



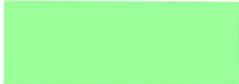
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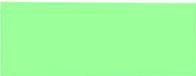
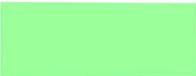
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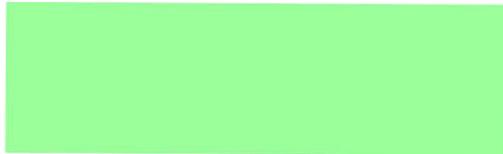
OFFICE: TEXAS SERVICE CENTER

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 (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

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 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.

On May 4, 2013, the director denied the petition concluding that the petitioner failed to establish that it will employ the beneficiary in a qualifying managerial or executive capacity. In denying the petition, the director noted the petitioner's claimed staffing levels and organizational structure and determined that the beneficiary would more likely than not perform primarily non-qualifying duties.

On appeal, counsel for the petitioner disputes the director's decision, challenging the director's reliance on the petitioner's staffing as a factor of eligibility. Counsel asserts that "at the time of filing/RFE, [the petitioner had] several stores and multiple employees, including two store managers, sales personnel and a licensed cosmetologist." Counsel further contends that the petitioner has the staffing hierarchy in place to allow the beneficiary to concentrate his attention on managing the company.

Upon review of the record in its entirety and for the reasons discussed below, the petitioner has not established that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

I. The Law

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.

II. Employment in a Managerial or Executive Capacity

The sole issue addressed by the director is whether the petitioner established that it will employ the beneficiary in a managerial or executive capacity.

A. Facts

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on March 10, 2010. On the Form I-140, the petitioner described its business as "retail." The petitioner stated that it had four current employees and failed to provide its gross and net annual income.

In a letter dated March 8, 2010, the petitioner provided a brief description of the beneficiary's duties, noting that he: identifies, plans and develops business opportunities; oversees budgets; establishes and implements the company's administrative and operational policies and procedures; and is in charge of making decisions related to the compensation of employees. The petitioner noted that the beneficiary has "hired, discharged, supervised, evaluated and prescribed the duties of sales managers, purchasing managers and other direct reporting staff." The petitioner did not provide additional information regarding the beneficiary's duties or evidence of its staffing and organizational structure. The petitioner did submit copies of several current and expired lease agreements as evidence of its retail activities. At the time of filing, it appears that the petitioner had valid leases for a store and a small kiosk under the business name ' [REDACTED] ' at The Mall at [REDACTED] in Massachusetts. The petitioner also provided a lease for a retail store located in [REDACTED] Massachusetts.

After reviewing the initial evidence, the director issued a notice of intent to deny (NOID) on February 23, 2011. The director requested, in part, that the petitioner submit a detailed description of the beneficiary's duties and detailed information regarding the number and types of employees he will manage, including their job titles, job duties and educational levels.

In response, the petitioner provided a statement from counsel dated March 25, 2011 in which counsel addressed the various deficiencies discussed in the NOID. With regard to the beneficiary's proposed employment, counsel listed the beneficiary's executive responsibilities to include planning business objectives, establishing policies and procedures for attaining set goals, overseeing operations for efficiency and quality, developing and implementing strategies to generate resources and revenue, tracking sales progress, improving sales and marketing strategies, and positively promoting the company with vendors, customers, leasing offices, and the public. Counsel referred to a description of top-level executives found in the *Occupational Outlook Handbook*, 2010-2011 Edition.

The petitioner also submitted its own separate job description in which the petitioner listed the beneficiary's duties and responsibilities and allocated percentages of time to groups of job duties rather than to individual daily tasks. The petitioner indicated that the beneficiary would allocate his time as follows: 30% would be allocated to the above set of responsibilities recited in counsel's response statement; 15% would be spent

reviewing activity reports and financial statements, determining how to proceed in terms of long-term planning and budgets, setting a pricing structure, reviewing managers' reports to determine what changes would need to be made, and preparing budgets for board approval; another 15% would be spent conducting market research, identifying additional products for retail and potential acquisition opportunities, and improving the implementation of sales and marketing strategies for introducing products and services; 10% would be allocated to conducting management meetings, overseeing and evaluating management team performance, reviewing performance of subordinates and making hiring and firing decisions, and determining compensation of company agents and employees; another 10% would be spent initiating and negotiating contracts with vendors, wholesalers, leasing managers, and other business partners, and executing documents, such as checks and contractual agreements; 5% would be allocated to unspecified tasks to complying with the company's articles of incorporation and bylaws, preparing reports and reporting to the board of directors, and designing business plans for presentation before the board of directors; 4% would be spent promoting the company with vendors, customers, and business associates in the industry; and the remaining 11% of the beneficiary's time would be allocated to general oversight and management of daily operations.

