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U.S. Citizenship
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FILE:

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Office: TEXAS SERVICE CENTER

Date:

JAN 11 2007

IN RE:

Petitioner:

Beneficiary:

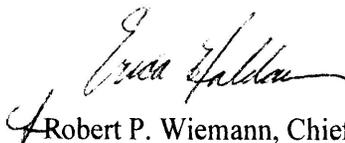
PETITION:

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based visa petition. The petitioner subsequently filed an appeal with the Administrative Appeals Office (AAO), which the AAO summarily dismissed. The matter is again before the AAO on a motion to reopen or reconsider. The AAO will grant the motion and affirm its February 23, 2006 decision.

The petitioner filed the 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 Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of Florida that is engaged in the freight forwarding business. The petitioner seeks to employ the beneficiary as its customer service manager.

The petition was filed on February 27, 2004. Upon review of the record, the director issued a request for evidence on February 2, 2005. The petitioner filed a response to the director's request for evidence on April 30, 2005. However, the petitioner's response was not matched with the record of proceeding and the director denied the petition determining that the petition had been abandoned. On May 10, 2005, counsel for the petitioner filed a motion to reopen and provided evidence that the petitioner had submitted a timely response to the director's request for further evidence. The director reopened the matter to consider the timely filed response.

In a decision dated July 12, 2005, the director denied the petition concluding that the petitioner had not provided sufficient evidence of the beneficiary's employment in a primarily managerial or executive capacity in either the foreign or United States organization.

On August 15, 2005, counsel for the petitioner filed an appeal. The director declined to treat the appeal as a motion and forwarded it to the AAO for review. On appeal, counsel submitted a letter similar to that provided in response to the director's request for evidence, which contained the same descriptions of the beneficiary's assignments in the foreign and United States companies already offered by the petitioner. Noting the regulation at 8 C.F.R. § 103.3(a)(1)(v), which provides instruction on the summary dismissal of an appeal, the AAO summarily dismissed the petitioner's appeal based on counsel's failure to "identify specifically an erroneous conclusion of law of a statement of fact."

In its February 23, 2006 decision, the AAO observed that the job descriptions offered by the petitioner failed to demonstrate that the beneficiary had been or would be employed in a primarily managerial or executive capacity.¹ The AAO summarized the beneficiary's job duties, and noted that the job responsibilities outlined by the petitioner suggested that the beneficiary had been and would be performing operational and administrative tasks of the companies' customer service divisions. The AAO further observed that neither organization accounted for the performance of the non-managerial and non-executive tasks by a managerial, supervisory, or professional staff employed subordinate to the beneficiary. The AAO also concluded that the beneficiary had not and would not be employed as a function manager.

On motion, counsel contends that the AAO failed to consider documentation submitted by the petitioner in its response to the director's request for further evidence, which counsel claims demonstrates that the beneficiary

¹ As the prior decisions of the director and the AAO are already part of the record, they will not be entirely repeated herein.

had been and would be employed in a primarily managerial or executive capacity. Counsel submits a letter in support of the motion.

The regulation at 8 C.F.R. § 103.5(a)(2) states:

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The regulation at 8 C.F.R. § 103.5(a)(3) states:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [Citizenship and Immigration Services (CIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

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.

Counsel filed the instant motion on March 20, 2006. In a subsequently submitted letter, dated April 17, 2006, counsel claims that the AAO erred in summarily dismissing the appeal as it failed to consider the petitioner's motion to reopen, in which it discussed the beneficiary's job duties in the foreign and United States organizations. Counsel states that the Texas Service Center "automatically sent this case to the AAO without

taking into account the [p]etitioner's [m]otion to [r]eopen," which counsel claims resulted in the AAO's review of an incomplete record.

Counsel further contends that the AAO did not acknowledge the full descriptions offered for the beneficiary's positions in the foreign and United States entities. Counsel states that the AAO listed in its February 23, 2006 decision "what it believes to be a complete list of the employee's duties for the U.S. [c]orporation," while neglecting additional "policy-making, goal-setting and executive decision-making duties" stated in the petitioner's previously submitted letters.

Counsel challenges the AAO's interpretation of the petitioner's staffing levels, stating that it failed to consider that the operations of the petitioner and two affiliated United States companies had been integrated under the petitioning entity. Counsel states that as a result of the integration, the beneficiary would supervise thirty-five employees, including ten managers. Counsel contends that the AAO also erred in its review of the foreign entity's organizational hierarchy, stating that the organizational chart depicts the beneficiary as managing the company's sales, claims, and customer service departments. Counsel asserts that in this position, the beneficiary was primarily performing "policy-making and goal-setting tasks."

