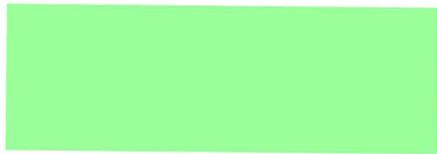




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JUL 25 2013**

OFFICE: NEBRASKA SERVICE CENTER

FILE: 

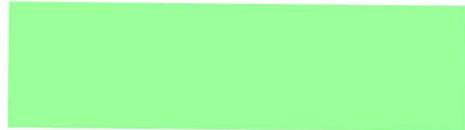
IN RE:

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg

Acting 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 Nevada corporation that seeks to employ the beneficiary in the United States as its race team director. 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 October 17, 2011, which contained relevant information pertaining to the beneficiary's employment abroad and his proposed position with the petitioning entity. The petitioner also provided evidence in the form of various business documents pertaining to both entities.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a request for evidence (RFE) dated July 25, 2012 informing the petitioner of various evidentiary deficiencies. The RFE addressed a variety of eligibility factors, including the beneficiary's managerial or executive capacity in his positions with the foreign and U.S. entities. Specifically, the director instructed the petitioner to provide more detailed job descriptions pertaining to the beneficiary's positions with his foreign and U.S. employers. The petitioner was also asked to include the foreign entity's organizational chart that corresponds with the beneficiary's employment abroad.

The petitioner's response included a statement dated October 16, 2012 from counsel, who addressed the director's various RFE requests. After considering the information provided with regard to the beneficiary's foreign and proposed employment, the director determined that the petitioner failed to establish eligibility based on two independent grounds. The director observed, based on the U.S. and foreign entities' respective organizational hierarchies, that neither entity has the organizational complexity to support an employee whose duties would be primarily in a qualifying managerial or executive capacity. The director therefore concluded that the beneficiary was not employed abroad and would not be employed in the United States in a qualifying managerial or executive capacity. Based on these two adverse findings the director issued a decision dated January 25, 2013 denying the petition.

On appeal, counsel disputes the director's findings, contending that the director "failed to evaluate the nature of the [b]eneficiary's job duties within the context of the supercross/motocross industry" and that the beneficiary would have discretion over the petitioner's goals and policies as well as the selection and management of its riders. Counsel also states that the beneficiary, along with the team manager, marketing manager, and chief mechanic, would manage the mechanical staff routines. Counsel asserts that the beneficiary's subordinates include "professional, highly-skilled industry-specific riders, mechanics and managers" and cannot be classified as non-professional.

Upon review, and for the reasons discussed herein, counsel's assertions are not persuasive and thus fail to overcome the director's grounds for denial.

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.

As stated previously, the primary issues in this matter pertain to the beneficiary's employment capacity in his respective positions with the foreign and U.S. entities. Specifically, the AAO will determine whether the petitioner provided sufficient evidence to establish that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity.

In general, when examining the executive or managerial capacity of the beneficiary, the AAO reviews the totality of the record, starting first with the descriptions of the beneficiary's job duties. *See* 8 C.F.R. § 204.5(j)(5). As observed in the director's decision, a detailed job description is crucial, given that the duties themselves will reveal the true nature of the beneficiary's foreign and proposed 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 this information in light of other relevant factors, including, but not limited to, job descriptions of the beneficiary's subordinate employees, the nature of the business conducted by the entities in question, the beneficiary's subordinate staff in each of his respective positions, and any other facts that may help the AAO to gain a comprehensive understanding of the beneficiary's actual roles in his respective positions with the foreign and U.S. entities.

