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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



B4

DATE: APR 06 2012 OFFICE: NEBRASKA SERVICE CENTER FILE:

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:
Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
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 engaged in the wholesale of computer memory chips, and it seeks to employ the beneficiary as a sales 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 denied the petition concluding that the petitioner failed to establish that the beneficiary's employment abroad was within a qualifying managerial or executive capacity.

On appeal, counsel disputes the director's findings and provides an appellate brief laying out the grounds for challenging the denial. Counsel for the petitioner contends that the beneficiary is a function manager and a manager that supervised professionals.

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 that will be addressed in this proceeding calls for an analysis of the beneficiary's job duties with the foreign company. Specifically, the AAO will examine the record to determine whether the

petitioner submitted sufficient evidence to establish that 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 examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Published case law clearly supports the pivotal role of a clearly defined job description, as 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); *see also* 8 C.F.R. § 204.5(j)(5). USCIS reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the petitioner's business, the employment and remuneration of employees, as well as the job descriptions of the beneficiary's subordinates, if any, and any other facts contributing to a complete understanding of a beneficiary's actual role within a given entity.

An analysis of the record does not lead to an affirmative conclusion that the beneficiary was employed abroad in a qualifying managerial or executive capacity. With regard to the foreign position the petitioner provided a list of job duties performed by the beneficiary with a percentage breakdown which included broadly stated job responsibilities. Due to the overly general information included in the percentage breakdown, the AAO is unable to gain a meaningful understanding of how much time the beneficiary spent performing qualifying tasks versus those that would be deemed non-qualifying.

The petitioner provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. The petitioner states vague duties such as the beneficiary will "set target customers and sales goals to team members in their sales territories," "monitor sales activities," and "adjust sales strategies." The petitioner did not, however, define the petitioner's goals and policies, or clarify the role of the sales department. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. The petitioner's descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature.

The job description also includes several non-qualifying duties such as the beneficiary will "watch market situation and provide team members necessary information and suggestions," "customer visit," and "train team members." The petitioner also provided the duties to be performed by the beneficiary's subordinates which include "responsible for sales growth/goal achievements, marketing co-operation, customer relationship and account receivables with major and minor clients." The petitioner did not indicate who will be in charge of the market research, the development of the marketing program, or the development of the sales strategies. It appears that the beneficiary will be developing and marketing the products of the business rather than directing such activities through subordinate employees. 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 Intn'l.*, 19 I&N Dec. at 604.

The petitioner indicated that 30% of the beneficiary's time was allocated to "monitor sales activities between sales reps and target customers and assist sales reps when needed." It is unclear which specific tasks actually fall within this broad category. Merely using the term "monitor" to describe the beneficiary's function does not establish that the tasks the beneficiary performed were of a

qualifying nature. The beneficiary's position description is too general and broad to establish that the preponderance of his duties is managerial or executive in nature.

The job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will perform. While the petitioner has provided a breakdown of the percentage of time the beneficiary will spend on various duties, the petitioner has not articulated whether each duty is managerial or executive.

Furthermore, the director requested an organizational chart of the foreign company describing the job duties of the beneficiary with the foreign entity. The organizational chart indicated that the beneficiary supervised six sales representatives. In addition, the organizational chart indicated that the beneficiary was supervised by the International Sales Team Director, who was supervised by the general manager, the president/CEO and the board of directors. It appears that the beneficiary was the first-line supervisor of the sales department.

After reviewing the beneficiary's job description with the foreign entity and considering that information in light of the foreign entity's organizational structure as it specifically pertained to the beneficiary's position, the AAO cannot conclude that the primary portion of the beneficiary's time was spent performing tasks within a qualifying managerial or executive capacity.

Although counsel suggests that the beneficiary's position may be deemed as that of a function manager which does not focus on the beneficiary's duties as a personnel manager, counsel cannot merely raise these alternate claims to avoid addressing the non-qualifying tasks the beneficiary would have to perform by overseeing the work of non-supervisory, non-professional, and/or non-managerial employees. 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). Moreover, counsel's assertions are not consistent with the job description and the organizational chart that the petitioner has provided in which considerable focus was placed on the beneficiary's supervision of subordinate employees.

The AAO acknowledges counsel's contention that the beneficiary's position is an essential function within the petitioner's organization. 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. § 214.2(l)(3)(ii). 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 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. at 604. The petitioner has not provided sufficient evidence that the beneficiary manages an essential function. As noted above, the petitioner provided a brief and vague job description that did not discuss how the beneficiary is managing an essential function. Only on appeal did counsel for the petitioner claim that the beneficiary is a function manager. However, as noted above, the beneficiary's job description does not establish that the beneficiary is primarily performing in a managerial capacity.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In the case of a function manager, factors to review may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

As discussed above, the petitioner has not identified employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business since the subordinates' duties are to execute the sales and not to look for new customers or to develop the marketing and sales strategies. The fact that the beneficiary has been given a managerial job title and general oversight authority over the sales representatives is insufficient to elevate her position to that of a "function manager" as contemplated by the governing statute and regulations. As discussed above, the petitioner has not established that the beneficiary's duties are primarily managerial in nature, and thus she cannot be considered a "function manager."

Other than stating that the proposed position will be responsible for managing an unidentified essential function, counsel provides no explanation or evidence in support of his claim that the beneficiary would qualify as a function manager pursuant to section 101(a)(44)(A)(ii) of the Act. 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).

In summary, the petitioner has failed to provide sufficient evidence to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity and based on this finding, the instant petition cannot be approved.

Furthermore, the petitioner submitted a letter that stated the beneficiary was employed with the foreign company since September 6, 1999 and has held the position of Sales Manager since January 1, 2004. On appeal, the petitioner submits a certificate of employment that states the beneficiary was employed as a Sales Manager with the foreign company from "Jan 2005 to Sep 2005." Thus, the information is inconsistent as to the length of time the beneficiary held the position of Sales Manager with the foreign company. The regulations require that the beneficiary hold a qualifying managerial or executive position with the foreign company for at least one year. If the letter that was submitted on appeal is accurate, the beneficiary did not hold the position of Sales Manager with the foreign company for an entire year. 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).

In summary, the petitioner has failed to provide sufficient evidence to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. Based on this finding, the petition cannot be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.