Counsel further challenges that the AAO "erred in determining the applicable burden of proof," claiming that the record demonstrates by a preponderance of the evidence that the beneficiary would manage an essential function of the petitioning entity.

Upon review, counsel's assertions are not persuasive. The petitioner has failed to demonstrate that the beneficiary's assignments in the foreign and United States entities had been or would be primarily managerial or executive in nature.

Counsel claims on motion that the AAO's review of the beneficiary's employment capacity in the United States organization was focused only on those job duties outlined by the petitioner on its list titled "managerial duties" and did not include those responsibilities stated by the petitioner in its April 26, 2005 letter submitted in response to the director's request for evidence. The record indicates that the AAO properly considered the job duties offered for the beneficiary's position of customer service manager. The AAO notes that according to counsel's April 26, 2005 letter, the beneficiary holds the same job responsibilities in the United States corporation as she did in the foreign entity.

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 AAO emphasizes that the six job duties identified in its February 23, 2006 decision are those specifically outlined by the petitioner on its list of "managerial duties" performed by the beneficiary as the company's customer services manager. Of particular relevance is the petitioner's representation that the cumulative amount of time devoted by the beneficiary to these six job duties is forty hours per week. The record suggests that the job duties outlined by the petitioner and catalogued by the AAO in its decision are an accurate depiction of what the beneficiary would do during a typical workweek. Similarly, contrary to counsel's claim on motion, the list of job duties performed by the beneficiary in the foreign entity demonstrates that the beneficiary performed primarily non-managerial and non-executive tasks, and spent only twenty percent of her time "working with functional managers and suppliers," a responsibility that counsel characterized as managerial or executive and claimed consumed "a great percentage of her time." The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Despite counsel's claims otherwise, the AAO properly relied on the outline of the beneficiary's "managerial duties" in its review of the beneficiary's employment capacity. Counsel's general objections on motion do not overcome the well-founded conclusions of the director or the AAO. Similarly, counsel's assertions fail to corroborate her claim that the beneficiary would perform primarily managerial tasks, rather than the operational tasks summarized by the AAO. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The AAO notes that counsel submits on motion revised lists of the beneficiary's job duties in the foreign and United States entities, which attribute additional job duties to the beneficiary than those identified by the petitioner in its prior submissions. There is no evidence that the job descriptions were previously made part of the record. 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 or motion. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaighena*, 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.* Under the circumstances, the AAO need not and does not consider the sufficiency of the revised job descriptions.

Additionally, counsel's assertion that the beneficiary would manage a staff of thirty-five employees, including ten managers, is not support by the record. Counsel claims an increase in the size of the staff supervised by the beneficiary in the United States organization, stating that an integration of the petitioner and two affiliated companies resulted in a more complex staffing levels. The petitioner's organizational chart, however, does not substantiate counsel's claim that the beneficiary would personally manage the "new" managerial employees. The managerial employees referenced by counsel are depicted on the petitioner's organizational chart as direct subordinates of the company's general manager, not the beneficiary. The petitioner did not identify on its organizational chart any lower-level employees who would be managed by the beneficiary. The record does not support counsel's claim that the AAO incorrectly reviewed and interpreted the petitioner's staffing levels, and, in particular, the beneficiary's subordinate workers. As noted by the AAO in its prior decision, if the petitioner claims that a beneficiary's duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. Counsel did not overcome this essential requirement on motion. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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).

With respect to the beneficiary's position in the foreign entity, counsel claims that the company's organizational chart establishes the beneficiary's managerial authority over its sales, claims, and customer service departments. As previously noted by the AAO, the petitioner identified only one employee by name that purportedly reported to the beneficiary. Absent additional evidence of lower-level workers, the AAO cannot conclude that the beneficiary was relieved from performing the non-qualifying tasks associated with the foreign entity's sales, claims, and customer service functions. 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).

Based on the foregoing discussion, the petitioner has not demonstrated that the beneficiary's assignments in the foreign and United States entities are comprised of primarily managerial or executive job duties.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, *Matter of E-M-* also stated that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Here, the beneficiary's job descriptions and the companies' organizational charts fail to establish that the petitioner's claim of employing the beneficiary as a manager or executive is "probably true." As discussed above, the record supports a finding that the beneficiary's employment in the foreign and United States entities had not been and would not be primarily managerial or executive in nature. Accordingly, the director's decision to deny the petition and the AAO's subsequent dismissal of the petitioner's appeal were appropriate.

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 AAO's previous decision will be affirmed and the petition will be denied.

ORDER: The AAO's February 23, 2006 decision is affirmed.