

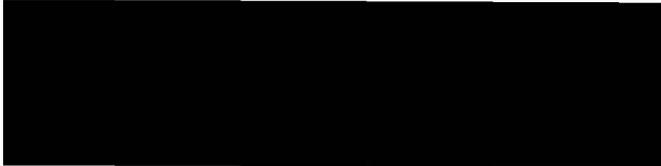
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By

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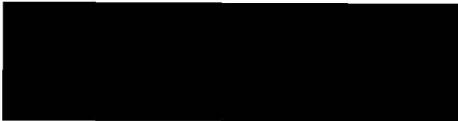


FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 07 2007
LIN 06 001 54206

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

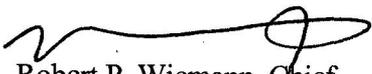
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Canadian corporation with a branch office in the United States. It seeks to employ the beneficiary as the director of global accounts of the Chicago, Illinois corporate office. 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 denied the petition based on two separate grounds of ineligibility: 1) the beneficiary was not employed abroad in a qualifying managerial or executive capacity; and 2) the beneficiary would not be employed by the U.S. petitioner in a managerial or executive capacity. However, based on a thorough review of the documentation provided, the AAO concludes that the petitioner has provided sufficient evidence and information to establish by a preponderance of the evidence that the beneficiary was employed abroad in a qualifying managerial capacity.

On appeal, counsel disputes the director's conclusions and submits a brief in support of his arguments. In light of the AAO's favorable conclusion with regard to the beneficiary's employment abroad, this decision will address the only remaining ground for ineligibility--the proposed employment in the United States.

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 issue in this proceeding is whether the beneficiary would be employed by the U.S. petitioner 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 Form I-140, the petitioner submitted a letter dated September 13, 2005 from T [REDACTED] the claimed executive director of the Chicago global sales office,¹ who provided the following account of the beneficiary's prospective employment in the United States:

[The beneficiary] is the senior-most manager with responsibility for all outbound sales and marketing operations from the national accounts in the Chicago, Minnesota, Nebraska, Iowa, North Dakota and South Dakota geographical territory to all [petitioner properties] worldwide to increase sales productivity and operating revenues. As such, she is responsible for an essential function of [the p]etitioner's operations. As such, she is responsible for an essential function of [the p]etitioner's operations. Within this territory, [the beneficiary] oversees specific assigned market segments including but not limited to [i]nsurance, [c]orporate and secondary incentive. [The beneficiary] exercises professional authority, as well as her extensive experience and knowledge of overall sales and marketing operations, in general, and regional sales and marketing operations for the hospitality and tourism industry, in particular. She oversees the development and implementation of sales, marketing, promotional and merchandising programs to achieve business objectives and enhanced revenues and maintain optimum corporate and local visibility for the company. She identifies and segments market groups for sales and marketing efforts, specifically targeting corporate travel managers, business travel agencies, association consortiums and insurance sales. She also implements and maintains account management systems. She develops a sales action plan, promotional plan and recommended budget, including room night objectives for the market. She coordinates efforts with supervisory and managerial hotel sales operations employees. She recommends and evaluates promotional activities, collateral material and sales opportunities addressed to support specific [h]otel objectives. Finally, [the beneficiary] exercises discretionary authority over the essential regional sales function to enforce the policies and procedures of [the petitioner].

On December 9, 2005, the director issued a request for evidence (RFE) instructing the petitioner to provide a specific estimate of the percentage of time the beneficiary would spend performing each job duty. The petitioner was also asked to provide its organizational chart illustrating its staffing levels and identifying the beneficiary's superiors and subordinates by name and position title. The director acknowledged the possibility that the petitioning organization may have too many employees to be named in an organizational chart. Accordingly, the director instructed the petitioner to identify other departments, teams, and the number of employees therein in order to adequately illustrate the beneficiary's position with respect to others within the petitioner's organization.

In response, the petitioner provided the following breakdown of the beneficiary's prospective duties and responsibilities with the U.S. petitioner:

¹ Although Mr. [REDACTED] signs the letter under the title of executive director of the Chicago global sales office, the U.S. organizational chart provided in response to the Request for Additional Evidence (RFE) does not include Mr. [REDACTED]. Moreover, the chart names J [REDACTED] r as the executive director of the Chicago global sales office.

