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FILE:



Office: VERMONT SERVICE CENTER

Date:

JUN 13 2005

EAC 03 010 53128

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:

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 Director, Vermont Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of New York in May 2001. It import, exports, and distributes fashion jewelry. It 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.

The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner asserts that the descriptions of the beneficiary's duties are not vague and identify specific managerial functions.

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 that 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. *See* 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the beneficiary will be employed in a managerial or executive capacity for the United States entity.

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 a September 12, 2002 letter appended to the petition, the petitioner indicated that: "Having established [the petitioner's] initial market research and beginning business operations in the U.S., the Company now focuses on developing the U.S. market for the parent company's products and researching current developments in the U.S. market." The petitioner stated:

The General Manager is the most senior position in the Company and in such capacity is responsible for directing the Company to ensure effective and profitable operation and growth. [The beneficiary] exercises full discretionary authority over all of the day to day activities of the Company, including managing the affairs of two subordinate professionals, a Business Development Analyst and Marketing and Sales Manager, both of whom hold university degrees. Moreover, [the beneficiary] is responsible for formulating and executing current and long-range objectives, development and implementation of the Company's basic organization, operating plans and policies, and the establishment of controls for operating efficiency. He reviews and approves the operating plans and budgets developed by the Business Development Analyst and marketing and sales strategies and forecasts prepared by the Marketing and Sales manager, as well as reviewing and approving company wide policies and procedures.

As General Manager for the Company, [the beneficiary] is also responsible for communicating with executives of major clients, business associations and in negotiating major contracts. [The beneficiary] acts as the representative for the company in numerous business meetings and conferences with the executives of companies throughout the United States as well as companies in Europe and Asia. [The beneficiary] reviews and approves capital acquisitions and expenditure plans and ensures that all company activities and operations are carried out in compliance with local, state and federal regulations and laws governing business operations.

He [is] also responsible for developing company strategies and oversees the implementation of planning, development, marketing and sales strategies for the company's U.S. and international trade activity.

The petitioner also included its organizational chart showing the beneficiary as general manager over three subordinate employees. The petitioner included descriptions of the job duties for the beneficiary's three subordinate employees. The petitioner indicated that the business development analyst is responsible for developing, formulating and implementing all research and marketing strategies for the development and expansion of the business; is responsible for analyzing industry publications and attending conferences to determine current market trends; and, conducts research to provide reports on technology and to develop business strategies. The marketing and sales manager duties were described as conducting in-depth research on specific segments of the fashion jewelry and accessories market, evaluating basic business potentials, recommending merchandising ideas, policies, activities, and pricing, and preparing reports on the market for the company's products. The petitioner indicated that the secretary/receptionist performed administrative office duties, such as typing, ordering office supplies, coordinating billing and payroll with outside

accountants, and generating airbills and invoices, and coordinating with shipping and freight forwarding companies.

On June 11, 2003, the director requested further evidence on the issue of the beneficiary's managerial or executive capacity. The director requested: a comprehensive description of the beneficiary's duties; a list of employees identifying each employee by name, position title, and complete position description; a breakdown of the number of hours devoted to each of the petitioner's employees' job duties on a weekly basis; and, Internal Revenue Service (IRS) Forms 941, Employer's Quarterly Federal Return, for the third and fourth quarters of 2002 and IRS Forms W-2, Wage and Tax Statement, issued to the petitioner's employees in 2002.

In a September 5, 2003 response, counsel for the petitioner provided the following description of the beneficiary's duties and proportion of time spent on the duties:

[The beneficiary] is responsible for directing and managing the essential function of the daily operations of the Company, including conferring and strategizing with sales and marketing staff in full-filling [sic] the Company's goal of expanding the Parent Company's client base in the United States. 8 hours.

Review daily activity reports produced by the Company's marketing and sales manager. 6 hours.

Evaluate performance of subordinate staff; acting in a pro-active and hands-on capacity to ensure that the management, marketing and sales duties are properly carried out; determine production and marketing policies in terms of which product lines are to be promoted; negotiate the terms and conditions of contracts and contract renewals; research more cost effective raw materials and means of transporting products from the parent company's production facilities to the U.S. operation. 16 hours.

Work closely with the company's business development analyst and marketing and sales manager to formulate and implement short and long term marketing goals and strategies to increase product sales; conduct research on client satisfaction. 2 hours.

