DATE:

MAR 19 2012

OFFICE: TEXAS SERVICE CENTER

FILE:



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

The petitioner is a Florida corporation that is engaged in business and real estate investment and seeks to employ the beneficiary as its president and general 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.

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 disputes the director's decision and contends that the director issued erroneous findings and did not utilize all the documentation submitted with the petition in order to determine the petitioner's eligibility. The AAO reviewed the entire record to make its determination.

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 issue raised by the director in this proceeding calls for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether 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, counsel submitted a letter dated January 17, 2008 stating that the petitioner is a "business that consists of the operations of a Pizzeria and residential and commercial property management services (of numerous active real estate properties in Miami and Orlando, and a restaurant in Miami); it continuously seeks to invest in high yielding active business opportunities."

In response to the director's notice of intent to deny, counsel submitted a list of duties to be performed by the beneficiary as follows:

- Establish current and long term objectives, plan, and policies
- Dispense advice, guidance, direction, and authorization to carry out procedures
- Oversee the soundness of the corporation's financial structure
- Negotiation with banks and other credit lenders to get the best financing deals for equipment
- Review operating results of the corporation and correct unsatisfactory results
- Establish and maintain an effective system of communications throughout the organization and remain informed of all new developments in the industry
- Represent the organization with major customers, shareholders, the financial community, and the public
- Direct and coordinate promotion of services performed to develop new markets, increase market share, and obtain leverage over the competition
- Analyze budget to identify areas in which reductions can be made, and allocate operating budget items
- Follow-up with administrative and operations personnel and review activity, operating, and sales reports to determine changes in operations if required
- Recruit, hire, and terminate personnel and maintain adequate staff to meet activities' demand
- Provide day-to-day guidance to all aspects related to the corporation's sound and profitable operation.

The petitioner also submitted a business plan that indicated the different investments made by the petitioner, and outlined the marketing and sales strategies for the pizzeria owned by the petitioner. In addition, the business plan has an organizational chart of the U.S. company. According to the chart, the beneficiary is the president that supervises the legal consultant, accounting services and a vice-president, who in turn supervises a property management person and the pizzeria general manager. The property management person has two unidentified employees and the pizzeria has 3 cooks, 3 delivery employees and 3 cashiers. The only two names listed in the organizational chart are the beneficiary and the vice-president. No individuals are listed for the other positions. In addition, the petitioner did not submit job descriptions for any position other than the position held by the beneficiary as president.

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). In the instant case the description of the beneficiary's job duties is too general to convey an understanding of exactly what the beneficiary will be doing on a daily basis and how much of his time would be spent on qualifying tasks versus the non-qualifying ones. For instance, the description of duties indicates that

a great deal of the beneficiary's time would be spent developing policies and strategies. However, the petitioner does not clarify with sufficient detail what the beneficiary would actually be doing in his effort to develop policies and strategies or why that effort would occupy a great deal of his time. Furthermore, the petitioner indicated that the beneficiary would "direct and coordinate promotion of services performed to develop new markets, increase market share, and obtain leverage over the competition"; "analyze budget to identify areas in which reductions can be made, and allocate operating budget items"; and "review activity, operating, and sales reports to determine changes in operations if required." None of these duties can be deemed as qualifying duties, especially when there is no evidence of a staff that would prepare the reports or assist with the marketing strategies. Since the petitioner must establish that the beneficiary would *primarily* perform qualifying duties, it must be determined that the beneficiary would not spend a majority of his time performing these non-qualifying duties. 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). In the instant case, the record lacks sufficient information to indicate what specific duties the beneficiary would primarily be performing. As such, the AAO cannot affirmatively conclude that the beneficiary would primarily perform managerial or executive duties.

The petitioner submitted Form 1120, U.S. Corporation Income Tax Return, for 2006, 2007 and 2008. In those three years, the petitioner did not pay any compensation of officers. In addition, the petitioner paid zero salaries and wages in 2006, and paid \$28,594.00 in salaries and wages in 2007, and paid \$14,200.00 in salaries and wages in 2008. In response to the notice of intent to deny, the petitioner submitted Form W-2 for all employees of 2008. The petitioner employed 6 individuals in 2008 but according to the yearly salary, they were all part-time employees. The wages and salaries paid by the petitioner in 2008 totaled to \$14,200 for six employees. In addition, the petitioner did not provide a W-2 Form for the beneficiary or the vice-president. According to the tax returns, the petitioner does not hire any full-time employees and the six employees that were hired in 2008 barely received a salary for that year. The organizational chart submitted by the petitioner is not corroborated by the tax returns. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. The record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the business. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff

of professional, managerial, or supervisory personnel who relieve him from performing nonqualifying duties. The petitioner has not demonstrated that it has reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization or that he operates at a senior level within an organizational hierarchy. Based on the evidence furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

While not addressed in the director's decision, the AAO finds that the petitioner failed to establish that it has the ability to pay the beneficiary's proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the *prospective United States employer* has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

(Emphasis added.)

The petitioner indicates on the Form I-140, at Part 6, that it will pay the beneficiary \$1,200.00 per week, or approximately \$60,000.00 per year. In response to the director's intent to deny, counsel for the petitioner stated that the petitioner has the ability to pay the proffered wage and submitted corporate income tax returns for 2007 and 2008, and a financial statement that shows the petitioner's current assets as \$1,896,546.57.

On the Form 1120, U.S. Corporation Income Tax Return, for 2007, the petitioner declared gross receipts or sales of \$216,774.00, and a net operating loss of \$70,904.00. According to the Form 1120 for 2008, the petitioner declared gross receipts or sales of \$49,875.00. In addition, in both 2007 and 2008, the petitioner did not pay compensation to the officers. It paid \$28,594.00 in salaries and wages in 2007, and \$14,200.00 in salaries and wages in 2008. According to the tax returns, the petitioner does not have the ability to pay the proffered wage to the beneficiary. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner has not established that it has the financial ability to remunerate the beneficiary. For this additional reason, the petition may not be approved.

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.