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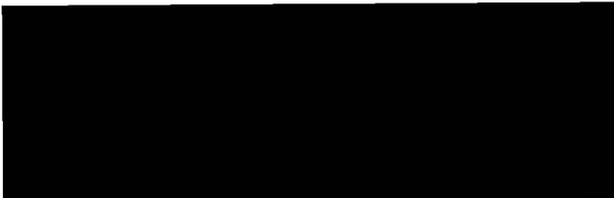
Petitioner:

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, Nebraska Service Center, denied the employment-based petition. The matter is now before the AAO on appeal. The appeal will be dismissed.

The petitioner is a limited liability company organized in the State of Michigan in July 2001. It provides consulting and engineering services. It seeks to employ the beneficiary as its international marketing 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: (1) that the beneficiary would be employed in a managerial or executive capacity for the U.S. petitioner; or, (2) that the beneficiary had been employed in a managerial or executive capacity for the foreign entity.

On appeal, counsel for the petitioner submits a brief and copies of two unpublished decisions in support of the appeal.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 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 first issue in this proceeding is whether the petitioner established that the beneficiary's position for the United States entity would be in a managerial capacity. The petitioner does not claim that the beneficiary will perform in an 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.

In a September 3, 2004 letter appended to the petition, the petitioner stated that the beneficiary would be "responsible for all aspects of managing domestic and international marketing, and extension of the sale of engineering services to industries other than automotive." The petitioner stated that:

She will be responsible at this high managerial level to create a marketing plan for the Company. She will devise and implement plans to create methods of research to identify marketing strengths and weaknesses of this Company and those of other competitors. She will analyze information and data received and identify new areas for market penetration.

* * *

She will establish marketing goals and objectives both in terms of industries, locations, time, and personnel; and establish a program of marketing strategies and techniques, including selections of media, types of conferences, tradeshow and the like to attend. Because Petitioner is not a large organization administratively, she will work closely with engineering managers to create

plans to promote sales of our services. In this regard, she will be responsible to coordinate publicity, advertising, and promotional programs to targeted business sectors.

The petitioner also noted that the beneficiary would have the authority to create a budget for the marketing goals, plans, and objectives, including media selection, promotions, personnel, etc. The petitioner added that the beneficiary would follow through with engineering managers and others to insure that marketing requirements and goals were being met, would "apply managerial skills of international marketing, to bear on the improvement of corporate communications materials," would devise strategies to aid the petitioner's managers in understanding marketing concepts and strategies that she had developed, and would establish training and educational plans for internal personnel. The petitioner emphasized that the beneficiary would be responsible for creating a marketing plan to take advantage of concepts she had successfully introduced into marketing plans for the foreign entity. The petitioner indicated that the beneficiary would serve with other managers on a management team to discuss the overall operations and directions of the petitioner and would report to the vice-president of group marketing.

The petitioner provided its organizational chart showing the beneficiary on the third tier in the position of international marketing manager reporting to the vice-president of group marketing, who in turn, reported to a "president and chief executive officer," the 99 percent interest owner in the petitioner. The chart also identified a second individual as the petitioner's direct president. The chart did not identify any positions subordinate to the beneficiary.

On April 28, 2005, the director requested further evidence on this issue. The director requested a statement signed by an authorized official of the petitioner describing the beneficiary's intended employment, including information concerning the dates of employment, job titles, specific job duties, types of employees supervised, if any, level of authority, and title and level of authority of the beneficiary's immediate supervisor, as well as the percentage of time the beneficiary would perform the various duties. The director also requested the petitioner's organizational chart showing the beneficiary's position in the U.S. in relation to others in the company.

