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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
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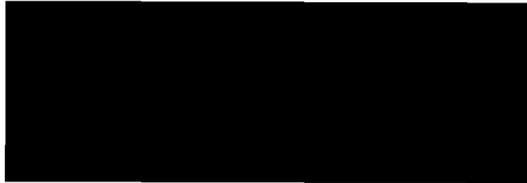
Petitioner:

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 gas station and convenience store that 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.

The director denied the petition based on the following grounds of ineligibility: (1) failure to establish that the petitioner was doing business for at least one year at the time the petition was filed; and (2) failure to establish that the beneficiary's proposed employment with the U.S. entity would be within a qualifying managerial or executive capacity. On appeal, counsel disputes the director's findings and provides an appellate brief.

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 a preliminary matter, the petitioner submitted documentation with the response to the director's request for evidence regarding the petitioner's business operations from 2007 through 2009. As noted by the director, through the years, the petitioner has grown in size and now operates two gas stations with convenience stores, has more employees, and has higher gross sales. However, the AAO must review the beneficiary's job duties and the petitioner's business operations as they existed when the petition was filed, not at the time of appeal. The petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45,

49 (Comm. 1971). On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Thus, the AAO will review the information submitted on December 1, 2006, when the I-140 was filed.

The first issue in this proceeding is whether the United States entity had been doing business for one year. The regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner must establish that it has been doing business for at least one year prior to filing the Form I-140. The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

In order to demonstrate that the U.S. entity has engaged in the regular, systematic and continuous provision of goods or services, the petitioner submitted several invoices billed to the U.S. entity, financial statements for 2004 and 2005, copies of the U.S. company's bank account, the IRS Form 1120, U.S. Corporation Income Tax Return, for 2005 indicating a gross receipt of sales of \$0.00, an asset purchase agreement, and lease agreements.

As noted by the director in the denial decision, one of the lease agreements submitted by the petitioner is for an office space that is not the gas station with the convenience store. In response to the request for evidence, the petitioner stated that it had a lease agreement dated November 1, 2005 valid until May 2006 for an office space.

The petitioner stated in the response to the request for evidence that it took over the business operations of the gas station/convenience store on November 8, 2005 by signing an asset purchase agreement. Upon review of the Asset Purchase Agreement submitted by the petitioner, it was entered into on November 8, 2005 for the sale of the business. On the second page of the purchase agreement, it states that the "effective date of the transfer shall be the opening of business on January 1, 2006." The director also noted that the IRS Form 1120, U.S. Corporation Income Tax Return for 2005 indicated a gross receipt of sales of \$0.00. The petitioner provided invoices billed to the U.S. entity in November and December of 2005 but there is no evidence that the petitioner owned this business at this time since the asset purchase agreement stated that the "effective date of transfer shall be the opening of business on January 1, 2006."

On appeal, counsel for the petitioner states that "the petitioner entered into the Asset Transfer Agreement on November 8, 2005 and "immediately made arrangements to take over the operations of an ongoing business before the effective date of transfer." On appeal, the petitioner submits a declaration from the beneficiary stating that it entered into an asset purchase agreement to buy the business on November 8, 2005 and "I made arrangements to take over the operation of the business." The beneficiary also states in his declaration that he "opened a business account on October 25, 2005," and inventory was purchased and "over \$165,400 was advanced toward purchase of the business from November 8, 2005 to December 22, 2005." The petitioner also submits copies of checks written by the petitioner to the owner of the gas station and convenience store.

Although the beneficiary states that the petitioner was making "arrangements to take over the operation of the business," this does not mean that the petitioner was the actual owner of the business operations prior to January 1, 2006. The contract in the record states that the petitioner will not take over the business until

January 1, 2006. The petitioner's preparations to take over the business do not qualify the petitioner as the actual owner at that time. As stated by the contract, the petitioner did not take over the business until January 1, 2006 and thus, the petitioner was not doing business for one entire year prior to filing the instant petition on December 1, 2006. For this reason, the petition may not be approved.

The second issue that will be addressed in this proceeding calls for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the petitioner submitted sufficient evidence to establish that 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 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). 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 in the business. A review 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.

The I-140 petition was filed on December 1, 2006. At the time of filing, the petitioner did not provide a job description of the position to be performed by the beneficiary as President. In the response to the request for evidence, 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 petitioner failed to clarify how much time the beneficiary spent performing qualifying tasks versus those that would be deemed non-qualifying.

