



U.S. Citizenship
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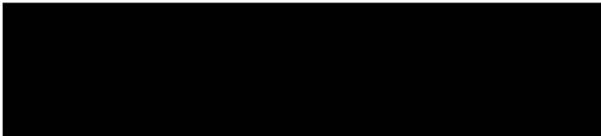
Petitioner:

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, Chief
Administrative Appeals Office

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

The petitioner filed instant immigrant visa petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act. The petitioner is a limited liability company that is organized under the laws of the State of Delaware and is operating a sperm bank in the State of New York. The petitioner seeks to employ the beneficiary as its general manager.

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

On appeal, counsel for the petitioner contends that the beneficiary qualifies as a function manager as a result of his management of the petitioner's sales and marketing functions. Counsel submits a brief 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.

The issue in this proceeding is 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 instant immigrant visa petition on January 19, 2005, noting the beneficiary's proposed employment as the general manager of the four-person company in the United States. In an appended letter, dated December 20, 2004, the petitioner's president stated that in the position of general manager, the beneficiary would possess "complete control of the company" and discretion over its day-to-day operations and development, including such "work" as:

- Marketing to consumers and fertility clinics
- Press contact
- **Development** and overview of sales
- IT [(information technology)] management
- Accounting

- Development of business strategy including short and long term goals
- Human resource management with full authority to hire and fire the personnel, promotion and salary decisions

In the beneficiary's attached resume, his employment in the United States was described as follows:

Management of [the petitioning entity] including control and development of internal and external procedures. Supervision and training of employees in handling and shipment of sperm. Responsible for liquid nitrogen handling and refilling of storage tanks. Relationship building with clinics. Quality control and accounting. Control and development of sales, marketing and accounting.

The director issued a request for evidence on September 26, 2005, noting that the record was not sufficient to establish that the beneficiary's proposed position would be primarily managerial or executive in nature. The director requested that the petitioner submit a "detailed description of the beneficiary's proposed executive/managerial duties," including an allocation of the amount of time the beneficiary would spend on each task per week, as well as a statement addressing the following: (1) the number of subordinate supervisors to be managed by the beneficiary; (2) the job titles and job duties of the beneficiary's subordinate employees; (3) the managerial, executive or technical skills necessary to perform the beneficiary's job duties; and (4) the "degree of discretionary authority" the beneficiary would possess in day-to-day operations. The director asked that the petitioner also provide an organizational chart reflecting the United States company's management and personnel structure, its 2004 Internal Revenue Service (IRS) Forms W-2 and W-3 and 2005 payroll register, copies of its quarterly tax returns for the first and second quarters of 2005, and evidence, if applicable, of its use of independent contractors.

The petitioner responded in a letter dated October 14, 2005, and attached a statement explaining the manner in which the beneficiary would allocate his time in the United States organization. Specifically, the petitioner stated that as the company's general manager, the beneficiary's time is divided indistinguishably among the following areas: marketing, public relations, sales, accounting and general marketing. The petitioner explained that of the five areas of responsibility, the management, development and control of the company's marketing is "the most important part of [the beneficiary's job]." The petitioner included a copy of the marketing plan written by the beneficiary, and noted its use of outside contractors to perform the related marketing tasks. The petitioner identified the beneficiary's achievements with respect to the company's marketing, advertisements and press coverage in magazines and newspapers, online, and on the television and radio. The petitioner also noted the beneficiary's responsibilities of managing the company's information technology system, which included developing a new website, as well as developing and implementing "business development initiatives," and managing, hiring, firing, and promoting personnel. The petitioner further stated that with regard to its day-to-day sales, the beneficiary had hired a salesperson, which the beneficiary was responsible for training and managing.

In the attached documentary evidence, the petitioner provided a copy of the beneficiary's employment contract with the United States company, which stated that as the company's manager, the beneficiary would "be in charge of the day-to-day management of the [petitioner's] entire activities . . . and shall have the managerial responsibility of the business area connected hereto." In a separate letter, dated October 14, 2005, the petitioner's attorney stated:

[The beneficiary] is charged with spearheading the North American effort for the worldwide enterprise of which [the petitioning entity] forms a part. [The beneficiary] is in charge of marketing, operations and finance for the North American business. [The beneficiary] managed the termination of the company's predecessor entity and severing the ties with the former part owner. He managed the move of the business to New York and re-establishment of the business there. He is listed as 'manager' of the US limited liability company.