In a June 22, 2005 response, the petitioner explained that the marketing for companies affiliated with the petitioner through the ownership of [REDACTED], the petitioner's 99 percent interest owner, had been centralized under the vice-president of group marketing. The petitioner indicated that the vice-president of group marketing had executive authority to deal not only with marketing the petitioner's services but also the services of the affiliates. The petitioner then provided a description of the group marketing vice-president's duties. In the next paragraph, the petitioner stated that the beneficiary "is in fact responsible for managing all of the development of marketing plans, goals, and strategies for Petitioner, and as alluded to above, for our affiliated companies." The petitioner added:

[The beneficiary] will have discretion on how best to devise marketing strategies and goals for Petitioner and our affiliates, all of whom are engaged in similar engineering activities. In that role, she will have functional managerial duties over devising marketing plans for each of the specific affiliates that are in conformity with the overall plans which she devises. She will have the authority to direct engineering, design and sales managers in assistance in data gathering. The purpose of this data gathering will be to provide [the beneficiary] information which will allow her to oversee the development of a detailed marketing strategy.

The information provided, based upon her direction of the types of data and statistics required, will allow her to make an in-depth study of the demands for our services, the types of services demanded, the profitability of those various areas, the demographics of customers, trends in the marketplace, etc. During that time she will meet with engineering managers, product development managers, global sourcing managers, etc. so that any plans and policies which she creates take into consideration all of those various managers' concerns and, perhaps, competing interests.

The petitioner indicated that it expected its market share and that of its affiliates to grow and that with that growth market researchers would be hired to replace the engineering managers, product development managers, etc. in regard to carrying out the plans, policies, and goals set forth by the beneficiary. The petitioner also noted that the beneficiary would act independently, would have full authority in regard to her position, and once the marketing/sales/promotional plans were created would have managerial authority and responsibility to see that the plans were implemented with ongoing authority to direct other managers to put the policies and procedures in place. The petitioner stated that the beneficiary would spend 99 percent or more of her time directing market research, analyzing data and information, preparing marketing/sales plans and strategies, identifying marketing goals, and meeting with other managerial and executive level personnel to implement those plans. The petitioner also referenced the allocation of the beneficiary's time while she was employed in Brazil, indicating that these more specific percentages of time were parallel to the beneficiary's work for the petitioner in the United States. The more specific percentages of time included 45 percent of the beneficiary's time spent on marketing tasks, including implementation of her policies; 35 percent of her time spent on sales related matters, including training programs and sales management programs; 5 percent of her time spent on promotion and liaison duties; 5 percent of her time spent on budgeting; and 10 percent of her time spent managing human resource/accounting personnel.

On August 13, 2005, the director denied the petition, determining that function managers were not required to directly supervise subordinates but that the petitioner must clearly demonstrate that the beneficiary would not perform the function. The director determined that the petitioner had not provided objective evidence to demonstrate that there would be subordinate personnel who would relieve the beneficiary from performing non-qualifying duties.

On appeal, counsel for the petitioner asserts that the beneficiary does not provide the petitioner's marketing services but rather devises the plans, strategies, and methodologies necessary to develop the petitioner's marketing strategy. Counsel contends that the description of the beneficiary's duties compares favorably to the duties listed as marketing and sales manager's duties in the Department of Labor's Occupational Outlook Handbook. Counsel observes that the director failed to discuss whether the beneficiary functions at a senior level within the organizational hierarchy or whether the beneficiary has direction over the day-to-day operations of marketing and sales management. Counsel contends that the director's failure to discuss these elements amounts to a concession that the beneficiary operates at a senior level within the organizational hierarchy and has direction over the day-to-day operations of marketing and sales management. Counsel claims that other managers will carry out the day-to-day marketing operations and observes that "[i]t is important to consider that the beneficiary has served at a high senior level dealing directly with managing marketing and sales." Counsel cites unpublished decisions in an attempt to distinguish the approvability or lack of approvability of a "function manager" petition. Counsel concludes by asserting that: (1) there are sufficient personnel over whom the beneficiary will have control in

marketing and sales to show that she will not be performing the duties herself; and (2) the beneficiary will be spending 45 percent of her time managing marketing and 35 percent of her time managing sales which constitutes the majority of her time.

