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U.S. Citizenship
and Immigration
Services

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FILE: EAC 02 259 53255 Office: VERMONT SERVICE CENTER

Date: MAR 03 2005

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:

SELF-REPRESENTED

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 AAO will dismiss the appeal.

The petitioner filed this immigrant petition seeking to employ 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 petitioner is a corporation organized in the State of Maryland that is doing business as a nursing employment agency. It filed this immigrant petition seeking to employ the beneficiary as its office manager.

The director denied the petition concluding that the petitioner had not established that the beneficiary was employed abroad or would be employed in the United States in a primarily managerial or executive capacity.

On appeal, the petitioner contends that the director did not thoroughly consider the facts presented in the record. The petitioner claims that the beneficiary would be employed by the United States entity in a primarily managerial capacity, and notes that the beneficiary's employment capacity is supported by the reasonable needs of the petitioning organization. The petitioner submits a statement in support of the appeal.

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 or 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.

On appeal, the petitioner did not specifically address the beneficiary's employment capacity in the overseas organization. In a statement submitted with the appeal, the petitioner merely states "[t]he beneficiary has been employed by the petitioner for over a period of three years preceding the time of the petition." As a

result of the petitioner's failure to address the director's finding that the beneficiary performed the non-qualifying day-to-day operations of the foreign entity, the petitioner has essentially conceded that the beneficiary was not employed by the foreign entity as a multinational executive or manager. Therefore, the director's decision pertaining to this issue will be affirmed. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The AAO will address the issue of whether the beneficiary would be employed by the United States entity in a primarily 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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.

The petitioner filed the employment-based petition on August 8, 2002 seeking to employ the beneficiary as its office manager. In an attached affidavit dated May 1, 2002, the petitioner provided the following description of the job duties associated with the beneficiary's proposed position:

The duty of the beneficiary as office manager will include but not [be] limited to managing the daily operation of the office, interacting with contractors, signing of contracts, organizing payroll materials, office equipment and supplies, making bank deposits and contacting creditors.

The director issued a request for evidence, dated June 24, 2003, asking that the petitioner submit the following evidence in support of the petitioner's claim that the beneficiary would be employed in the United States in a primarily managerial or executive capacity: (1) the number of workers employed in the United States organization, and each employee's job title and educational background, including that of the beneficiary; (2) a list of individuals contracted by the beneficiary; and (3) a description of the job duties performed by the workers in the United States office.

The petitioner responded in a letter dated September 12, 2003 explaining that the beneficiary's presence is needed in the United States entity to manage the company. In an attached document, titled "Introduction," the position of office manager is described as:

The officer manager supervises and oversees the daily operation of the office. He/she delegates duties where necessary to other staff members. He trouble shoots any office conflicts and resolves issues. All complaints should be directed to the office manager.

The petitioner provided a list of workers, including nine certified nursing assistants, four certified geriatric nursing assistants, one certified medicine aide, five registered nurses, thirteen licensed practicing nurses, a client coordinator, and three staffing coordinators. The petitioner noted that the list was not conclusive, as the petitioner also utilized contractors. The petitioner provided licenses for fifteen of its twenty-seven nurses. The petitioner also submitted a license verification from the Maryland Board of Nursing website, which indicated that the beneficiary possessed an active certified nursing assistant license with an expiration of September 28, 2003, a certificate confirming one year of national service by the beneficiary in the national youth service corps, a Certificate in Education from the University of Nigeria, a certificate of attendance in a physics curriculum, and a school certificate confirming the beneficiary's completion of secondary school.

In a decision dated November 13, 2003, the director determined that the petitioner had not established that the beneficiary would be employed by the petitioning organization in a primarily managerial or executive capacity. The director noted that although a list of the petitioner's employees was submitted for review, the record did not establish that the beneficiary would be employed in the United States company as a multinational executive or manager. Consequently, the director denied the petition.

On appeal, the petitioner claims that the director did not thoroughly consider the facts presented. The petitioner states that the beneficiary would be responsible for managing the human resources department of the organization, in which he would have the authority to supervise and control the department, "hire, fire, promote and recommend employees in his department," and exercise discretion over the department's daily operation. The petitioner states that the beneficiary's proposed employment as a manager would be based not

only on the number of individuals supervised, but also on the professional status of each of his subordinates, as each is required to be licensed by the State. The petitioner also explains:

The petitioner's need for the beneficiary in its human resources department is reasonable considering the overall purpose and stage of development of the organization and function. The petitioner hires high level healthcare professionals whose credentials have to be evaluated and thoroughly screened. The petitioner needs a human resources manager who understands the organization, has years of experience, patience, tolerance and understanding with the organization's executives and directors. The interest of our clients who rely on our staffing integrity has to be protected and the beneficiary possesses the necessary profile needed by the petitioner.

Upon review, the petitioner has failed to establish that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. 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 record does not specifically identify the position in which the beneficiary would be employed in the United States organization. The petitioner noted on the immigrant petition that the beneficiary would be employed as its office manager, yet on appeal, claims that the beneficiary's position would be managing the company's human resources department. This discrepancy is relevant in determining the beneficiary's true position within the organization, especially in light of the fact that the beneficiary provides different job responsibilities for each position. The beneficiary's position of office manager is described by the petitioner in its affidavit submitted with the petition as "managing the daily operation of the office, interacting with contractors, signing of contracts," and maintaining payroll, supplies, and the corporate bank account. The position of human resources manager, however, is described as managing the human resources department only, including supervising, and hiring and firing employees in this particular department. The AAO notes that the petitioner did not even identify the existence of a human resources department in the documentation submitted prior to the appeal. Considering these discrepancies, it is unclear what position the beneficiary would occupy in the petitioning organization. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Regardless of which position the beneficiary would be employed in, the job descriptions for each fail to identify the related job responsibilities. The director requested a description of the job duties performed by all workers in the United States organization. The petitioner, however, failed to specifically address the beneficiary's responsibilities in the company, providing only a brief paragraph of the duties of an "office manager" in general. The petitioner's vague description, which included "supervises and oversees the daily operation of the office," "delegates duties . . . to staff members," and "trouble shoots any office conflicts and resolves issues," does not provide an accurate account of the exact managerial job duties of the beneficiary. 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. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Furthermore, the job description submitted on appeal, which provides that the beneficiary would have the authority to supervise and control the human resources department, would hire, fire, promote and recommend personnel, and would have discretion over day-to-day operations, is merely a restatement of the statutory definition of managerial capacity. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Even if the AAO were to consider the beneficiary as an office manager, as initially claimed in the petition, the petitioner's description of his job responsibilities clearly demonstrates that the beneficiary would be performing non-qualifying functions of the business, rather than performing in a primarily managerial capacity. The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The record indicates that the specific non-managerial and administrative operations to be performed by the beneficiary include signing contracts, "organizing payroll materials, office equipment and supplies, making bank deposits and contacting creditors." As the petitioner did not indicate the amount of time the beneficiary would devote to these non-qualifying functions, the AAO cannot conclude that the majority of the beneficiary's time would be spent performing in a primarily managerial capacity. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The petitioner notes on appeal that the reasonable needs of the petitioning organization in light of the overall purpose and stage of development of the organization should be taken into account when determining whether an individual is employed in a primarily managerial or executive capacity. *See* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, this analysis arises when staffing levels are used as a factor in determining an individual's employment capacity, and serves only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Although the appeal will be dismissed, the AAO notes that the director's decision fails to specifically identify the reasons for the denial of the employment-based petition. When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i).

Based on the above discussion, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.