Additionally, the petitioner provided an organizational chart, which depicts the beneficiary at the top of a hierarchy consisting of two retail locations, each employing a store manager, one of whom was also a purchasing manager at one of the store locations. The subordinates of one store manager include five sales people, while the subordinates of the store manager/purchasing manager include two sales people and one licensed cosmetologist able to perform manicures and pedicures. The chart depicts a total of eleven employees, including the beneficiary.

After reviewing the petitioner's response and the documents that were previously submitted, the director determined that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. Although the director reviewed the information provided in the petitioner's organizational chart and job descriptions provided for the beneficiary and other company employees, the AAO finds that the director improperly focused on an organizational chart that appears to reflect an organizational hierarchy that did not exist at the time of filing. The petitioner stated on its Form I-140 that it had four current employees (including the beneficiary) as of March 2010 when the petition was filed. The organizational chart that the petitioner provided in response to the NOID depicts a staffing structure that is nearly three times larger than the one the petitioner had in place at the time of filing. Despite the petitioner's compliance with the NOID in which the director expressly requested that the petitioner submit a current organizational chart, the petitioner's eligibility must be established based on facts and circumstances that existed at the time of filing. 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). Since the organizational chart does not depict the petitioner's staffing level and organizational structure as it existed at the time of filing, the chart has little to no probative value in establishing the petitioner's eligibility.

Accordingly, to the extent that the director's analysis includes an evaluation of evidence that is not relevant to the petitioner's eligibility at the time of filing, the irrelevant portion of the director's analysis is hereby withdrawn. Instead, the AAO's analysis will focus on the facts and circumstances that existed on the date the petition was filed.

In general, when examining the executive or managerial capacity of the beneficiary, it is necessary to review 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). USCIS will then consider this information in light of the petitioner's organizational hierarchy as it existed when the petition was filed to determine whether the petitioner had adequate staff to support the beneficiary in a position that would primarily entail the performance of tasks within a qualifying managerial or executive capacity.

Moreover, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)).

In the present matter, the record includes a job description that is overly general and fails to assign time allocations to individual job duties. Rather than listing the beneficiary's actual daily tasks as projected at the time of filing and indicating how much time the beneficiary planned to spend on each individual task, the petitioner provided a list of broad job responsibilities, assigning time allocations to groups of job duties and responsibilities. For instance, the petitioner claimed that the beneficiary would plan the company's business objectives and establish its organizational policies. However, the petitioner did not list any specific daily job duties associated with these responsibilities, which are so general that they could be applied to any employee whose position is at the top tier of an organization, regardless of whether that individual spends his time primarily performing tasks within a qualifying capacity.

The petitioner was equally vague in failing to explain how the beneficiary would ensure efficiency, quality, and effective resource management or what steps he would take in his effort to implement strategies for generating revenue. In other words, these general statements fail to apply the specific facts and circumstances of the petitioning entity in terms of the industry and the specific organizational hierarchy in which the petitioner operates, which may limit the amount of time the beneficiary has available to devote to tasks of a qualifying managerial or executive nature. The petitioner cannot provide an over-broad position description and expect USCIS to speculate as to what duties the beneficiary might perform as the president of a retail business with multiple locations and four claimed employees. It is therefore essential that the petitioner provide a detailed delineation of the beneficiary's specific proposed job duties. Due to the general nature of the responsibilities that are intended to account for 30% of the beneficiary's time, the petitioner has not established how much of the 30% would be spent performing tasks of a qualifying nature.

Additionally, the job description indicates that unspecified portions of the beneficiary's time would be allocated to performing operational and administrative tasks, including preparing budgets for board approval, conducting market research, improving market and sales strategies, negotiating contracts, and preparing reports to be presented before the board of directors. As the petitioner did not fully explain the context in which these job responsibilities would be carried out or provide time allocations to individual duties and responsibilities, the petitioner did not establish how much time the beneficiary would allocate to the

performance of qualifying tasks versus tasks, such as those specifically named, which would be deemed as non-qualifying. While 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 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).

Furthermore, when the proposed job description is considered in light of the petitioner's four-person staffing structure, the evidence as a whole does not establish that the petitioner was able to employ the beneficiary in a qualifying capacity at the time of filing. The petitioner did not specify which four positions were filled at the time the petition was filed, thus leaving open the question of how many of the petitioner's daily operational tasks the beneficiary would have to assume upon himself in order to compensate for the petitioner's limited staffing. As noted, the petitioner submitted a number of leases for retail stores, three of which had not expired as of the date of filing. It is unclear how the petitioner was operating up to three retail locations with only four employees.