The petitioner provided copies of its 2005 first and second quarter tax returns, both of which confirmed the employment of the beneficiary and a salesperson. The petitioner also submitted copies of licenses and permits obtained by the beneficiary for the petitioner's business operations in the United States, "general marketing material," including letterheads, brochures, and magazine advertisements, pictures of the beneficiary at business exhibitions, as well as a letter from an outside contractor utilized by the petitioner in the development of such marketing materials as "magazine advertisements, stationery, buttons, trade show booths, a web site and brochures."

In his December 5, 2005 decision, the director concluded that the petitioner would not employ the beneficiary in a primarily managerial or executive capacity. The director noted an inconsistency between the number of employees noted by the petitioner on its Form I-140 and those actually reported as employees on the petitioner's quarterly wage report. The director also noted that the petitioner had provided "vague" and "general managerial functions" in its description of the beneficiary's position, which were insufficient to establish whether it would be primarily managerial or executive in nature, and stated that the petitioner had neglected to submit the requested "complete position description" for its remaining employees. The director concluded that, as a result of the limited evidence offered by the petitioner, the beneficiary would be "primarily engaged in providing sales, marketing, and services to [the petitioner's] clients, not directing the organization." Consequently, the director denied the petition.

Counsel for the petitioner filed a timely appeal on January 5, 2006. In a subsequently submitted appellate brief, dated January 30, 2006, counsel contends that the beneficiary would be employed as a function manager of the petitioning entity. Counsel states:

[T]he [b]eneficiary, as [the petitioner's] manager, directs, controls and manages all sales and marketing in the United States, working approximately thirty-seven hours a week plus overtime. The [b]eneficiary's primary activities include: 1) managing the day-to-day operation of the New York office; b) developing and maintaining all marketing plans for the United States business; c) contacting and negotiating relationships with outside contractors for accounting and other business needs; d) maintaining and updating the website to meet ever-growing customer demand; e) supervising and remaining in constant contact with the heads of the Danish laboratories and the medical director to ensure compliance with both FDA regulations and the customer demand for detailed donor information; f) directing all sales decisions by supervising the full time sales associate and controlling internet sales; g) reporting to and being under the general supervision of only the [p]resident of [the foreign entity], Ole Schou; and h) having wide discretion in directing the future development of [the petitioning entity]. Although [the beneficiary] does handle some non-managerial duties related to sales, and appears on behalf of [the petitioner] at conventions and for interviews with the press, the overwhelming proportion of his activities consist of the direction and management of other employees and the website to further the sales and marketing of [the

petitioner]. Therefore, the [b]eneficiary has formerly been and will continue to be a top functional manager in the [foreign entity's] organization having vast control of all of [the foreign entity's] sales and marketing done in the United States. He is and has been functioning at a senior level in the organization and will continue to do so fueled by the success of his operations in New York.

Counsel stresses the importance of the petitioner's sales and marketing, emphasizing that they are essential functions, and stating:

The evidence indicates that the beneficiary is the primary individual responsible for managing the day-to-day operations of [the petitioning entity], focusing around the sales and marketing of European-produced sperm in the United States. [The] [b]eneficiary is solely responsible for managing the company's website which generates ninety-percent of the company's business. Since [the petitioner] must market directly to the consumers, print ads and the website are crucial in the marketing of this service. These functions are managed exclusively by [the] [b]eneficiary on a daily basis. Even though the [b]eneficiary does not directly supervise many supervisory, managerial or professional employees within his own office, he nevertheless manages [the petitioning entity] through other Danish employees at [the foreign entity] and through independent contractors in the United States. Through [the] [b]eneficiary's policy directives, [the foreign entity's] employees adapt their activities to meet the needs of the United States market. Here, with to[o] the [p]resident of [the foreign entity] stationed in Denmark, the [b]eneficiary must function at a senior level within [the petitioning entity] and control all decision making on a daily basis in the New York office. By managing the essential function of sales and marketing in the United States, it is clear that [the] [b]eneficiary's duties are primarily managerial in relation to the organization.

