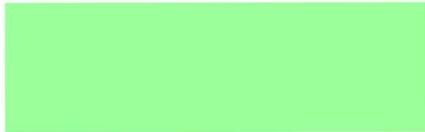




U.S. Citizenship
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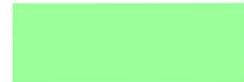
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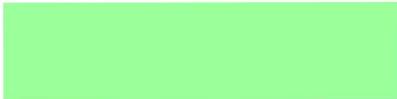
FILE:



AUG 07 2013

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 Delaware corporation that seeks to employ the beneficiary in the United States as its CEO. 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 3, 2011, which addressed several eligibility requirements, including the beneficiary's proposed employment with the petitioning entity. The petitioner also provided corporate and financial documents in its effort to establish eligibility.

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 February 8, 2012 informing the petitioner of various evidentiary deficiencies. The director instructed the petitioner to submit, in part, a more detailed job description pertaining to the beneficiary's proposed employment listing the beneficiary's proposed job duties and an estimate of the percentage of time the beneficiary planned to allocate to each of the enumerated items. The director also asked the petitioner to provide an organizational chart depicting the petitioner's staffing at the time the petition was filed.

The petitioner responded to the RFE by providing a statement dated April 19, 2012, which included a description of the beneficiary's proposed position. The petitioner also provided a copy of its organizational chart depicting the beneficiary in his proposed position along with his two subordinates, a financial manager and a producer.

After considering the petitioner's response, the director determined that the petitioner was statutorily ineligible based on its failure to establish that the beneficiary would be employed with the U.S. entity in a qualifying managerial or executive capacity. The director found that the petitioner offered a deficient job description for the proposed employment and further observed that the petitioner submitted IRS Form W-2 statements for a total of five employees for 2011, but depicted only three employees in its organizational chart. The director found that the minimal staffing would preclude the petitioner from being able to employ the beneficiary in a qualifying managerial or executive capacity. Additionally, relying on the common law definition of the term "employee" and the beneficiary's ownership interest in the petitioning entity, the director determined that the petitioner and the beneficiary do not have an employer-employee relationship. In light of these adverse findings, the director issued a decision dated December 14, 2012 denying the petition.

On appeal, counsel submits a brief disputing both of the director's findings. Counsel places great emphasis on the beneficiary's position title and placement within the organization, stressing the beneficiary's discretionary authority over business and personnel matters. Counsel acknowledges that the petitioning entity is small in size and that the beneficiary would therefore be "involved at all operational levels." He indicates that the beneficiary would be called upon to recruit all staff, including in-house employees and contract workers, and he would build and maintain partnerships and the petitioner's client base. Counsel claims that it is common to have a CEO among "the vast majority of internet companies" that are similar in size to that of the petitioner.

Upon review, and for the reasons discussed below, the AAO finds that counsel's assertions are not persuasive in overcoming the director's adverse findings.

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 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, including (but not limited to) job descriptions of the beneficiary's subordinates and their respective job duties, the nature of the business conducted, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role within the petitioning entity's organizational hierarchy.

Turning first to the job description the petitioner offered in response to the RFE, the AAO finds that the director's observations regarding the overall generality of the description were accurate. Although the petitioner assigned 40% of the beneficiary's time to developing the organization's primary goals, operating plans, and short- and long-term objectives, these terms are obscure and consist primarily of paraphrased portions of the statutory definition of executive capacity. *See* Section 101(a)(44)(B)(ii) of the Act. The petitioner does not explain what specific daily tasks are indicative of developing goals and policies within the context of the petitioner's specific type of internet business and organizational composition. The AAO finds that the petitioner is similarly vague in stating that 25% of the beneficiary's time would be allocated to leading the organization towards its set goals. Although the petitioner indicates that this would involve meeting and advising executives, no clarifying information is provided to establish to which executive it was referring - those within the petitioner's own organization or those employed by its business partners - given

that the beneficiary's responsibility to delegate authority to his subordinates was listed separately from meeting with and advising executives.

The remaining portions of the position description included the following subheadings: infrastructure and systems administration, roadmap and future expansion, and industry position and goodwill. The information within the first subheading indicates that the beneficiary would be directly involved in managing vendor relationships to ensure that companies whose services the petitioner contracts continue to meet the petitioner's needs; information within the second subheading indicates that the beneficiary would be in charge of forging business relationships in order to introduce its products to a variety of markets; and information within the third subheading indicates that the beneficiary would attend networking events, seminars, and conferences to represent the petitioning entity.

The AAO finds that these job duties, while clearly germane to the petitioner's continued business success, are more indicative of tasks necessary to provide marketing and sales services. 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 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 non-qualifying tasks appear to comprise the main portion of the beneficiary's proposed position and thus cannot be deemed as merely incidental. While counsel contends on appeal that the beneficiary is "the CEO of a smaller sized emerging company," the petitioner's limitations due to its small size will not outweigh its burden of having to establish that as of the date the petition was filed it had the capability to employ the beneficiary in a managerial or executive capacity such that the primary portion of his time would be allocated to tasks of a qualifying nature. A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Regardless of whatever measures the petitioner plans to take, including hiring additional staff, to relieve the beneficiary from having to allocate his time primarily to non-qualifying tasks, the petitioner cannot be deemed eligible if eligibility can not be established 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). Here, the petitioner has not presented evidence to establish that it was ready and able to employ the beneficiary in a qualifying capacity at the time of filing. Therefore, on the basis of this finding the instant petition cannot be approved.

In light of the above adverse finding with regard to the petitioner's statutory ineligibility, the AAO need not address the director's second adverse finding, which was based on the common law definition of "employee."

Lastly, while not previously addressed in the director's decision, the AAO finds that the record lacks sufficient evidence that the petitioner fits the definition of *multinational*, which is defined as a qualifying entity, or its affiliate, or subsidiary, that conducts business in two or more countries, one of which is the United States. 8 C.F.R. § 204.5(j)(2). Although the petitioner indicated that its affiliate is an Australian entity, whose corporate existence is substantiated by the documents submitted in support of the petition, the record lacks sufficient evidence that the foreign entity continues to do business by engaging in the regular, systematic, and continuous provision of goods and/or services. *Id.*

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 statutory ineligibility as 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, 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). The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.