In the present matter, the information pertaining to the job duties the beneficiary performed during his employment with the foreign entity indicates that the beneficiary allocated his time primarily to the performance of non-qualifying operational tasks that were directly related to the foreign entity's revenue generating scheme. In other words, the beneficiary did not merely oversee the daily tasks being performed, but rather performed operational and administrative tasks associated with day-to-day operation of the company's motorsports racing team. Such tasks included arranging for and informing team members of transportation and accommodations and arranging team dinners for Thursday, Friday, and Saturday; providing the riders with a training program, nutritional plan, and ensuring that the riders eat a healthful diet; attending

the race track to oversee the training schedule and timing and recording riders' lap times; ensuring continuity and growth of the business by communicating directly with existing and potential sponsors; communicating directly with riders to address their concerns, providing them with encouragement and support, and communicating with the chief mechanic to ensure that riding equipment is prepared and ready; conducting research of track layouts, race day schedules, and weather in order to complete plans for race day strategy; setting up an awning at the track and apprising riders of track format; and making motivational speeches and generally motivating riders as part of race preparation. This list of the beneficiary's tasks indicates that the beneficiary engaged in all administrative activities and hands-on training and motivation of the riders in addition to procuring sponsorship for the riders to maintain a steady source of revenue for the business. Although such tasks are essential to the operation of the business, they do not fall within the statutory definitions of managerial or executive capacity at section 101(a)(44)(A) or (B) of the Act.

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 performed or would perform were/are only incidental to the position in question. 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 present matter, the job description discussed above indicates that the primary portion of the beneficiary's time during his employment abroad was spent performing the very tasks that were necessary to provide services without which the business simply could not have continued its daily operation. While the beneficiary's discretionary authority is evident from the sheer volume of operational tasks with which the beneficiary was entrusted, his overall authority cannot outweigh the nature of the activities he carried out on a daily basis and the fact that those activities cannot be deemed as those of a managerial or executive employee. Counsel's assertion that the beneficiary oversees "highly-skilled" riders does not establish that his time was allocated primarily to the oversight of professional employees. Not only has counsel failed to establish that the riders themselves could be classified as professional employees, there is little evidence to establish that the beneficiary's role was limited to supervision of these individuals. Rather, the evidence, which includes the list of the beneficiary's specific tasks, indicates that the beneficiary was directly engaged in training the riders and carrying out all necessary administrative tasks necessary to make travel, food, and hotel arrangements for the riders. These tasks do not fall within the applicable definitions of managerial or executive capacity, no matter how talented the riders are and regardless of the fact that these tasks are essential to the operation of the business.

With regard to the beneficiary's proposed employment with the petitioning entity, a review of the job description provided indicates that his duties would be overwhelmingly similar to those duties that he performed as race team manager during his employment abroad. In light of the finding that the beneficiary's employment abroad consisted primarily of non-qualifying tasks, we must conclude that the proposed position of race team director would also be similarly comprised of non-qualifying operational and administrative tasks.

In light of the deficiencies discussed in the analysis above, the AAO cannot conclude that the beneficiary was employed abroad or that he would be employed in the United States in a qualifying managerial or executive capacity and based on these findings of ineligibility the instant petition cannot be approved.

Additionally, while not previously addressed in the director's decision, the petitioner has failed to provide sufficient evidence to support its claim that it has an affiliate relationship with the beneficiary's foreign employer.

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

In the present matter, the petitioner claims to have an affiliate relationship with the beneficiary's foreign employer by virtue of both entities being solely owned by the beneficiary and his father. However, in reviewing the record, the documentation provided does not corroborate the petitioner's claim. More specifically, the record contains documentation showing that the beneficiary's father owns a trust that holds a majority interest in the foreign entity. The only evidence of ownership pertaining to the petitioning entity is the petitioner's corporate tax returns for 2010 and 2011 both of which identify the beneficiary as sole owner. In other words, based on the evidence presented, the beneficiary's father appears to hold a majority interest in the foreign entity, while the beneficiary holds a majority interest in the U.S. entity. In addition, there is no parent entity with ownership and control of both companies such that would qualify the two entities as affiliates. Although counsel claims that the foreign entity has invested capital in the petitioning company, stressing the father/son relationship as part of a common ownership scheme, this familial relationship does not constitute a qualifying relationship under the regulations. *See e.g. Ore v. Clinton*, 675 F.Supp.2d 217, 226 (D.C. Mass. 2009)

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 appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.