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U.S. Citizenship  
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FILE:



Office: NEBRASKA SERVICE CENTER

Date: JAN 06 2006

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IN RE:

Petitioner:



Beneficiary:

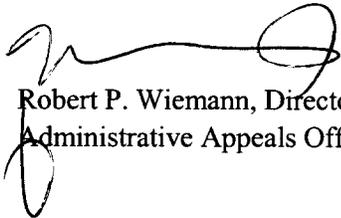
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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

The petitioner is a branch office of a Canadian entity recognized in the State of North Dakota in August 2003. It manufactures and sells farm equipment. It seeks to employ the beneficiary as its USA Marketing and Sales Leader. 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.

On May 10, 2005, the director denied the petition determining that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity for the U.S. petitioner. Although the director did not make an explicit determination, the director also questioned whether the beneficiary's position for the foreign entity was primarily managerial.

On appeal, counsel for the petitioner contends that Citizenship and Immigration Services (CIS) erred in concluding that the petitioner had changed the beneficiary's job description to make a deficient petition conform to the statutory requirements. Counsel asserts that the petitioner's response to the director's request for further evidence provided more detail merely strengthening the approvability of an already compliant petition. Counsel also argues that CIS erred in concluding that a perceived conflict between job descriptions for the U.S. entity cast doubt on the validity of the beneficiary's foreign position description.

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 principal issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a managerial or executive capacity for the U.S. petitioner.

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 December 1, 2003 letter submitted in support of the petition, the petitioner indicated that the beneficiary had overall responsibility for the petitioner's marketing and sales efforts in the United States. The petitioner also referenced an attachment to the petition outlining the beneficiary's duties and responsibilities in this position. The attachment is titled "Job Description," is dated July 18, 2003, and sets out the U.S. Marketing and Sales Leader position's accountability, challenges, and percentage of time spent on each challenge as:

The U.S. Marketing and Sales Leader is "[r]esponsible to deliver on Sales targets and to establish a winning Dealership network in the Midwestern USA." The major challenges of the position are: "Create customer appetite for [the petitioner's] product [25 percent]; Establish a winning Dealership network [25 percent]; Surpass the Sales target – again and again! [25 percent]; Develop the programs capable of encouraging the dealer and customer to step up to the plate [10 percent]; Establish winning relationships with partners such as [major dealers - 10 percent]; Forecasting and wholegoods inventory management [5 percent]."

The petitioner also listed the actions that would need to be taken to meet the major challenges listed. The petitioner noted that this position was responsible for three direct subordinates and six indirect subordinates. The petitioner provided its organizational chart showing the beneficiary's position of U.S. Marketing & Sales Leader and that of a U.S. Service & Warranty Team Leader reporting to a U.S. Team Leader who reported to the president and general manager of the company.

On December 22, 2004, the director observed that the evidence submitted indicated that the beneficiary would be primarily performing sales and marketing duties and would be performing many routine tasks rather than managerial level tasks. The director noted that the beneficiary would have a subordinate but that the record was not clear how much time the beneficiary would spend on supervisory duties versus routine functional duties for marketing and sales. The director provided the statutory definitions for both managerial and executive capacity and requested clear evidence that the beneficiary would be primarily performing managerial or executive level duties and noting that the evidence must establish that the beneficiary met all four criteria of either managerial or executive capacity.

On March 4, 2005, counsel for the petitioner provided a response to the director's request for evidence, including a February 16, 2005 letter from the petitioner. In the petitioner's February 16, 2005 letter, the petitioner indicated that the beneficiary must: "use his executive capacity to develop, direct and oversee all sales and marketing initiatives in the United States" which included setting the sales goals for the U.S. market, forecasting sales needs, developing and implementing marketing programs, sales programs, strategies, and initiatives; "formulate the correct advertising strategies," which involved working with research agencies, newspapers, television, radio, and

retail financing agencies; "use his broad sales and management experience to ensure his sales team of territory managers and product specialists are educated, trained, well informed and motivated to meet the needs of our dealers and customers in a professional and efficient manner;" have the authority to hire, terminate, supervise, and motivate all U.S. sales team members; and, exercise sound judgment in all areas of his mandate with only general direction from the company headquarters.