The AAO will now review the job duties that made up 50% of the beneficiary's time whereby the beneficiary is "responsible for the overall management of the business." The beneficiary is "responsible for formulating and implementing all operational policies to meet the basic goals established by the company to assure that the daily operation of the business is running smoothly," and "responsible for overall management of the business including determining the number of staff needed for each location for the daily operations, hiring and firing of staff, overseeing operational business matters and human resource matters." Merely using the term "overall management" to describe the beneficiary's function does not establish that the tasks the beneficiary will perform are of a qualifying nature. The beneficiary's position description is too general and broad to establish that the majority of his time would be 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 also stated that the beneficiary spends 10% of his time "securing contracts with vendors after negotiating for the purchase of goods to be sold in the 2 stores." The beneficiary also spends 5% of his time to "develop promotional and marketing strategies to increase the traffic of the gas stations." In addition, the petitioner stated that the beneficiary spent 50% of his time "responsible for the control of the financial direction of the company" to include "oversee the maintenance of the accounting records," "negotiate credit-banking transactions and letters of credit of the company's behalf," "develop financial policies," and "oversee credit matters including accounts payable and receivables." However, the petitioner did not identify any employees who actually assisted in market research, marketing, and promotional programs, and who actually prepared the accounting records, thus indicating that the beneficiary may have been the one to carry out these operational functions, which are clearly outside the parameters of what would be deemed as being within a managerial or executive capacity.

The job description submitted in response to the director's request for evidence discusses two gas stations but at the time of filing, the petitioner only had one gas station. Thus, the job description does not accurately reflect the job duties of the beneficiary at the time of filing the petition. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

On appeal, the petitioner provides basically the same vague job description that is too general and does not provide a true understanding of the tasks the beneficiary will perform. The petitioner also states that the beneficiary is a function manager by "exercising control over essential business functions such as financial planning, marketing, management and financial services."

Although counsel suggests that the beneficiary's position may be deemed as that of a function manager, counsel cannot merely raise these alternate claims to avoid addressing the non-qualifying tasks the beneficiary would have to perform by overseeing the work of non-supervisory, non-professional, and/or non-managerial employees. 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).

The AAO acknowledges counsel's contention that the beneficiary performs an essential function within the petitioner's organization. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. at 604. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. As noted above, the petitioner provided a brief and vague job description that did not discuss how the beneficiary is managing an essential function. Only on appeal did counsel for the petitioner claim that the beneficiary is a function manager. However, as noted above, the beneficiary's job description does not establish that the beneficiary is primarily performing in a managerial capacity.

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. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's organizational hierarchy,

the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

The petitioner has not identified employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business since the subordinates' duties were not provided. 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 that of a "function manager" as contemplated by the governing statute and regulations. As discussed above, the petitioner has not established that the beneficiary's duties are primarily managerial in nature, and thus he cannot be considered a "function manager."

Other than stating that the proposed position will be responsible for managing an unidentified essential function, counsel provides no explanation or evidence in support of his claim that the beneficiary would qualify as a function manager pursuant to section 101(a)(44)(A)(ii) of the Act. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The organizational chart of the U.S. company at the time of filing the petition indicated the beneficiary as president who supervised a secretary, a manager, and three cashiers. The petitioner did not provide job descriptions for these positions at the time of filing the petition. The director noted in her decision that given the amount of hours that the petitioner is open, and the hours worked by the employees, there were several hours that the business is open without any employees to cover those shifts so the beneficiary must have been responsible for the cashier duties during these times.

On appeal, counsel for the petitioner states that the "original schedule of hours only showed the working hours on Monday through Friday," and the "employer forgot to mention that the store has different working hours on Saturdays and Sundays." On appeal, the petitioner provides a new working schedule of all employees. However, the new schedule is the current schedule and not the schedule for when the petition was filed on December 1, 2006. The new schedule discusses two gas stations and convenience stores when the petitioner had only one gas station and convenience store at the time of filing. Thus, the new schedule cannot be used to establish eligibility since it does not reflect the employee work schedule at the time of filing the petition. Again, 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 at 165.

In summary, the petitioner has failed to provide sufficient evidence to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. For this additional reason, the 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.