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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



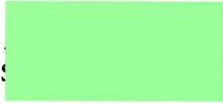
U.S. Citizenship
and Immigration
Services



HOLLYWOOD, FL 33021

DATE: **MAR 21 2013**

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:



CORAL GABLES, FL 33146

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,

A handwritten signature in black ink, appearing to read "R. Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was initially approved by the Director, Texas Service Center. On further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with a notice of his intention to revoke the approval of the preference visa petition, and his reasons therefore. The director ultimately revoked the approval of the petition. 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 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.

In support of the Form I-140, the petitioner submitted a statement dated October 28, 2009, which addressed the beneficiary's employment abroad and his proposed position with the U.S. entity. The petitioner also provided a number of corporate and business documents pertaining to both entities. The petitioner submitted further documentation in response to each of two notices of request for evidence (RFE) issued on January 25, 2010 and July 13, 2010, respectively. The director approved the petition on June 18, 2011.

Notwithstanding the approval of the petition, further review of the record indicated that the petition may have been approved in error. Therefore, on March 7, 2012, the director issued notice of intent to revoke (NOIR) pointing out the various deficiencies that were observed subsequent to the petition's approval. Specifically, the director determined that the petitioner failed to meet statutory and regulatory requirements establishing that: (1) the beneficiary would be employed by the petitioning entity in a qualifying managerial or executive capacity; and (2) the petitioner has the ability to pay the beneficiary's proffered wage. Additionally, relying on the common law definition of the term "employee," the director determined that the petitioner failed to establish that the beneficiary was an employee of the foreign entity and that he would be an employee of the U.S. petitioner. Lastly, the director concluded that the Form I-140 lacked signatures from the petitioner or its attorney and therefore was not properly filed. The petitioner was allowed time in which to address and overcome the noted deficiencies.

The petitioner responded with a statement, dated March 7, 2012, which addressed the beneficiary's job duties and responsibilities in his proposed position with the U.S. entity. The petitioner also provided an organizational chart depicting the petitioner and the beneficiary's foreign employer, listing the employees that comprise the staffing of each entity. Additionally, the petitioner provided the IRS Form W-2 statements it issued to employees in 2010 as well as all four of its quarterly tax returns for 2010. The petitioner did not, however, address the director's inquiries into the issue of employer-employee relationship between the beneficiary and his two employers; nor did the petitioner provide evidence to establish the proper signing and filing of the Form I-140. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

After conducting a comprehensive review of the record, the director determined that the petitioner did not establish eligibility and therefore revoked the approval in a decision dated June 20, 2012. The director determined that the petitioner failed to overcome the adverse findings that were addressed in the NOIR. The director considered the 2009 quarterly wages shown in the provided documents and determined that the wages of two individuals were not commensurate with those of full-time employees. In light of this indication, the director questioned the petitioner's ability to support the beneficiary in a qualifying managerial

or executive capacity where the primary portion of the beneficiary's time would be allocated to tasks of a qualifying nature. The director also considered the petitioner's tax documents in finding that the petitioner lacked the ability to pay the beneficiary's proffered wage commencing on the priority date. Finally, the director considered the beneficiary's majority ownership of the foreign and U.S. entities in concluding that an employer-employee relationship was not present between the beneficiary and either of the two employers. Lastly, the director concluded that the Form I-140 lacked signatures from the petitioner or its attorney and therefore was not properly filed.

On appeal, counsel disputes the director's findings and asserts that the director failed to provide sufficient evidence to justify revoking the previously approved petition. The AAO finds that counsel's assertions are not persuasive and fail to overcome the grounds for revocation. A full discussion of the key issues is provided 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 the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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.

Additionally, section 205 of the Act, 8 U.S.C. § 1155, states the following: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime* . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

In the matter of the instant revocation, the first issue to be addressed is the beneficiary's proposed employment with the U.S. entity. Specifically, the AAO will examine the record to determine whether the petitioner submitted sufficient evidence to establish that it had the ability, at the time of filing the Form I-140, to employ the beneficiary 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 petitioner's description of the beneficiary's job duties. See 8 C.F.R. § 204.5(j)(5). A detailed job description is crucial, as 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, such as job descriptions of the beneficiary's subordinate employees, the nature of the business conducted by the entity in question, the size of that entity's subordinate staff, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role and job duties.

Turning to the job description included in a document dated November 1, 2009, which the petitioner provided in support of the Form I-140, the AAO notes that the enumerated items were overly vague and thus preclude a meaningful assessment of the beneficiary's actual job duties. Although the petitioner provided a follow-up list of job duties in a document dated August 1, 2010, that job description was also deficient, as it listed a number of non-qualifying tasks while continuing to use overly broad terminology in an effort to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. 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 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).