The petitioner attached a document titled "Job Description," dated December 31, 2003, which set out the U.S. Marketing and Sales Leader's accountability and challenges and percentage of time spent on each challenge. In the December 31, 2003 job description, the U.S. Marketing and Sales Leader's purpose is "to plan and implement overall USA marketing strategy to support the companies' goals and objectives. Ensure that company image, policy and procedures are carried forward to the USA Market as it is related to the dealers and customers. Manage resources and staff to maximize effectiveness and efficiency." The major challenges of the position are:

- (1) Set sales goals for the USA marketplace, forecast sales requirements and coach staff to achieve these goals. 25 percent
- (2) Plan promotional events to support USA sales strategy. 25 percent
- (3) Keep [the petitioner's] sales staff knowledgeable on competitors [sic] products and sales strategies. 20 percent
- (4) Oversee the USA distribution dealer network. 20 percent
- (5) Resolution of major customer complaints. 10 percent

The petitioner also listed the actions that would need to be taken to meet the major challenges listed. The petitioner noted that this position was responsible for three direct subordinates and eight indirect subordinates. The petitioner also provided a job description for the position of territory manager whose responsibilities included contact for dealers, product demonstration, and managing the territory.

On May 10, 2005, the director denied the petition, observing that the petitioner's second job description for the beneficiary's U.S. position differed entirely from the responsibilities and percentages set out in the petitioner's initial job description. The director determined that the changes made to the second description were made to make the position appear to be at a higher level within the organization. The director noted that the petitioner had failed to explain why the official description had been revised after filing the petition and that the record did not contain evidence reconciling the two position descriptions. The director determined that the two positions were conflicting and that the record did not establish that the beneficiary would be employed in an executive or managerial position in the United States.

On appeal, counsel for the petitioner asserts that the director erred when concluding that the petitioner had vastly changed the job description. Counsel claims that the initial job description grouped goals into broad categories and suggested ways to achieve the goals; and that the second job description merely described the beneficiary's specific duties. Counsel provides a chart comparing the initial goals listed by the petitioner as comprising the beneficiary's job position and the restated job description depicting the beneficiary's specific duties. Counsel argues that the second description more accurately and completely details the beneficiary's job position for the petitioner and is not a radical departure from the initial description.

Counsel contends that the beneficiary's position for the U.S. petitioner is a managerial position with responsibility for directing the petitioner's sales arm, a major component or function of the organization. Counsel indicates that the petitioner employs a staff of three territorial managers subordinate to the beneficiary's position who carry out the day-to-day ministerial functions of the company, including developing dealerships and attending trade shows. Counsel attaches a more complete description of the territorial managers' job position as well as evidence that the petitioner employs three territorial managers. Counsel also includes an example of the petitioner's dealership agreement and a list of 42 dealerships that sell the petitioner's products. Counsel concludes that based on the evidence submitted the beneficiary's position is clearly managerial.

Counsel's assertions are persuasive. The AAO finds that in this matter the evidence submitted in response to the director's request for evidence is an elaboration on the beneficiary's managerial position. The information submitted in response to the director's request for evidence and on appeal clarifies the beneficiary's managerial position. Although counsel does not clearly claim that the beneficiary is a functional manager, the evidence in the record is sufficient to establish that the beneficiary is a functional manager.

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. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, 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. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *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 employed in a managerial or executive capacity. *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. 593, 604 (Comm. 1988)).

Beyond the required description of the beneficiary's job duties, Citizenship and Immigration Services, (CIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In the case of a function manager, where no subordinates are directly supervised, these other factors may include 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 value of the budgets, products, or services that the beneficiary manages.

In this matter, upon review of the totality of the record, the petitioner has established that the beneficiary will serve as a function manager for the U.S. petitioner. First, the beneficiary's title sufficiently identifies the beneficiary's role within the U.S. organization as the sales and marketing leader. The petitioner has provided an

audited financial statement to substantiate its prominence in the farm equipment industry and the petitioner's U.S. sales of its manufactured products is necessarily an essential function.

Second, the totality of the information in the record is sufficient to establish that the beneficiary functions at a senior level with respect to the function managed. The beneficiary is the individual ultimately responsible for the petitioner's sales and marketing efforts in the United States. He exercises discretion over the day-to-day operations of the function that he controls. The petitioner has substantiated the employment of the beneficiary's three territorial managers and has provided evidence of the numerous dealers that stock the petitioner's products for sale. The evidence in this matter is sufficient to establish that the beneficiary does not sell the petitioner's product or directly perform the marketing duties that are associated with promoting the products. The petitioner has sufficient staff both directly and indirectly to perform the daily operational tasks associated with carrying out the sales and marketing function. Upon review of the totality of the record, the petitioner has established that the beneficiary would primarily serve as a function manager for the petitioner.

The secondary issue in this matter, which involves the director's questioning of the beneficiary's duties for the foreign entity, is moot, as the AAO does not find conflict in the record regarding the beneficiary's duties for the U.S. petitioner. A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003). As the director observed, the information provided by the petitioner regarding the beneficiary's duties for the foreign entity is sufficient to establish the beneficiary's managerial capacity for the foreign entity prior to his entry into the United States as a nonimmigrant. The director's questioning of the petitioner's credibility on this issue is withdrawn.

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 been met.

ORDER: The appeal is sustained.