Sales Account Management – 60%

- senior-most manager with responsibility for all outbound sales and marketing operations from the national accounts in the Chicago, Minnesota, Nebraska, Iowa, North Dakota and South Dakota geographical territory to all [petitioner r]esorts worldwide
- oversee specific assigned market segments including but not limited to [i]nsurance, [c]orporate and [s]econdary [i]ncentive
- educating customers of product, destinations and the benefits of choosing [the petitioner's properties] over the competition
- develop and implement sales, marketing, promotional and merchandising programs
- identify and segment market groups for sales and marketing efforts
- implement and maintain account management systems
- visit with customers to ensure and understanding [sic] of their businesses, needs and their demands of [petitioner r]esorts

Office and Personnel Management – 15%

- develop office and individual goals based on the overall expectation of the companies yearly production
- monitor goals and progress of [the s]ales [c]oordinator

Market Intelligence – 10%

- explore new emerging vertical markets
- solicit new business from new accounts through an understanding of key competitors
- communicate with competitors to determine [the] proper position in [the] market and proper industry representation
- recommend and evaluate promotional activities, collateral material and sales opportunities
- participate in monthly Quick Market Intelligence conference calls between all senior management and hotel representation

Budget and Financial plans and reports – 3%

- manage a personal budget including funds for trade show and exhibit participation, travel, promotion, entertainment and membership
- prepare a detailed commentary on the monthly results which outlines the overall production, explanations for failures to achieve set goals or successful market influences
- achieve performance goals based on daily, monthly, quarterly and yearly benchmarks

Participation in conferences and trade shows – Approximately 17 days per year

- oversee attendance and booth coordination at The Meeting Professionals International (MPI) Professional Education Conference and The MPI World Education Conferences
- coordinate client events and functions in conjunction with these conferences
- active participant and exhibitor at The Motivation Show and The CBI Pharmaceutical Meeting Planners Conference
- active member of MPI which allows a greater awareness of [the petitioner's] presence in the marketplace

The petitioner also provided its organizational chart, which illustrates the hierarchy within the petitioner's sales and distribution department, where the beneficiary's position is situated. The chart shows that the sales and distribution department is divided into three sales divisions: tour and leisure sales, association sales, and corporate group markets. The head of all three divisions is the vice president of sales and distribution. Her direct subordinates are the three executive directors, each of whom presides over one of the three sales divisions. The beneficiary's position as director of global accounts within the corporate group markets division is at the next level of the departmental hierarchy. Her direct superior is an executive director, while her direct subordinate is a sales coordinator. The chart further shows that the corporate group markets division has a total of three global directors, one of whom is the beneficiary. The chart suggests that all three directors, two global sales directors and one global accounts director, are at the same level within the overall department.

After reviewing the information provided, the director denied the petition in a decision dated March 23, 2006. The director specifically found that the beneficiary would not be employed by the U.S. petitioner in a managerial or executive capacity.

On appeal, counsel asserts that in light of the claim that the beneficiary would manage an essential function, the petitioner does not need to show that the beneficiary would oversee the work of subordinates. Counsel states that the director's mention of subordinates subjects the beneficiary to the definition of a traditional manager. While counsel is correct in stating that a function manager need not supervise subordinate

personnel, the mere claim that the beneficiary's position in the United States is that of function manager requires that the petitioner's description of the beneficiary's daily duties demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. Thus, even if the beneficiary does not supervise those individuals who perform the petitioner's daily operational tasks, the petitioner must nevertheless establish that it is adequately staffed to relieve the beneficiary from having to spend a majority of her time performing non-qualifying tasks. While counsel is correct in stating that the performance of some non-qualifying tasks would not render the beneficiary ineligible for classification as a multinational manager or executive, the relevant statutory provision is clear in requiring the petitioner to establish that the primary portion of the beneficiary's duties be of a qualifying nature. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties).

Counsel further states that the director's reasoning suggests that an organization cannot have two functional managers overseeing the same function. Counsel deems this reasoning to be flawed and asserts that it is plausible for both the beneficiary and her direct superior to manage the same function. The AAO does not dispute counsel's reasoning. However, his theoretical argument, despite its plausibility, does not apply to the facts presented by the petitioner in the instant matter.

Counsel's assertions are not persuasive. 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 in managing the essential function, 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. See 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 "primarily" 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)).

In the present matter, the breakdown of the beneficiary's proposed job duties indicates that the beneficiary would spend 60% of her time managing sales accounts. This responsibility would involve overseeing outbound sales and marketing operations and developing and implementing various programs associated with sales and marketing. However, aside from the fact that the petitioner did not assign a specific time breakdown to these or any other duties within this general category, the record lacks any indication as to who would actually perform sales and marketing tasks which the beneficiary would be overseeing. The AAO notes that the job description of the beneficiary's sole subordinate does not indicate that he would perform sales and marketing tasks, thereby implying that the beneficiary would not only oversee, but would also actually perform these duties herself.

Additionally, the petitioner clearly described the beneficiary's role in "sales account management" to include educating the consumer regarding the petitioner's products and facilities, maintaining account management systems, and visiting customers to ensure their satisfaction. These duties are indicative of daily operational

tasks necessary to ensure the sale of the petitioner's products and services. As such they cannot be deemed qualifying. Similarly, exploring new markets, soliciting new business, and communicating with competitors in an effort to improve the petitioner's business are also daily operational tasks that deal with the sales of the petitioner's products and services.