When, as in the present matter, the petitioner offers a job description that incorporates vague job responsibilities as well as non-qualifying operational tasks, the AAO cannot determine with any degree of certainty what portion of the beneficiary's time would be allocated to non-qualifying tasks, such as negotiating contracts with suppliers and clients, overseeing the work of non-professional personnel, and conferring with and advising clients.

Furthermore, when considering the petitioner's limited staffing at the time of filing, the AAO questions what actual tasks the beneficiary would perform in his efforts in directing and implementing policies and

objectives, implementing administrative and operational systems, and directing and coordinating sales and pricing activities. The AAO is also dubious that in the context of an entity with a limited organizational complexity the beneficiary would be able to allocate a significant portion of his time to directing and coordinating policy-related and financial matters. Moreover, as the director properly pointed out in the revocation, the petitioner's organization does not include a sales or marketing employee, thus indicating that the beneficiary is likely responsible for actually carrying out the sales and marketing functions and is therefore involved in performing these non-qualifying operational tasks in addition to those discussed above.

On appeal, counsel asserts that the director failed to take into account the petitioner's "overall purpose and stage of development" when considering the petitioner's staffing. However, the petitioner's stage of development notwithstanding, the director shall not allow consideration of the petitioner's needs to override the statutory requirement, which mandates that in order to qualify for the immigrant classification of a multinational manager or executive, the petitioner must establish that the duties to be performed by the beneficiary would be primarily those within a qualifying managerial or executive capacity. The petitioner cannot meet its burden of proof by merely paraphrasing the statutory elements that comprise managerial or executive capacity or by providing broad statements to describe the beneficiary's proposed employment.

While counsel urges the AAO to consider the beneficiary's discretionary authority and his overall position within the petitioner's organizational hierarchy, these two aspects alone are not sufficient to establish the nature of the job duties the beneficiary would primarily perform. Counsel's objection to the director's use of a "test" to determine the beneficiary's managerial or executive capacity is not valid, given that the "test" merely reiterates regulatory and statutory requirements, which focus on quantifying the time that the beneficiary allocates to qualifying versus non-qualifying tasks.

In general, other than reiterating the broad statements previously issued by the petitioner, counsel has conveyed no pertinent information that would explain how the petitioner, given its inadequate support staff, was able to employ the beneficiary in a qualifying managerial or executive capacity at the time the petition was filed. The AAO therefore finds that the petitioner has failed to establish that the beneficiary would primarily perform tasks within a qualifying managerial or executive capacity and on the basis of this initial finding, this petition cannot be approved.

The AAO will now turn to the regulatory provision that requires the petitioner to establish its ability to pay the beneficiary's proffered wage commencing from the date the petition is filed.

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

Ability of prospective employer to pay wage. 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.

In the present matter, the director first looked to the wages the petitioner paid the beneficiary at the time of filing and properly determined that the amount paid was far below the amount indicated in the Form I-140 as the beneficiary's proffered wage.

Next, the director conducted a proper analysis of the petitioner's tax returns to determine that the petitioner had neither the net income nor the net assets available to account for the beneficiary's proposed salary. 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held the Immigration and Naturalization Service (now USCIS) had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income.

Although counsel asserts that the instant case is ideal for introducing the petitioner's bank statements as evidence of its ability, the regulation is clear in expressly requiring that evidence of the petitioner's ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." While the director is permitted to consider bank statements in certain "appropriate cases," counsel offers no explanation as to why the petitioner's tax returns do not provide an accurate illustration of the company's financial status. As such, counsel has not established that the instant matter falls within the realm of "appropriate cases" where evidence other than annual reports, federal tax returns, or audited financial statements should be considered in order to determine the petitioner's ability to pay.

In light of the above, the AAO finds that the petitioner failed to provide sufficient evidence of its ability to pay the beneficiary's proffered wage and on the basis of this second adverse conclusion this petition may not be approved.

Although the director relied on the common law definition of the term "employee" in reaching a third adverse finding regarding the petitioner's lack of an employer-employee relationship with the beneficiary, the AAO declines to address this issue in the current proceeding and will instead rely on the express statutory and regulatory grounds discussed above.

In summary, the petitioner has not established that it was eligible for the immigration benefit sought at the time of filing.

Accordingly, the approval of the petition will remain revoked for the above stated reasons, with each considered as an independent and alternative basis for revocation. 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.