Counsel's assertions are not persuasive. Based on the statutory definition of managerial capacity, a petitioner must prove the following elements to establish that a beneficiary is primarily serving as a function manager within an organization:

First, the beneficiary must "manage" a function within the organization or a department or subdivision of the organization;

Second, the "function" within the organization, or a department or subdivision of the organization must be "essential;"

Third, the beneficiary must function at a "senior level" within the organizational hierarchy or with respect to the function managed; and

Fourth, the beneficiary must control and "exercise discretion" over the day-to-day operations of the function.

See section 101(a)(44)(A) of the Act.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. The term "essential" is commonly defined as "inherent" or "indispensable." *Webster's II New College Dictionary* 384 (2001). Accordingly, based on the plain meaning of the word "essential," the petitioner must establish that the function managed by the beneficiary is inherent and indispensable to the petitioner's operations rather than a non-essential or superfluous task.

When examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). If a petitioner claims that the beneficiary is primarily managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in that capacity, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. If a petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). In addition, the petitioner's description of the beneficiary's daily duties must clearly demonstrate that the beneficiary primarily *manages* the function rather than *performs* the duties related to the function. 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

In the matter of a function manager, where no subordinates are directly supervised, CIS will consider the beneficiary's position within the organizational hierarchy, the depth of the petitioner's organizational structure, the scope of the beneficiary's authority and its impact on the petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

Upon review of the totality of the record, the petitioner has not established that the beneficiary is primarily serving as a function manager. First, the AAO acknowledges that the petitioner has identified the particular function pertinent to this matter as the marketing and sales of its engineering and consulting services.¹ Second, although the petitioner has not provided its budget allocation to this function or an estimate of the volume of business brought in by and through the beneficiary's performance of this function, the AAO accepts that the beneficiary's area of responsibility is essential to the sale, promotion, and marketing of the petitioner's engineering and consulting services.

However, the petitioner has not established that the beneficiary primarily manages the function rather than performs the operational and administrative tasks necessary to market, sell, and promote the petitioner's services. The petitioner initially asserted that the beneficiary would devise a marketing strategy and work closely with engineering managers to create the plans to promote the petitioner's services, as well as coordinate the publicity, advertising, and promotional programs to sell the petitioner's services. In response to the director's request for further evidence, the petitioner indicated that the beneficiary's area of responsibility would extend to devising conforming marketing plans for each of the specific affiliates and include directing engineering, design, and sales managers to assist in gathering data. In addition, the petitioner noted that the beneficiary would "make an in-depth study of the demands for our services, the types of services demanded, the profitability of those various areas, the demographics of customers, trends in the marketplace, etc." The petitioner concluded by indicating that the beneficiary would spend 99 percent or more of her time: (1) directing market research; (2) analyzing data and information; (3) preparing marketing/sales plans and strategies; (4) identifying marketing goals; and (5) meeting with other managerial and executive level personnel to implement those plans. The petitioner divided the majority of the beneficiary's time as spending 45 percent on marketing tasks including implementation of her policies, and 35 percent on sales-related matters including training programs and sales management programs.

¹ The AAO acknowledges that the petitioner is affiliated with several other companies. However, it is unclear whether the petitioner is claiming that the beneficiary is a function manager for the petitioner or is a function manager for the petitioner coupled with its various affiliates. This is an important point, as a function manager must operate at a senior level within the petitioner's organizational hierarchy and the organizational structure must identify other personnel who will carry out the tasks associated with the function. In this matter, the organizational structure provided does not reveal how the beneficiary's position fits into the petitioner's organizational hierarchy or how the beneficiary's position has expanded to include not only the petitioner but also affiliated companies.

