

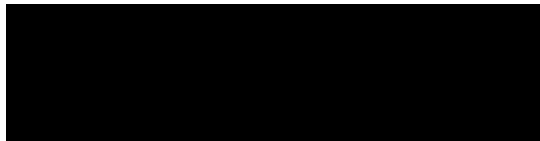
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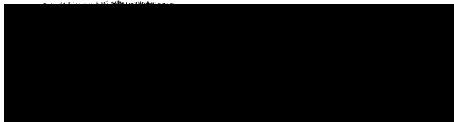
FILE: [REDACTED]
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OFFICE: TEXAS SERVICE CENTER Date: **APR 04 2005**

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

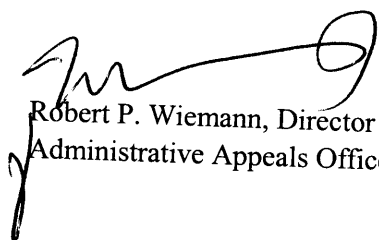
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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, Director
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 engaged in providing information technology services. It seeks to employ the beneficiary as its 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. The director denied the petition based on the determination that the beneficiary would not be employed in a managerial or executive capacity.

On appeal, counsel disputes the director's conclusions and submits a brief in support of his arguments.

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.

The issue in this proceeding is whether the beneficiary would be performing in a managerial or executive capacity.

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 support of the petition, the petitioner submitted a letter stating that the beneficiary would "manage the overall activities of our company and to implement the business plan" The petitioner also provided the following job description:

[The beneficiary] conducts and controls all operations and strategic management activities of our company, including setting and reviewing corporate objectives, coordinating marketing, sales and purchase plans; directing the expense controls of the company, including outsourcing services, personnel evaluation and hiring and firing; also he reviews the financial statements of the company and identifies new business opportunities and project feasibility.

On September 16, 2003, the director issued a request for additional evidence instructing the petitioner to submit information on its staffing levels, including the position titles, job duties, and educational levels of all

of its employees. The petitioner was also instructed to submit its tax return for 2002, the 2001 and 2002 W-2 forms for its employees, and its quarterly tax reports for the first two quarters of 2003.

The petitioner responded with an organizational chart, which named a total of six employees and a consulting firm. The petitioner also submitted a number of W-2 statements for 2002, including statements for the beneficiary, the technical support manager, the operations assistant, a technical support employee, and the graphics sales manager. The petitioner did not submit any tax reporting documents for the accountant or for the marketing firm, both of which were named in the chart organizational. Therefore, the record indicates that the petitioner had no more than five employees throughout 2002, and based on each individual's reported wages, three of the five employees either were not employed for the entire year or were employed on a part-time basis. The petitioner did not provide job descriptions for any of the positions named in its organizational chart.

On January 26, 2004, the director denied the petition concluding that the petitioner failed to establish that the beneficiary would primarily perform managerial or executive duties. Although the director commented on the personnel structure of Tekvoice Communications, it is noted that Tekvoice is not the petitioner in the instant matter and, therefore, has no bearing on the outcome of this proceeding.

On appeal, counsel explains that the petitioner was adversely affected by the events of September 11, 2001, which caused the petitioner to "redirect a portion of its efforts" to Tekvoice. While this may explain the petitioner's organizational structure in 2002, it does not relieve the petitioner from the burden of having to establish that at the time it filed the I-140 petition on the beneficiary's behalf it was ready to employ the beneficiary in a managerial or executive position, regardless of any extraneous events. Furthermore, the petitioner filed the petition one year and three months after the occurrence of September 11, 2001. If the petitioner was aware that the aftermath of this event continued to have an adverse affect on its business such that the beneficiary could not primarily perform managerial or executive duties, the petitioner had the option of filing the petition at a later date when eligibility could be established. It is noted that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, regardless of any reasonable explanations for delays in establishing eligibility, the burden of proof remains on the petitioner.

Counsel also discusses the additional responsibilities the beneficiary assumed in an effort to develop Tekvoice Communications, claiming that the new company's development required the beneficiary's direction and leadership. The petitioner goes on to discuss other measures that have been taken to ensure Tekvoice Communication's progress and the additional employees that have been hired to provide additional services as the company expands. Counsel did not include a discussion of the beneficiary's employment with the petitioning company and provided no additional information about the beneficiary's duties as they pertained to the petitioner. Counsel's discussion on appeal was primarily devoted to the progress and development of Tekvoice Communications. However, as previously discussed, Tekvoice is not the petitioner in the instant matter. Therefore, any tasks carried out by the beneficiary in his capacity as an employee of Tekvoice are irrelevant in this proceeding.

In addition to counsel's brief, the petitioner provided the following additional job description for the beneficiary:

- Represents the interests of [the petitioner] with regard to its investment in Tekvoice Communications Inc.
- Present[s] the results of the operations to the Board of Directors
- Manages, through the Business Development Manager, the sales of the products and services locally. The Business Development Manager manages the activities of sales executives located locally and overseas (Venezuela)
- Coordinated the day-to-day operations of the company through subordinate managerial and professional personnel by executing the business plan agreed with the Board of Directors.
- Responsible for all financial decisions made on behalf of the company. Coordinates with the outsourced accounting and tax service . . . with regard to preparation of all financials [sic] documentation and adherence to governmental reporting requirements.
- Manages the relationships with manufacturers and distributors
- Directs and reviews the preparation of legal documents through outsourced service

Although the petitioner also submitted a copy of an agreement made between the petitioner and a consulting company, the commencement date of the agreement was January 1, 2003, which was after the petition had been filed. The record contains no evidence that the petitioner had been paying for consulting services prior to or at the time the petition was filed in December of 2002. As stated previously, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Id.*

While the petitioner submitted another organizational chart, it was identical to the chart submitted in response to the request for additional evidence. In addition, the petitioner did not address any of the comments made by the director in the denial regarding the lack of documentation showing that the employees listed in the organizational chart were employed by the petitioner on a full-time basis at the time the petition was filed.

In examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the instant case the description of the beneficiary's job duties is too general to convey an understanding of exactly what the beneficiary will be doing on a daily basis. The petitioner provides no detailed information as to what tasks are actually involved in coordinating the daily operations of the company or what duties define the beneficiary's responsibility for the petitioner's financial status. Reciting the beneficiary's vague job responsibilities or broadly cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? 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). While the petitioner generally indicates that the beneficiary's discretionary authority fits the definition of managerial or executive capacity, these definitions are meant to serve only as guidelines to be applied to a specific list of duties. Where, as in the instant case, the petitioner fails to provide CIS with a specific list of duties, a determination cannot be affirmatively made that the beneficiary primarily performs qualifying tasks. This is particularly so

in the instant matter, where the petitioner was unable to show that it had an adequate support staff to relieve the beneficiary from having to perform non-qualifying tasks. Based on the evidence submitted, the AAO cannot affirmatively conclude that the beneficiary would primarily perform managerial or executive duties.

Beyond the decision of the director, the petitioner has failed to establish its continued ability to pay the beneficiary's proffered wage. 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 instant matter the petitioner submitted the beneficiary's W-2 wage and tax statements for 2002 and 2003, the earlier statement showing a salary of \$45,000 and the subsequent statement showing a salary of only \$26,500. Thus, while the petitioner adequately established its ability to pay the beneficiary's proffered wage in 2002, it failed to demonstrate its ability to continue paying the beneficiary's proffered wage beyond the date the petition was filed.

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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional ground discussed in the paragraph above, this petition cannot be approved.

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.