As previously stated, the petitioner cannot merely claim that the beneficiary would assume the role of a function manager without providing sufficient evidence to show who is actually performing the duties associated with essential function. 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. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because, as noted, several of the beneficiary's daily tasks do not fall directly under traditional managerial duties as defined in the statute. For this reason, 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).

Again, 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., supra*. In the present matter, the beneficiary's job description indicates that a significant portion of her time would be likely spent performing non-qualifying job duties, which is understandable given the lack of support personnel to specifically assist the beneficiary in performing many of the sales and marketing tasks with which she has been charged.

As previously noted, the director's unfavorable decision with regard to the beneficiary's foreign employment was not warranted by the record and, therefore, is withdrawn. However, the AAO concurs with the director's conclusion regarding the question of the beneficiary's position within the U.S. branch organization. Because of the differing conclusions, it is important to compare and emphasize the differences between the beneficiary's non-qualifying position with the U.S. organization and the beneficiary's qualifying position with the foreign organization.

Despite the numerous references to both of the beneficiary's positions being equal in the amount and nature of duties required by each position, the organizational structure within the beneficiary's department in the United States can be easily distinguished from the organizational structure of the beneficiary's department abroad. Namely, the latter identifies three sales managers who supervised two sales coordinators. It is conceivable that the joint efforts of the beneficiary's underlying support staff were sufficient to relieve the beneficiary from many non-qualifying tasks such that they did not comprise the majority of the beneficiary's overall job duties. Thus, even if the beneficiary did not spend the primary portion of her time managing the individuals who performed the tasks associated with the essential function, the record shows that support personnel were in place to perform a majority of the non-qualifying sales and administrative tasks.

By contrast, the organizational chart that illustrates the staffing structure of the beneficiary's department within the U.S. petitioner suggests that a single "sales coordinator" would be the only individual that might relieve the beneficiary from performing non-qualifying tasks. The remainder of the employees within the beneficiary's department include an executive, whose position is directly above that of the beneficiary, and

two other global directors, whose positions appear to be at the same level as that of the beneficiary and who, therefore, would unlikely assume the administrative or non-managerial duties associated with the beneficiary's claimed essential function.

In 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). In the instant matter, the petitioner's job description does not clearly delineate the qualifying duties to be performed by the beneficiary. Nor does the record support the statements made by counsel on appeal. As such, the AAO cannot affirmatively conclude that the primary portion of the beneficiary's duties would be within a qualifying managerial or executive capacity as claimed.

Beyond the decision of the director, the AAO observes that the petition is deficient in that it lacks sufficient evidence to establish that the petitioner is a U.S. employer that may make a valid offer of employment. Only a United States employer may file this petition. 8 C.F.R. § 204.5(j)(1). In employment-based preference visa petition proceedings, a petitioner with no location in the United States is not an employer and, therefore, cannot offer permanent employment in the United States to an alien. Only a United States-based branch office, affiliate, or subsidiary of a foreign organization may file such a petition. *Matter Of A. Dow Steam Specialties, Ltd.*, 19 I&N Dec. 389 (Comm. 1986).

The AAO acknowledges that the Canadian corporation is one of North America's leading operators of luxury hotels and is listed on the New York and Toronto stock exchanges. However, despite the petitioner's claims as a valid United States branch office, the AAO notes that the offer of employment is on the Canadian corporation's letterhead. And while the petitioner has submitted internal corporate documents to show that it is a branch office, the record is devoid of any evidence to show that the foreign corporation is authorized to do business as a foreign corporation in Illinois.

The immigrant visa regulations do not define the term "branch." *Cf.* 8 C.F.R. § 214.2(l)(1)(ii)(J) (defining branch in nonimmigrant proceedings as "an operating division or office of the same organization housed in a different location."). CIS has recognized that the branch office of a foreign corporation may file a nonimmigrant petition for an intracompany transferee. *See Matter of Kloetti*, 18 I&N Dec. 295 (Reg. Comm. 1981); *Matter of Leblanc*, 13 I&N Dec. 816 (Reg. Comm. 1971); *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970); *see also Matter of Penner*, 18 I&N Dec. 49, 54 (Comm. 1982)(stating that a Canadian corporation may not petition for L-1B employees who are directly employed by the Canadian office rather than a United States office). When a foreign company establishes a branch in the United States, that branch is bound to the parent company through common ownership and management. A branch that is authorized to do business under United States law becomes, in effect, part of the national industry. *Matter of Schick*, *supra* at 649-50.

Probative evidence of a branch office would include the following: a state business license establishing that the foreign corporation is authorized to engage in business activities in the United States; copies of Internal Revenue Service (IRS) Form 1120-F, U.S. Income Tax Return of a Foreign Corporation; copies IRS Form 941, Employer's Quarterly Federal Tax Return, listing the branch office as the employer; copies of a lease for office space in the United States; and finally, any state tax forms that demonstrate that the petitioner is a branch office of a foreign entity.

The record does not contain any evidence of this nature. For this additional reason, the petition may not be approved.

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. Based on the reasons discussed above, the AAO concludes that the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.