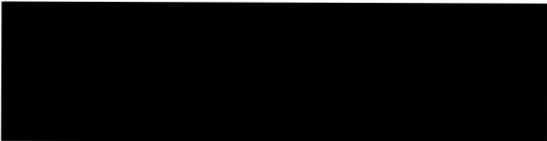


identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services



84

FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER Date:
LIN 08 036 52268

AUG 12 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).



John F. Grissom
Acting 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 limited liability company organized in the State of California. The petitioner seeks to employ the beneficiary as its director of North American operations. 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 the finding that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

On appeal, counsel disputes the director's conclusion, arguing that denying the petition on the basis of the beneficiary's qualifying employment abroad amounted to an abuse of discretion. An appellate brief has been provided.

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 was employed abroad in a qualifying 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 October 30, 2007 in which the beneficiary, on behalf of the petitioner, stated that he was employed in an executive capacity as the foreign entity's president until his transfer to the United States in November 2005. The beneficiary stated that he was in charge of overseeing the establishment of the foreign entity.

On June 25, 2008, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a detailed description of the beneficiary's job duties during his employment abroad, including a list of specific daily tasks accompanied by the percentage of time assigned to each task. The petitioner was also asked to discuss the employees within the beneficiary's "hierarchical chain," identifying the beneficiary and the employees under the beneficiary's supervision.

In response, the petitioner claimed that the beneficiary is a function manager and provided Exhibit 2, which contains the following percentage breakdown of the time the beneficiary spent managing the foreign entity's essential functions:

Management of Corporate Sales: 40%

- Management of projects including engineering, drafting and delivery schedules[;]
- Quoting all bids for projects[;]
- Oversight of jobsites to view/evaluate projects[;]
- Providing project managers, design engineer[s], architects and steel fabricators with pertinent information on the technical aspects of fiberglass grating and structural products[;]
- Customer relations[;]
- Management of orders and delivery schedules, and coordination with [the petitioner;]
- Coordinated with the factory in China about project orders and delivery dates[;]
- Reviewing and correcting all project drawings[;]
- Ensuring timely delivery of all projects and goods, orders and delivery schedules[;]
- Evaluate customer requirements in relation to product allocation[.]

Marketing and Advertising: 25%

- Developed and designed a new website for [the foreign entity;]
- Updated catalogs and website as required[;]

- Monitored and adjusted advertising rates on search engines[;]
- Modification of website to ensure higher ranking on the search engines[;]
- Sourced different advertising (trade magazines, web, trade shows) [;]
- Attended industry trade shows[;]
- Developed price lists for Reps, OEMs (Original equipment manufacturers) and [the] general public[;]
- Developed new products for various markets[;]
- Arranged certifications required for various Canadian agencies . . . to ensure all products meet requirements[.]

Sourcing and Overseeing Reps: 25%

- Sourced and secured local representatives who also rep compatible lines[;]
- Contacting and visiting with reps for different regions[;]
- Training and education of the reps on our entire project lines[;]
- Providing technical expertise on rep projects[;]
- Quoting all rep projects[;]
- Coordination of drawings and technical information for the reps[.]

Accounting: 10%

- Managed all [a]ccounts [r]eceivable and [p]ayables[;]
- Created all sales orders[;]
- Invoiced all sales[;]
- Arranged payments to all vendors[;]
- Prepared all operational and capital budgets[;]
- Arranged all monthly and quarterly tax payments[;]
- Handled all payroll responsibilities including check writing, payroll tax and T4 slips[.]

The petitioner further explained in a letter that was incorporated as Exhibit 3 that the petitioning entity would continue to manufacture the products sold abroad and that it would provide product information, engineering, and material supply to the local representatives and distributors of the petitioner's products. The petitioner added that the foreign entity has hired a marketing director since the beneficiary's departure. In the foreign entity's organizational chart, also part of Exhibit 3, the beneficiary's position was illustrated at the top of the organizational hierarchy with five different entities as the representatives directly overseen by the beneficiary in his position as the foreign entity's president.

