

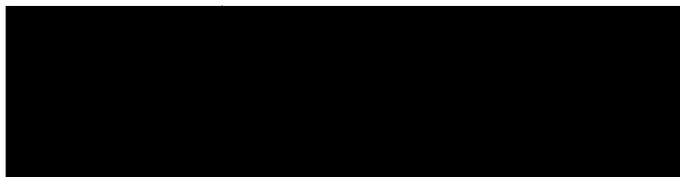
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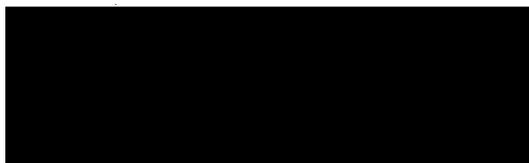
Petitioner:

Beneficiary:



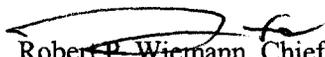
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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 preference visa petition was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Delaware corporation engaged in providing marketing and product support services. It seeks to employ the beneficiary as its sales and support 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 failed to establish that it would employ the beneficiary in a managerial or executive capacity and denied the petition.

On appeal, counsel disputes the director's findings and submits a brief in support of her arguments.

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 a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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 primary issue in this proceeding is whether the beneficiary would be employed in the United States in a 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) 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 support of the petition, the petitioner submitted a statement dated April 14, 2005, which contained the following description of the beneficiary's proposed responsibilities:

- Operations Management: Oversee all day-to-day aspects of U[.]S[.] operations.
- Personnel Management: Hiring, firing, and day-to-day oversight of staff, including directing sales managers and representatives;
- Specialized Contract Oversight: Oversee and coordinate large government classified contracts;

- Positioning and Launching: Directly responsible for the positioning and launching of [the petitioner], responsible for the operational management and customer support of [the petitioner's] product range;
- Quality Control: Carry out inspection and testing of products imported from the United Kingdom to ensure that the highest standards of quality are maintained. Manage diagnosis and repair of equipment determined faulty by customers;
- Efficiency and Sales: Optimize company efficiency and increase sales; and
- Liaison: Liaise with the president of [the foreign entity] on position and launching [a] 3[-] year new product strategy and marketing plan.

On January 3, 2006, Citizenship and Immigration Services (CIS) issued a request for additional evidence (RFE) instructing the petitioner to provide documentation to assist it in determining the beneficiary's employment capacity in the proposed position in the United States. The petitioner was asked to provide a detailed breakdown of the beneficiary's proposed duties including the number of hours the beneficiary would devote to each duty on a weekly basis. The petitioner was also asked to provide an illustration of its management and personnel structures, identifying the job titles and job duties of each subordinate employee. The RFE specifically noted that if contract labor is used to perform any of the petitioner's functions, adequate documentation must be submitted to identify the contractors used and the actual services performed. The petitioner was also asked to provide its tax and payroll documentation.

The petitioner's response included an organizational chart, which named the two employees in the two positions above the beneficiary as well as the two positions subordinate to the beneficiary. The petitioner further explained that the beneficiary's position is the senior-most position in the U.S. entity. Although the petitioner provided a copy of the beneficiary's employment contract, which contained an overview of the beneficiary's responsibilities, none of the submissions directly addressed CIS's request for a detailed hourly breakdown of the beneficiary's duties. The petitioner also provided its payroll documents and the W-2 statements issued in 2005, showing that the beneficiary and his two direct subordinates were full-time employees of the petitioning entity during the time the Form I-140 was filed.

