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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

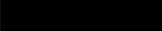
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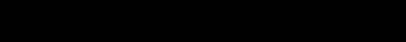


by

DATE: MAY 09 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 seeks to employ the beneficiary as its 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.

In support of the Form I-140 the petitioner submitted a statement dated March 19, 2008, which included a description of the beneficiary's proposed employment as well as general information pertaining to the beneficiary's prior employment with the foreign entity. Additionally, the petitioner provided supporting evidence, including corporate, tax, and business documents pertaining to the U.S. and foreign entities.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a request for additional evidence (RFE) dated April 14, 2009 informing the petitioner of various evidentiary deficiencies. The director instructed the petitioner to provide evidence showing that it has a qualifying relationship with the beneficiary's foreign employer and that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

The petitioner provided a response statement dated May 5, 2009 from its prior counsel. Counsel's response was accompanied by the petitioner's corporate filing documents as well as a number of employer's quarterly reports listing the petitioner's employees in 2007 and 2008.

After reviewing the record, the director concluded that the petitioner failed to establish eligibility and therefore issued a decision dated January 25, 2010 denying the petition. The director determined that the beneficiary was not eligible for the immigrant classification because the petitioner failed to establish that: 1) it has a qualifying relationship with the beneficiary's foreign employer; 2) it has been doing business in the United States; or 3) the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

On appeal, counsel disputes the director's conclusions and submits a statement along with supplemental documents in an effort to overcome the grounds for denial.

With regard to the first conclusion concerning the petitioner's qualifying relationship with the beneficiary's foreign employer, the director erroneously focused on the petitioner's failure to provide a Securities and Exchange Commission Form 10K, which is irrelevant in the present matter, and seemingly made an unnecessary reference to a regulatory requirement that pertains to partnerships that provide accounting services. As the petitioner's particular set of circumstances are such that do not call for the filing of a Form 10K or meeting regulatory requirements that pertain to accounting partnerships, the AAO finds that the director's conclusion was not based on documentation that is relevant in establishing whether a qualifying relationship is present in the instant matter. In reviewing the petitioner's submissions, it appears that sufficient documentation was presented to establish the existence of the requisite qualifying relationship. Therefore, the AAO hereby withdraws the director's first adverse finding.

Additionally, after reviewing the record in its entirety it is the AAO's finding that sufficient documentation has been submitted to establish that the petitioner had been doing business for at least one year prior to filing

the instant petition and continued to do business beyond the date of filing. *See* 8 C.F.R. § 204.5(j)(3)(i)(D). It appears that the director's adverse finding was primarily based on lease documents rather than evidence of purchase and sales, which the petitioner submitted in support of the Form I-140. The AAO will therefore withdraw the director's second adverse finding as a basis for the denial. The remaining issue is 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.

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 proposed job duties. See 8 C.F.R. § 204.5(j)(5). Merely establishing that the beneficiary would have discretionary authority and an elevated position within the petitioner's organizational hierarchy is not sufficient, as the beneficiary's 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 then consider the given job description in light of the petitioner's organizational hierarchy, the beneficiary's position therein, and that entity's overall ability to relieve the beneficiary from having to primarily perform its daily operational tasks.

The job descriptions provided fail to establish that the beneficiary's primary focus would be the performance of tasks within a qualifying managerial or executive capacity. In reviewing the job description that was provided in the March 19, 2008 statement, the AAO notes that 20% of the beneficiary's time was allocated to developing business proposals to capture business opportunities, develop business relationships with suppliers, distributors, and key accounts, communicate with clients, and pursue new business opportunities. While these responsibilities may be crucial for the petitioner's financial stability and success, they entail the performance of non-qualifying tasks, which contain sales and marketing components. The AAO further notes that while the beneficiary will be tasked with managing and supervising the petitioner's personnel, the organizational hierarchy that was in place at the time the petition was filed indicates that the petitioner's staff was comprised of only three employees other than the beneficiary and of those three employees only one held a position that could be deemed as either managerial or professional. See section 101(a)(44)(A)(ii) of the Act.

Additionally, while the remainder of the job description conveys certain managerial aspects, such as formulating and implementing strategies, managing company policies, evaluating the company's performance, achieving financial objectives, and developing goals and strategies, these statements are overly vague and fail to convey a meaningful understanding of the specific underlying tasks that the beneficiary would actually undertake in meeting these broad business objectives. The AAO cannot conclude that the beneficiary will primarily perform qualifying managerial- or executive-level tasks simply because he will have discretionary authority and will assume an elevated position within the petitioner's organizational hierarchy. 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 proposed daily job duties. 8 C.F.R. § 204.5(j)(5).

While the AAO acknowledges that no beneficiary is required to allocate 100% of his or her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform would only be 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). As the record in the present matter does not delineate the beneficiary's proposed job duties with sufficient specificity, the AAO cannot affirmatively conclude that the primary portion of the beneficiary's time would be allocated to tasks within a qualifying managerial or executive capacity.

Additionally, the AAO notes that counsel's reference on appeal to the petitioner's recent expansion of its business into jewelry and watches is irrelevant for the purpose of determining whether the petitioner was eligible for this immigration benefit 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). As noted above, the record in the present matter does not establish that the petitioner was ready to employ the beneficiary in a primarily managerial or executive capacity at the time the petition was filed and on the basis of this conclusion, the instant petition cannot be approved.

Lastly, while not previously addressed in the director's decision, the AAO finds that the record lacks sufficient evidence to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity as required by 8 C.F.R. § 204.5(j)(3)(i)(B). Although the petitioner's original support statement indicates that the beneficiary was employed abroad in the position of senior manager and was responsible for establishing policies and objectives, hiring and firing of company staff, and entering into contracts, this information fails to identify the beneficiary's specific daily tasks and thus is not sufficient to allow for the conclusion that the beneficiary was employed abroad in a qualifying 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). Therefore, 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.