In a decision dated September 10, 2008, the director denied the petition, concluding that the petitioner failed to establish that the beneficiary's foreign employment was in a qualifying managerial or executive capacity. The director found that at least fourteen of the job duties listed in the beneficiary's job description were indicative of operational tasks and therefore non-qualifying.

On appeal, counsel argues that the director placed undue emphasis on the lack of a subordinate support staff, asserting that U.S. Citizenship and Immigration Services (USCIS) must take into account the fact that at the time of the beneficiary's employment abroad, the foreign entity was at an early stage of development and did not require a support staff. Counsel further asserts that the number of employees a company has is not outcome determinative and does not warrant an unfavorable finding. The AAO notes, however, that the petitioner's reasonable needs do not serve to override the legal definition of managerial or executive capacity, which requires that the primary portion of the job duties performed are of a managerial or executive nature. *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 International*, 19 I&N Dec. 593, 604 (Comm. 1988). While the performance of non-qualifying operational tasks does not disqualify the petitioner from the immigration benefit sought herein, the petitioner must establish that those non-qualifying tasks are merely incidental to the position and do not consume the majority of the beneficiary's time.

In the present matter, the petitioner was not able to meet this critical burden due in large part to the fact that the foreign entity's only employee was the beneficiary himself. While the petitioner may have secured arrangements with sales representatives to sell and distribute the petitioner's product, sales and distribution are not the only non-qualifying tasks that were required in order to ensure the successful operation of the foreign entity. Thus, while the number of support personnel is not the sole factor to be considered in determining whether a particular position falls within the definition of managerial or executive capacity, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003).

Here, counsel argues that the petitioner does not need to establish that the foreign entity had employees other than the beneficiary in order to establish that the beneficiary was employed in an executive capacity where he purportedly directed the management of the foreign entity. Counsel's

interpretation of the statutory definition of executive capacity, however, is inaccurate. While counsel is correct that executive capacity is a concept that steers away from the notion of a personnel management, where the key portion of the job is to oversee the work of others, the idea that someone can function primarily in an executive capacity while being the company's sole employee is questionable at best and certainly requires a thorough explanation and supporting documentation to establish how the beneficiary was able to primarily perform duties within an executive capacity.

The AAO does not dispute the beneficiary's placement within the foreign entity's organizational hierarchy. However, this is only one of a number of factors that must be considered in order to determine whether the beneficiary was employed in an executive capacity. The petitioner must also establish that the foreign entity's operational tasks were primarily handled by someone other than the beneficiary himself. In the organizational chart that was submitted in response to the RFE, the beneficiary is at the top of an organizational hierarchy that is comprised of the beneficiary and five sales and distribution companies. However, the record does not contain any evidence to establish that the sales and distribution services were being performed by these outside contractors. Merely providing the names of the companies on an internally generated organizational chart does not establish that they provided the foreign entity with sales and distribution services. 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)).

Moreover, even if the petitioner had provided sufficient evidence to establish that the sales and distribution tasks were being handled by the outside companies that were named in the organizational chart, the record indicates that numerous other non-qualifying operational tasks were being carried out by the beneficiary. For instance, the petitioner stated that the beneficiary provided bid quotes, handled customer relations, managed orders and delivery schedules, corrected all project drawings, handled all marketing and advertising as well as the company's accounting, and trained and educated all sales representatives. With the exception of the marketing, advertising, and accounting duties, which cumulatively consumed 35% of the beneficiary's time, it is unclear how much more time was attributed to these other operational tasks. It is noted that 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988). In the present matter, despite the director's express request that a percentage of time be assigned to individual job duties, the petitioner assigned a percentage of time to groups of tasks, thereby precluding the AAO from gauging how much time was allotted to the qualifying tasks versus the non-qualifying ones. Without this crucial information, the AAO cannot conclude that the beneficiary primarily performed job duties within a qualifying executive capacity.

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.