The deficiency in the record regarding this issue relates to the petitioner's actual organizational structure. The petitioner has not provided an organizational structure that sufficiently details the individuals who will assist the beneficiary in gathering data. Neither does the organizational structure identify individuals who will participate in selling the petitioner's services or who will attend tradeshow or other functions to promote the petitioner's services. The petitioner has submitted very little documentary evidence to support its statements that the beneficiary will be sufficiently relieved from performing the tasks related to the marketing, selling, and promoting of the petitioner's services. Again, 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 *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. at 604.

In addition, the AAO is not satisfied that the beneficiary's role within the organization is that of a senior-level manager within the organizational hierarchy and with respect to the function managed. In performing her daily activities, the beneficiary will report directly to the vice-president of group marketing. The record suggests that the vice-president of group marketing will report to the owner and chief executive officer of the petitioner and its affiliates, not to the petitioner's president. The petitioner has failed to sufficiently detail the actual organizational structure of the petitioner, has failed to substantiate that it employs sales managers or engineering managers, and has failed to substantiate the beneficiary's relationship to the petitioner's affiliates or the affiliates' employees. The list of the petitioner's claimed affiliates and the organizational charts submitted do not include positions identified as sale manager positions, engineering manager positions, or promotional positions. The record is insufficient to support the petitioner's claims that the beneficiary works through other employees to assist her in gathering data or that the petitioner has employees available to implement her marketing/sales strategy. 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)).

In a company with only 25 employees and a confusing managerial structure, as depicted on the organizational charts submitted, the beneficiary's position cannot be considered senior within the company's organizational management hierarchy. Further, the petitioner has not established that the beneficiary occupies the senior position with respect to management of the petitioner's sales and marketing services, with accountability for overseeing marketing programs, monitoring production, and sales performance for the petitioner's key product or services. The petitioner has failed to establish that the beneficiary's duties satisfy the first and third element found in the definition of managerial capacity. See 101(a)(44)(A)(i) and (iii) of the Act.

The AAO acknowledges counsel's argument that the beneficiary's job duties closely resemble those described for "marketing and sales managers" in the U.S. Department of Labor's Occupational Outlook Handbook. Generic job descriptions found in Department of Labor publications have no bearing on an assessment of this beneficiary's job duties within the context of the petitioner's business and the petitioner cannot satisfy its burden of proof by making comparisons to such descriptions. When examining the managerial or executive capacity of a beneficiary, CIS reviews the totality of the record, including descriptions of a beneficiary's actual duties and those

of his or her direct or indirect subordinates, the nature of the petitioner's business, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business.

Finally, the AAO observes that citing to unpublished matters carries little probative value. Counsel should take note that unpublished decisions are not binding on CIS in its administration of the Act. *See* 8 C.F.R. § 103.3(c).

The petitioner has not established that the beneficiary will perform in a primarily managerial capacity for the U.S. petitioner. For this reason, the petition can not be approved.

The next issue in this matter is whether the beneficiary was employed in a managerial capacity for the foreign entity for one year prior to entering the United States as a nonimmigrant. Again, the petitioner does not contend that the beneficiary was employed in an executive capacity for the foreign entity.

The petitioner, in its initial letter in support of the petition, indicated the beneficiary had been employed at the foreign entity from January 2001 to February 2003. The petitioner stated that the beneficiary "performed all the same functions which are outlined under 'Position Offered'." The petitioner noted that the beneficiary's foreign position was an international marketing manager's position and that the beneficiary:

[D]evised marketing plans which allowed [redacted] the foreign entity] to make large advances in providing engineering services. Her plans and strategies to identify potential customers were followed by engineers and helped that Company achieve a growth of over 800%. The plans included creation of budgets; methods to gather data and information; types and places of media utilized for promotions and advertising; types of personnel to be utilized for different marketing efforts/strategies, etc. In all matters regarding marketing and commercial exploitation, [the beneficiary] made the final decision. She had the authority, and responsibility, to see to it that her plans were being followed, to monitor progress and effectiveness, to make necessary modifications to negotiate and execute marketing/advertising/promotional contracts on behalf of the Company. She reported only to the General Manager, the highest ranking executive, in country to keep him advised of marketing developments, and to assure compliance with overall Company philosophies.