Counsel further noted the beneficiary's "managerial control" over the activities performed by four of the foreign entity's independent contractors, who occupy the positions of medical director and heads of the company's three laboratories. Counsel states that in addition to directing the petitioner's salesperson, the beneficiary "directs the day-to-day research development, and testing activities of these [four] employees to meet the needs of his U.S. business."

Upon review, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive 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). 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 corroborate the petitioner's claim that the beneficiary would be primarily performing managerial or executive job duties of the petitioning entity. Throughout the record, both the petitioner and counsel emphasize the beneficiary's purported managerial role with respect to the petitioner's marketing and

sales, going so far as to claim the beneficiary as a function manager, and stating that the beneficiary would manage "the day-to-day operation of the New York office." The record, however, undermines these claims, and suggests that rather than *managing* the petitioner's daily functions, the beneficiary would, in fact, be responsible for performing non-qualifying functions of the business.

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, performing the non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks do not make up the majority of the beneficiary's duties; however, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial; 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.

Here, at the time of filing, the petitioner employed the beneficiary and a salesperson. Documentary evidence, including a letter from a marketing and design consultant utilized by the petitioner, as well as information contained on the petitioner's 2004 income tax return identifying compensation paid by the petitioner for "professional" services, suggests that the development of at least some of the petitioner's marketing materials and the related marketing functions were performed by outside contractors and not by the beneficiary. The AAO notes, however, that the beneficiary personally devised the petitioner's marketing strategy, as is evidenced by the fourteen-page "marketing plan" submitted by the petitioner with the Form I-140. In the marketing plan, the beneficiary discusses his "direct marketing campaign," in which he researched fertility clinics and drafted a letter to be sent to the clinics' doctors. As a result, while the beneficiary may not have personally developed the petitioner's advertisements, stationery, buttons, web site and brochures, his role in researching the petitioner's target market, creating the petitioner's marketing plan and preparing a promotional letter falls short of being primarily managerial or executive in nature.

Additional evidence in the record demonstrates that the beneficiary would not be primarily *managing* the petitioner's day-to-day operations as claimed by counsel on appeal. The AAO notes that despite counsel's emphasis on the petitioner's role as a marketing and sales office of the foreign entity, the petitioner is also responsible for facilitating orders and shipments throughout the United States. In view of these business functions, the petitioner has not accounted for the employment of persons who would perform the related non-qualifying tasks, such as importing, shipping, bookkeeping, accounts receivable and payable, and banking.¹ As noted by the director, the petitioner represented that its salesperson "[would be] responsible for day to day sales," but did not provide the requested outline of the specific job duties related to her sales

¹ The AAO notes that under the terms of the petitioner's sublease agreement for office premises, the petitioner would receive a receptionist service that would handle any operated assisted calls in the petitioner's voicemail system, receive the petitioner's mail and deliveries, and render items for pickup to the intended recipient.

position, or document her performance of any of the above-noted administrative and operational tasks. As a result, it is reasonable to conclude that the beneficiary would be responsible for personally performing these non-qualifying job duties. Also, the petitioner recognized that the beneficiary would be responsible for maintenance and revisions made to the petitioner's website, an additional responsibility that is not considered to be managerial or executive. *See* §§ 101(a)(44)(A) and (B) of the Act.

Moreover, regardless of the employment of a sales person, it appears that the beneficiary, himself, is also engaged in selling the petitioner's product. In a March 15, 2004 letter submitted to the New York City Department of Buildings explaining the petitioner's use of its acquired office space, the beneficiary described the business as follows:

Our primary work during each business day is to reply to e-mail and talk to customers on the phone. In the US, we sell directly to consumers, so we get a lot of questions from customers and help them find a donor they like. All donors donate in Denmark and are anonymous, and a big part of our work is to help the customers feel secure that the donor is a good, healthy donor. We are two in the office and we are not doctors or medically educated but both have gone to business school.

Once the customers have decided on a donor, we ship the sperm directly to their fertility clinic. This is done via FedEx and shipped in special liquid nitrogen dry shipper containers (not hazardous). We are approved by the New York State Department of Health to store and ship sperm in New York State.

