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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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DATE: **MAR 20 2012** OFFICE: NEBRASKA 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, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a New York limited liability company that seeks to employ the beneficiary as its regional 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 statement dated August 1, 2007 in which the petitioner's chief executive officer provided brief descriptions of the beneficiary's U.S. and foreign employment. The petitioner also provided its corporate documents and its 2006 tax return to be reviewed in determining the petitioner's eligibility.

The director examined the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a request for additional evidence (RFE) dated July 8, 2008 instructing the petitioner to provide more detailed descriptions of the beneficiary's foreign and proposed employment. The director asked the petitioner to list the beneficiary's daily tasks and to assign a time allocation to each of the listed job duties. The director also asked the petitioner to provide each entity's organizational chart as well as the petitioner's quarterly unemployment compensation reports for 2007 and the first quarter of 2008.

The petitioner provided some of the requested tax documents as well as a response statement addressing the director's concerns.

After reviewing the record, 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 February 26, 2010 denying the petition. The director found that the petitioner's extremely limited support staff at the time of filing strongly indicated that the beneficiary would spend the primary portion of his time performing non-qualifying job duties.

On appeal, the petitioner challenges the director's decision, contending that the director did not properly evaluate the petitioner's supporting evidence. In a supplemental appellate brief, the petitioner further discusses the beneficiary's proposed position, focusing on the beneficiary's discretionary authority and his supervision of other supervisory employees.

The AAO finds that the petitioner's assertions are not persuasive and fail to overcome the director's denial. It is noted that the petitioner's submissions have been reviewed and all relevant documentation that pertains directly to the key issue in this matter will be fully addressed in the discussion below.

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.

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 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 AAO will also consider 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 record shows an overall lack of detailed information regarding the beneficiary's duties and further indicates that the petitioner had an extremely limited support staff to relieve the beneficiary from the daily tasks involved in running the petitioner's operation. In the August 1, 2007 supporting statement, the petitioner claimed that the beneficiary would be involved in the daily activities and would only supervise the company's operations "through junior personnel" at some point in the future. Although the AAO cannot determine what was meant by the "day[-]to[-]day activities," the very claim that the beneficiary would "eventually" supervise those activities through "junior personnel" meant that at the time of filing the Form I-140 the petitioner was not equipped with the necessary personnel to relieve the beneficiary from having to perform those duties himself. This statement also strongly indicates that those daily activities are not ones that would fall within the parameters of what is deemed managerial or executive.

Next, in reviewing the statement that was submitted in response to the RFE, the AAO finds that the petitioner failed to provide the detailed job description that the director requested and again provided only generalized statements broadly discussing the beneficiary's responsibilities, which encompass a wide range of activities that deal with sales and marketing, business development, human resources supervision, financial policies and procedures, public relations, and profit and financial stability. In its general discussion of the beneficiary's role, the petitioner focused on the beneficiary's authority to make decisions and create policies. However, no specific information was provided with regard to the beneficiary's actual daily tasks or their respective time allocations. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103.

Furthermore, while the petitioner claimed that contract labor was used to carry out the sales function, there is no evidence on record to establish that someone other than the beneficiary was available to market the

petitioner's products. The petitioner also failed to provide evidence to establish the time periods during which the sales representatives provided their services, as the IRS Form 1099s that the petitioner submitted to show that independent contractors were hired do not establish when the services were provided. The AAO therefore cannot determine whether the independent contractors were working for the petitioner at the time the petition was filed. The petitioner also provided insufficient information to specifically determine what role the beneficiary has assumed with respect to the business development function. While the petitioner named two individuals as "helping hands" in the business development function (the same two employees who were also named as the independent sales contractors), it is unclear what tasks the independent contractors performed, as the beneficiary was responsible for contacting suppliers and buyers, both of which are non-qualifying tasks. The petitioner also failed to specify the specific tasks associated with developing and implementing financial policies, nor did the petitioner actually identify any financial policies or explain how developing and implementing policies translate into daily tasks.

On appeal, the petitioner once again focuses on the beneficiary's position at the top of the company's organizational hierarchy and the discretionary authority that inevitably goes along with this top-level placement. However, neither of these factors is sufficient to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. As noted above, in order to determine that the proposed employment fits either or both of the statutory definitions, the petitioner must provide a detailed job description and, based on the amount of time the beneficiary would allocate to each of his proposed tasks, the petitioner would have to establish that the beneficiary would allocate the primary portion of his time to qualifying tasks versus the non-qualifying ones. 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).

Here, as previously noted, the petitioner has failed to provide an adequate job description that conveys a meaningful understanding of what specific tasks the beneficiary would perform on a daily basis. While the petitioner lists numerous subordinate positions on appeal in an attempt to establish that the beneficiary would be relieved from having to allocate the primary portion of his time to non-qualifying tasks, the record indicates that only one individual, other than the beneficiary, received wages that were commensurate with those of a full-time employee. While others may have been employed full-time, their respective wages indicate that they were not employed during the entire 2007 tax year, thus leaving the AAO to question whom the petitioner actually employed when the petition was filed. Furthermore, based on the petitioner's response to Part 5, Item 2 of its Form I-140, the petitioner had only three employees when the petition was filed. Such limited staffing reasonably leads the AAO to question how the petitioner planned to support the beneficiary in a managerial or executive capacity such that the primary portion of his time would not be allocated to non-qualifying tasks.

In summary, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel or that the petitioner is adequately staffed to relieve the beneficiary from primarily performing non-qualifying 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. Based on the evidence furnished, it cannot be found that the beneficiary would be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Additionally, while not previously addressed by the director, the AAO finds that the petitioner has failed to establish eligibility on two additional grounds.

First, 8 C.F.R. § 204.5(j)(3)(i)(B) states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to his entry to the United States as a nonimmigrant to work for the same employer. The director specifically addressed this issue in the RFE by instructing the petitioner to provide a detailed analysis of the beneficiary's daily activities during his employment abroad. The petitioner provided a deficient job description that did not contain the requested information; nor did the petitioner provide any information regarding this issue when the Form I-140 was initially submitted. Based on the evidence submitted, the AAO cannot conclude that the beneficiary's employment abroad meets the requirements of 8 C.F.R. § 204.5(j)(3)(i)(B).

Second, 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." Although the petitioner provided tax documents pertaining to the time period in question, such documents do not show the frequency of the petitioner's sales transactions and thus cannot be relied upon to determine whether the petitioner was conducting business on a "regular, systematic, and continuous" basis. *See id.*

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 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.