On April 28, 2005, the director requested further evidence on this issue. The director requested a statement signed by an authorized official of the petitioner describing the beneficiary's employment abroad, including information concerning the dates of employment, job titles, specific job duties, types of employees supervised, if any, level of authority, and title and level of authority of the alien's immediate supervisor, as well as the percentage of time the beneficiary would perform the various duties. The director also requested the petitioner's organizational chart showing the beneficiary's position in relation to others in the foreign company.

In a June 22, 2005 response, the petitioner indicated that the beneficiary had served as a commercial manager in charge of marketing and business development. The petitioner noted that the beneficiary directly supervised a commercial assistant, a human resources coordinator, and accounting personnel but that she was also a functional manager, managing all aspects of marketing, sales, business development, and identification of potential avenues for expanding business opportunities. The petitioner indicated that: the beneficiary

formulated specific marketing plans and policies, devised marketing strategies and goals, and performed managerial analysis of market trends and economic conditions in various countries; devised methods for formal data collection which was carried out by managers in other departments and was responsible for the implementation, monitoring, and modification of marketing plans; managed sales efforts including a program for engineers on sales techniques, strategies, and methods of collecting data; managed promotional activities including types of methods to create better relationships and contacts with existing and potential clients; was responsible for a budget relating to marketing, sales, and commercial activities; reported only to the general manager and president; and was given complete discretion and latitude in how to proceed with her duties. The petitioner stated that the beneficiary spent 45 percent of her time implementing marketing policies she had established; 35 percent of her time on sales related matters including training programs and management of sales programs; 10 percent of her time managing human resource/accounting personnel; 5 percent of her time on promotion and liaison duties; and 5 percent of her time on budgeting.

The petitioner provided an organizational chart of the foreign entity showing the beneficiary reporting to the general manager and listing the beneficiary's subordinates as a commercial assistant, a human resource employee, and an accounting/administration employee. The beneficiary's position was placed on the same tier as other department managers. The other department managers appeared to have two layers of subordinates beneath them.

On August 13, 2005, the director denied the petition, again determining that function managers were not required to directly supervise subordinates but that the petitioner must clearly demonstrate that the beneficiary would not perform the function. The director determined that the petitioner had not provided objective evidence to demonstrate that there would be subordinate personnel who would relieve the beneficiary from performing non-qualifying duties.

Counsel submits the same argument and assertions regarding the beneficiary's managerial capacity for the foreign entity as set out for the U.S. petitioner. The foreign entity's organizational chart lists an engineering manager and four design managers so that the petitioner's assertions that the beneficiary utilizes other managers to implement her marketing plans can be substantiated. The AAO observes, however, that the foreign entity's organizational chart does not list sales managers. It is unclear who carries out the duties associated with sales related matters, if not the beneficiary. The foreign entity has indicated that the beneficiary spends 45 percent of her time implementing marketing policies and 5 percent of her time on budgeting. According to the organizational chart and the foreign entity's allocation of the beneficiary's time, the beneficiary spends 10 percent of her time as a first-line supervisor of non-professional positions, as the record does not establish that the beneficiary's three subordinates at the foreign entity hold positions that require the services of a professional staff. The record is unclear whether the beneficiary's time spent on promotion and liaison duties comprise primarily managerial tasks or tasks that are incidental to the beneficiary's managerial duties, or are duties that require the beneficiary to perform non-qualifying duties. Thus, the record in this matter substantiates only that the beneficiary spends 50 percent of her time on duties that can be considered the management of a function.

In this matter, the petitioner has not provided sufficient evidence to establish that the beneficiary's position for the foreign entity was primarily a managerial position. For this additional reason, the petition will not 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, 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.