Based on his representations, the beneficiary is assisting in the sale of sperm to the petitioner's customers by answering questions, providing information and guiding them in their decisions. Additionally, as noted previously, the beneficiary and/or the salesperson is completing the paperwork and transactional functions involved in transferring the sperm samples to the appropriate infertility clinics². The AAO also notes that in connection with the petitioner's importing and shipping functions, the record demonstrates that the beneficiary was personally responsible for obtaining necessary import permits and licenses, tasks not typically considered to be managerial or executive. *See* §§ 101(a)(44)(A) and (B) of the Act.

Furthermore, the beneficiary's role as a representative of the petitioning entity at trade shows and conventions suggests he is likely performing outside sales for the petitioner. Counsel states on appeal that a small portion of the beneficiary's non-managerial duties includes making appearances at conventions on behalf of the petitioner. It appears, however, that as the sole representative of the United States company at trade shows and conventions³, the beneficiary's responsibilities go beyond common public relations functions and fall short of being primarily managerial or executive in nature. *See* 9 FAM 41.54 N8.2-1. As the primary purpose of a convention or trade show is to publicize businesses, it is appropriate to conclude that the beneficiary is not merely representing the petitioner as a component of a public relations campaign, but rather, is acting as a sales representative of the petitioning entity. The record, therefore, undermines counsel's claim on appeal that the beneficiary is "managing the day-to-day operations of [the petitioning entity]", in particular

An October 13, 2005 letter from a FedEx representative addresses the "customer" relationship the beneficiary has maintained with FedEx and confirms "working with" the beneficiary since July 2003.

³ Photographs depict the beneficiary as the sole representative manning the petitioner's booth at a medical conference.

its sales and marketing functions, and instead supports a finding that the beneficiary is primarily performing the non-managerial and non-executive tasks related to the sales and daily operation of the petitioner's business. 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). As a result, the beneficiary cannot be deemed to be a function manager.

Finally, the petitioner mentions the beneficiary's managerial authority over the activities of the overseas company's medical director and the three individuals overseeing the foreign entity's laboratories. Neither the petitioner nor counsel, however, specifically explains the beneficiary's role as a manager over these four individuals. Counsel's blanket statement that the beneficiary "exercise[s] direct managerial control over the activities of the Danish employees" does not specifically address how the beneficiary is directing the day-to-day research, development and testing performed by these individuals. Although the sales of the petitioning entity are likely dependent on the tasks performed by these four workers, this proposition, by itself, is not sufficient to corroborate the claim that the beneficiary is functioning as their manager or executive. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported 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).

The AAO also notes that the claim of the beneficiary's purported supervision over four Danish workers does not explain the inconsistency raised by the director as to the number of workers claimed by the petitioner on its Form I-140. The petitioner noted a staff of four employees on Form I-140, while its March 31, 2005 quarterly wage report identified the employment of two. 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).

Based on the foregoing 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.

Beyond the decision of the director, an additional issue is whether the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. The petitioner identified the beneficiary as occupying the position of business development executive in the foreign entity, during which he was responsible for its "[e]xecutive training program," participated in "all managerial processes," represented the "office general management," and coordinated the foreign entity's licensing application to sell sperm in the State of New York. The petitioner further noted that during his one year of employment with the foreign company, the beneficiary "also [went] through training in general sperm banking management by doctors and lab technicians." Conversely, the beneficiary noted on his curriculum vitae the additional responsibility of "[s]ales and advertisement of [the foreign entity] in Europe," including performing marketing surveys and participating in conferences, job duties which were not addressed by the petitioner in its initial letter. The petitioner has not addressed the inconsistencies in the differing descriptions offered for the beneficiary's former position of business development executive. 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).

Additionally, based on the petitioner's response to the director's request for evidence, the beneficiary's year of employment in the overseas company was focused on training him for his assignment in the United States company, and included the performance of such non-qualifying tasks as developing marketing material and new shipping containers, registering the foreign entity with the United States Food and Drug Administration, obtaining necessary licenses, and training a lower-level sales staff. The AAO notes that these are not typically considered to be tasks that are managerial or executive in nature. See §§ 101(a)(44)(A) and (B) of the Act. Accordingly, the petitioner has not demonstrated that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity for at least one year prior to his entrance into the United States as a nonimmigrant. See *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991) (requiring that the petitioner prove that the beneficiary *primarily* performs the high-level managerial or executive responsibilities outlined in the statutory definitions and does not spend a majority of his or her time on day-to-day functions). For this additional reason, the petition will be denied.

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).

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.