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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

[redacted]

B4

DATE: APR 2 5 2012 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

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

The petitioner is a Texas corporation that seeks to employ the beneficiary as its general 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.

In support of the Form I-140 the petitioner submitted a statement dated February 7, 2008, which included a description of the beneficiary's proposed employment as well as other relevant information regarding the petitioner's eligibility for the immigration benefit sought. The petitioner also provided supporting evidence, including the petitioner's financial and corporate documents as well as documents pertaining to the petitioner's foreign subsidiary.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a request for additional evidence (RFE) dated March 26, 2009 informing the petitioner of evidentiary deficiencies. The petitioner provided two quarterly tax returns and wage reports in response to the RFE.

After reviewing the record, the director determined that the petitioner failed to establish eligibility and therefore issued a decision dated April 23, 2009 denying the petition. The director took note of the beneficiary's job description and the petitioner's limited support staff at the time the petition was filed and determined that neither factor established that the beneficiary would be employed in a qualifying managerial or executive capacity.

On appeal, counsel submits a brief in dispute of the denial. Counsel contends that the director is legally prohibited from denying the petition based only on the petitioner's personnel size. Counsel further asserts that the director misunderstood the scope and nature of the petitioning entity and offers a supplemental support statement dated May 22, 2009 in an effort to overcome the director's conclusion.

The AAO finds that counsel's statements are not persuasive and fail to overcome the director's denial. It is noted that the petitioner's submissions have been reviewed. All relevant documentation will be fully addressed in the discussion below.

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 to be addressed in this proceeding is the beneficiary's employment capacity in his proposed position with the petitioning U.S. entity. Specifically, the AAO will examine the record to determine whether the petitioner submitted sufficient evidence to establish that it would employ the beneficiary in the United States 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.

The AAO will review the description of the beneficiary's proposed job duties. *See* 8 C.F.R. § 204.5(j)(5). This approach is supported by published case law where it has been held that 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). The AAO will then consider the job description in light of the petitioner's organizational hierarchy, the beneficiary's position therein, and the petitioner's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks. While a detailed job description is admittedly one major component in determining the petitioner's eligibility, the petitioner is expected to provide sufficient evidence to corroborate the proposed job description. The petitioner should explain the means by which the petitioner plans to relieve the beneficiary from having to allocate the primary portion of his time to the performance of non-qualifying operational tasks. Merely providing a job description that describes a set of primarily qualifying tasks is meaningless if the organization that seeks to hire the beneficiary does not establish the availability of the necessary human resources to relieve the beneficiary from having to primarily perform non-qualifying operational job duties.

Counsel challenges the director's emphasis on the petitioner's small support staff and attempts to redirect focus by emphasizing the beneficiary's professional subordinate, who was employed by the petitioner at the time of filing, and the beneficiary's high level of authority with respect to the petitioner's business plan, budget, corporate policies, and contract negotiation with both customers and suppliers. The AAO finds, however, that it is both reasonable and often necessary for the director to consider the petitioner's support personnel when determining the petitioner's eligibility. In reviewing the relevance of the number of employees a petitioner has, 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).

While no beneficiary is required to allocate 100% of his time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. 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). The likelihood that the beneficiary would be relieved of having to primarily perform non-qualifying duties is more easily established when the petitioner provides evidence of a support staff, who would assist

the beneficiary with the performance of daily operational tasks. Although a small support staff does not preclude the petitioner from meeting its burden of proof as counsel in this matter strongly claims, in order to establish that the beneficiary's time would be primarily allocated to tasks of a qualifying nature, the petitioner must not only provide a detailed description of the proposed employment to establish what specific tasks the beneficiary would perform on a daily basis, but it must also address the key question of who would carry out the petitioner's operational tasks such as to relieve the beneficiary from having to do so.

The petitioner relies heavily on the assertion that the employees of the petitioner's foreign subsidiary will assist the beneficiary with the daily operational tasks. This claim is deficient, however, as it strongly suggests that the beneficiary would continue to play a significant role in managing the employees of a separate entity other than the petitioner. The beneficiary's continued role with the foreign subsidiary does little to enhance the AAO's understanding of the beneficiary's role with the petitioning entity.

Counsel indicates that the beneficiary's managerial role is exemplified in his oversight and management of the companies that provide the petitioner with necessary warehousing and distribution services. However, the petitioner has not provided an adequate explanation of how such oversight, which would include regular site visits to both the warehouse and distribution centers, would qualify as managerial or executive rather than operational tasks. While the AAO does not discount the beneficiary's significant role in these oversight responsibilities, the fact that the beneficiary would carry out valued services is undisputed. In fact, merely establishing that the beneficiary is a valued, and possibly even indispensible, employee does not necessarily qualify the beneficiary for classification as a multinational manager or executive. Only those employees who provide services that are primarily in a managerial or executive capacity can qualify for the immigration benefit sought by the petitioner. Here, neither the job description of the proposed employment, nor the staffing hierarchy that the petitioner had in place at the time of filing adequately establishes that the petitioner was ready and able to employ the beneficiary in a qualifying managerial or executive capacity.

The AAO finds that the petitioner has failed to establish that the beneficiary would primarily perform tasks in a managerial or executive capacity. Based on this determination, this petition cannot 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 met that burden.

ORDER: The appeal is dismissed.