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U.S. Department of Homeland Security  
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U.S. Citizenship  
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Services

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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **JUL 23 2008**  
SRC 06 086 52748

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

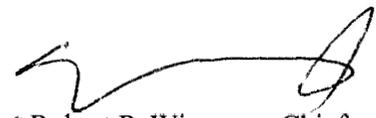
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to  
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to  
the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center. The petitioner appealed the matter to the Administrative Appeals Office (AAO). The appeal was dismissed. The petitioner now files a motion with the AAO seeking to reconsider the prior decision dismissing the appeal. The AAO will grant the motion to reconsider and affirm its prior decision dismissing the appeal.

With regard to the motion to reconsider, the AAO's review will be limited by the provisions cited in 8 C.F.R. § 103.5(a)(3), which states in pertinent part:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [Citizenship and Immigration Services] CIS policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The petitioner is a Texas corporation that operates as a wholesaler and retailer of garden and home decorative items. It seeks to employ the beneficiary as its vice-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.

The director denied the petition based on the determination that the petitioner failed to establish that the beneficiary would be employed by the U.S. entity in a managerial or executive capacity.

The AAO affirmed the director's decision, finding that the petitioner provided vague job descriptions for the beneficiary and failed to establish a support staff sufficient to relieve the beneficiary of primarily performing non-qualifying tasks. The AAO specifically addressed the petitioner's claim that the beneficiary would manage the function of vice-president, finding, again, that this claim requires a detailed description of the beneficiary's job duties that explains how the beneficiary will manage this function and who will perform the non-qualifying duties associated with that function. The AAO clarified that even though the petitioner need not have a large support staff in order to classify the beneficiary as a multinational manager or executive, the petitioner cannot circumvent the burden of establishing its employment of a sufficient support staff merely by claiming that the beneficiary would act in the role of a function, rather than a personnel, manager. In other words, the petitioner must establish who performs its daily operational tasks so that the beneficiary can be left to manage, not perform, the essential function. In addition, the AAO concluded, beyond the director's decision, that the petitioner failed to establish its ability to pay the beneficiary's proffered wage according to the provisions of 8 C.F.R. § 204.5(g)(2).

On motion, counsel asserts that the AAO failed to employ the proper standard for review, which ultimately led to an erroneous decision dismissing the appeal. Counsel reiterates that in applying the preponderance of the evidence standard, even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something

occurring). However, if the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Furthermore, the preponderance of the evidence standard of proof does not relieve the petitioner from satisfying basic evidentiary requirements set by statute and/or regulation. Therefore, if the regulations require specific evidence, the applicant is required to submit that evidence. *Cf.* 8 C.F.R. § 204.5(h)(3) (requiring that specific objective evidence be submitted to demonstrate eligibility as an alien of extraordinary ability).

In the present matter, applicable statutory provisions require the petitioner to establish that the beneficiary, in his proposed position with the U.S. entity, will primarily perform job duties within a managerial and/or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act. Additionally, the regulatory provisions at 8 C.F.R. § 204.5(j)(5) require the petitioner to provide a job offer clearly describing the beneficiary's proposed job duties. Precedent case law has stressed the importance of a detailed job description, establishing that the actual duties themselves will 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).

Therefore, statutory and regulatory provisions, as well as precedent case law establish that the AAO properly focused on the petitioner's description of the beneficiary's job duties. In doing so, the AAO determined that the information provided was insufficient to meet the standard requirements. The AAO further determined that the petitioner failed to provide sufficient documentary evidence to establish that it employed an adequate support staff at the time the Form I-140 was filed, such that the beneficiary would be relieved from having to primarily focus on the non-qualifying tasks that are necessary for the petitioner's daily operation and generation of revenue.

On the basis of a thorough analysis of the petitioner's submissions regarding the beneficiary's job duties and evidence of the company's organizational hierarchy, the AAO properly determined that the petitioner had not submitted relevant, probative, and credible evidence to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. While counsel introduces prior AAO decisions, pointing out that favorable decisions were issued in situations similar to that of this petitioner, the cases he references are unpublished and, therefore, not binding in the present matter. *See* 8 C.F.R. § 103.3(c). Thus, counsel has not established that the dismissal of the appeal was based on an incorrect application of law of CIS policy.

Furthermore, counsel has not addressed the issue of the petitioner's ability to pay the beneficiary's proffered wage, which the AAO cited as an additional ground for the petitioner's ineligibility. Therefore, even if counsel were able to establish error on the part of the AAO with regard to the first issue discussed above, the petitioner would nevertheless remain ineligible based on the determination that the petitioner has failed to establish that it meets the provisions of 8 C.F.R. § 204.5(g)(2).

Lastly, counsel requests clarification on the issue of when the beneficiary's period of unlawful presence begins to accrue. Counsel points to section 245(k)(2) of the Act, which states that an adjustment of status is not precluded to an alien whose period of unlawful presence does not exceed 180 days. Counsel also cites a General Counsel memorandum, which states that a denial of a petition or application is not considered final

unless or until the right to appeal is waived, the time for appeal has expired, or the appeal or certification is decided. *General Counsel Op. No. 91-23*, 1991 WL 1185134 (INS). On the basis of this reasoning, a USCIS decision that is appealable to the AAO is not considered final unless one of three previously discussed conditions is present. However, the filing of a motion to reopen and/or reconsider does not stay the prior decision or extend a beneficiary's previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

The AAO concurs with counsel's general statement regarding the pendency of an application or petition during appeal – the denial of a petition is not considered a final agency decision until the right to appeal is waived, the time for appeal has expired, or the appeal or certification is decided. However, an alien will derive "lawful presence" or an "authorized period of stay" on the basis of a pending appeal only if the underlying petition or application confers such a status. In the present matter, the USCIS decision regarding the Form I-140 would have been final on May 8, 2007, the day the AAO dismissed the petitioner's appeal. The subsequent motion did not extend or postpone that date. Since an I-140 petition by itself does not confer an authorized period of stay, it is not clear how the alien would have been in status during the period that the appeal was pending unless a concurrently filed Form I-485 also remained pending during the appeal. *See generally*, Memorandum from Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations, *Period of Stay Authorized by the Attorney General After 12-Day Tolling Period for Purposes of Section 212(a)(9)(B) of the Act* (March 3, 2000).

Regardless, the relevant issue in this proceeding was whether the petitioner established its eligibility to employ the beneficiary in the United States in the classification of a multinational manager or executive. It is the AAO's determination that the underlying decision dismissing the appeal was properly issued. The petitioner has not overcome the AAO's previously cited grounds for dismissing the appeal.

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. Here, the petitioner has not sustained that burden.

**ORDER:** The motion is dismissed.