Exercise complete discretionary authority to hire, fire and delegate authority among subordinates; plan long and short-term business objectives in support of the parent company's overall objectives; and, establish responsibilities and procedures for obtaining the objectives. 6 hours

Establish accounts for the long and short-term investment of cash flow, direct regional and national market studies and review and supervise the preparation of periodic overviews and reports relating to the parent company's overall operations. 8 hours.

Counsel for the petitioner indicated that the petitioner's business development analyst spent the majority of his time formulating and implementing marketing strategies and establishing relationships with existing and

potential clients. Counsel stated that the petitioner's marketing and sales manager spent his time managing the company's clients, researching the competitive environment, and conducting research on the fashion jewelry and accessories market. Counsel indicated the secretary/receptionist spent the majority of her time on general office duties. The petitioner provided copies of IRS Forms W-2 issued to the individuals in the four positions described.

The director determined that: (1) with the petitioner's organizational structure, revenues received, and salaries paid, it appeared unlikely that the beneficiary had been and would be employed in a managerial or executive position but would rather be primarily engaged in performing non-qualifying duties;(2) the descriptions of the beneficiary's duties identified general managerial functions and did not specify the duties the beneficiary performed or would perform which made his position managerial or executive; (3) the beneficiary's subordinates appeared to perform the mundane duties of the organization; (4) the petitioner had not provided evidence that the beneficiary would manage or direct a function of the organization; and, (5) the petitioner had not established that the beneficiary would supervise and control the work of other supervisory, professional, or managerial employees who would relieve him from performing the services of the corporation.

On appeal, counsel for the petitioner repeats the director's decision in part and the descriptions of the beneficiary's duties and the marketing and sales manager's duties. Counsel asserts that the petitioner was established to expand the import, export, distribution, and sales operation of the parent company's products, the petitioner did not require salespersons, and that the petitioner's staff are responsible for after sales maintenance and support, as well as, future research on market conditions and business development. Counsel claims that the descriptions of the beneficiary's duties are not vague and identify specific managerial functions.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner does not clarify whether the beneficiary would be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner may not claim a beneficiary is to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

The petitioner in this matter states that the beneficiary " exercises full discretionary authority over all of the day to day activities of the Company, including managing the affairs of two subordinate professionals," and "is responsible for formulating and executing current and long-range objectives, development and implementation of the Company's basic organization, operating plans and policies, and the establishment of controls for operating efficiency." In addition, the petitioner states that the beneficiary "is responsible for directing and managing the essential function of the daily operations of the Company," and that he "[e]xercise[s] complete discretionary authority to hire, fire and delegate authority among subordinates," and "plan[s] long and short-term business objectives in support of the parent company's overall objectives," and "establish[es] responsibilities and procedures for obtaining the objectives."

These statements are vague and nonspecific and do not provide an understanding of what duties the beneficiary actually performs day-to-day. For example, the petitioner does not define the tasks the beneficiary performs to execute the petitioner's current and long-range objectives, development and implementation of the company's organization, operating plans and policies. The actual duties themselves 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). Furthermore, the petitioner's description of the beneficiary's duties borrows liberally from the definitions of both managerial and executive capacity. See 101(a)(44)(A)(iv) and 101(a)(44)(i), (ii) and (iii) of the Act. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Moreover on review, the petitioner provides general statements indicating that the beneficiary communicates with clients, negotiates major contracts, acts as a company representative, is "pro-active" and "hands on" to ensure management, marketing and sales duties are carried out, as well as, determines production and marketing policy and researches the most cost effective transactions. These general statements do not sufficiently define the beneficiary's actual duties. It is not possible to determine whether these duties are primarily managerial or executive duties or are duties associated with the petitioner's daily operations. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Further, the duties of the business development analyst, the marketing and sales manager, and the beneficiary overlap. The record does not sufficiently distinguish amongst the various duties of these three individuals to substantiate their roles within the organizational structure. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner's organizational structure shows that the beneficiary is, at most, a first-line supervisor of non-professional employees. 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)(iv) of the Act. The petitioner's indication that the beneficiary reviews reports prepared by his subordinates, evaluates their performance, and ensures that they carry out the duties assigned do not elevate the beneficiary's position to a managerial or executive position for the purposes of this visa classification.

Counsel's assertions on appeal concerning the role the petitioner plays in business with its parent company are not persuasive. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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, that burden has not been met.

ORDER: The appeal is dismissed.