The job description provided in response to the NOID indicates that the beneficiary would review reports that are submitted by management personnel. However, the record does not establish that the petitioner employed "management personnel" other than the beneficiary himself. As such, it is unclear who, if not the beneficiary, would be responsible for providing the reports or what the subject matter of the reports would be. Additionally, given that the petitioner is a retail-based operation, it is reasonable to expect the petitioner to provide evidence establishing that the petitioner had employees at the time of filing to market and sell the products being offered. Despite the fact that the petitioner provided an organizational chart complete with sales employees and two store managers, as indicated previously, this chart does not depict the petitioner's organizational hierarchy at the time of filing and therefore is not relevant to a determination of whether the petitioner established eligibility in this matter. The record includes the petitioner's purchase invoices from 2008 through 2011, all of which identify the beneficiary as the immediate point of contact. While the time periods prior to when the Form I-140 filing took place would not be relevant as to the question of the petitioner's eligibility, the fact that the beneficiary remained the point of contact in the petitioner's purchase transactions at the time of and well beyond the date of filing indicates that the beneficiary continued to be directly involved in the petitioner's daily operational tasks. As the petitioner did not provide a detailed job description specifically delineating the beneficiary's proposed tasks and their respective time allocations, the AAO cannot determine just how much time the beneficiary was projected to spend on this and similar types of operational tasks at the time of filing.

Lastly, in response to counsel's claim that the petitioner maintained a complex operation and employed multiple employees "at the time of the filing/RFE," the AAO points out that nearly one year had passed between the time the petitioner filed the Form I-140 and the date the petitioner submitted its response to the director's NOID. It is therefore understandable that the petitioner may have added employees to its previously existing staff and thus expanded its operation. However, only those facts and circumstances that existed at the time of filing can determine the petitioner's initial eligibility for the immigration benefit sought herein. See *Matter of Katigbak*, 14 I&N Dec. at 49.

The petitioner has not provided a detailed account of the tasks the beneficiary was expected to perform within the scope of the staffing that the petitioner had available at the time of filing. Not only was the job description offered in response to the NOID devoid of detailed information delineating the beneficiary's specific tasks, but the minimal information that was contained within the job description is more consistent with the updated staffing structure that was depicted in the current organizational chart rather than the staffing structure that the petitioner had in place at the time of filing.

In summary, the evidence presented in the instant record does not establish that at the time of filing the petitioner was more likely than not able to employ the beneficiary in a qualifying managerial or executive capacity. The petitioner provided a job description that fails to establish what job duties the beneficiary was expected to perform at the time of filing, and it failed to provide evidence to demonstrate that it had sufficient staff to relieve the beneficiary from performing non-qualifying duties as of the date of filing. Therefore, given these significant deficiencies, the petitioner has failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity. According, the appeal will be dismissed.

III. Qualifying One Year of Employment Abroad

Although not addressed in the director's decision, the record contains inconsistent information regarding the beneficiary's date of employment with the foreign entity. As such, it is unclear whether the beneficiary was employed by the petitioner's foreign parent company for at least one year in the three years preceding his admission to the United States to work for the petitioner in nonimmigrant L-1A status. *See* 8 C.F.R. § 204.5(j)(3)(i)(B). The beneficiary was granted authorization to work for the petitioner in June 2008.

The petitioner submitted a letter from the foreign entity's president, who stated that the beneficiary was employed in Israel as the director of marketing from March 2004 until February 28, 2008. The president noted that the beneficiary "traveled back and forth to the US" during this time, but worked full time for the foreign entity while in Israel. The president further noted that the beneficiary's "tenures in Israel corresponded to marketing campaigns." The petitioner provided copies of paystubs from the foreign entity as evidence of wages paid to the beneficiary during the months of March 2005 through July 2005, May 2006 through November 2006, and January and February 2008.

However, the beneficiary, on his G-325A, Biographic Information, submitted with his concurrently filed Form I-485 Application to Adjust Status, indicates that he has resided in the United States continuously since January 2005. He also indicates that he held the position of Director of Marketing for the foreign employer only from May 2006 to November 2006 and from January 2008 to February 2008. He indicates an intervening period of employment as a fashion model with [REDACTED] from November 2006 until January 2008. USCIS records reflect [REDACTED] filed two H-1B petitions on the beneficiary's behalf which were valid from March 2002 until March 2008.

Due to these inconsistencies, the record does not establish that the beneficiary had one full year of employment abroad in a managerial or executive capacity in the three years preceding his admission to the United States to work for the petitioner as a nonimmigrant. For this additional reason, the petition cannot be approved.

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).

III. Conclusion

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative 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.