After reviewing the petitioner's response to the RFE, the director issued a decision dated April 3, 2006, denying the petition. While the director was correct in his ultimate conclusion, several of his observations suggest an erroneous interpretation of the statutory requirements and must be addressed at this time. First, the director commented on the duties of the beneficiary's subordinates, finding that both employees appear to be performing the "mundane duties of the organization." However, there is no explanation as to what is meant by "mundane," as this term is not employed in any way in the relevant statute or regulations. The purpose of maintaining a subordinate staff is to ensure that the beneficiary is relieved from having to primarily perform non-qualifying duties. Therefore, it is implied that the non-qualifying duties should be performed by a subordinate staff. The director's suggestion that the subordinate staff should not perform the petitioner's operational tasks in order to ensure the beneficiary's status as a multinational manager or executive is erroneous. While the brief list of job duties provided for each of the beneficiary's subordinates is not sufficient to determine whether either individual was employed in a managerial, supervisory, or professional capacity at the time of filing, the director's finding that the duties performed were "mundane" will not contribute to the overall negative determination regarding the petitioner's eligibility for the benefit sought.

Second, the director noted that the beneficiary's duties appear to lack sufficient complexity to be deemed professional in nature. However, neither the statute nor the regulations make any mention about the beneficiary's job duties having to be professional. While the term professional may apply to the beneficiary's subordinates, with regard to the beneficiary's own position the petitioner need only establish that the beneficiary's duties would be primarily within a managerial or executive capacity. As each of the above mentioned findings was erroneous, both are hereby withdrawn.

Notwithstanding the director's flawed analysis, the record supports the director's overall conclusion regarding the petitioner's inability to establish eligibility for the benefit sought. The director properly included a discussion of the petitioner's organizational structure, which served as a basis for his finding that the petitioner lacked the organizational complexity to relieve the beneficiary from having to primarily perform non-qualifying tasks.

On appeal, counsel disputes the director's findings, contending that the petitioner is adequately staffed with independently contracted sales representatives who carry out the petitioner's sales functions. However, this issue was properly raised in the RFE, which specifically addressed the issue of contract labor and allowed the petitioner the opportunity to provide information and sufficient evidence in support of such claims. Despite the RFE's direct request, the petitioner failed to provide any evidence of the contract labor now claimed on appeal. It is noted that the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Although the petitioner provides service agreements showing that it has contracted sales representatives, where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaignena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.*

Furthermore, even if the AAO were to overlook the petitioner's failure to provide the requested evidence in response to the RFE, it is noted that the sales agreements provided on appeal were all finalized in January of 2006, approximately eight months after the filing of the Form I-140. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). As such, any events that took place after the filing of the petition cannot be considered for the purpose of determining the petitioner's eligibility at the time of filing.

Therefore, despite counsel's assertions, the petitioner failed to provide any documentation to corroborate the claim regarding the contracted sales representatives. While the AAO agrees with counsel's assertion that size cannot be the sole basis for determining the petitioner's eligibility, the ability of the petitioner to relieve the beneficiary from having to primarily perform non-qualifying duties is heavily dependent upon evidence of a sufficient support staff, regardless of whether the support staff is directly employed by the petitioner or whether it is in the form of contracted labor. In the instant matter, the petitioner has stated that it is a sales-based operation. As such, the petitioner is expected to explain and provide sufficient corroborating evidence to establish who is actually performing the essential sales task. In light of the claim that the petitioner has contracted sales representatives to carry out the function, the director was correct in making adverse findings when the petitioner failed to provide evidence to show its employment of the claimed contract labor force.

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)).

Additionally, counsel properly focuses on the beneficiary's job duties, as CIS will look first to the petitioner's description of the job duties in examining the executive or managerial capacity of the beneficiary. See 8 C.F.R. § 204.5(j)(5). However, counsel's assertion that the petitioner's description of the beneficiary's job duties is sufficient to establish eligibility is without merit. While the petitioner provided a general list of the beneficiary's job responsibilities, the RFE specifically instructed the petitioner to provide more specific information about the beneficiary's actual daily tasks and the amount of time attributed to each task. 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). Although a response to the RFE was provided, the petitioner failed to comply with the request for an hourly breakdown of the beneficiary's duties. As such, the only job description on record for the beneficiary is the general list of responsibilities, which imply broad discretionary authority, but fail to discuss what actual duties the beneficiary would primarily perform on a daily basis.

Therefore, the record as presently constituted lacks the necessary information regarding the beneficiary's specific job duties and fails to document the sales representatives that are purportedly carrying out the petitioner's essential sales function. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.