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]

By

DATE: DEC 0 5 2012 OFFICE: NEBRASKA 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 in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** 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,

Ron Rosenberg
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 multinational corporation that seeks to employ the beneficiary in the United States as its 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.

In support of the Form I-140 the petitioner submitted a statement dated April 19, 2010, which contained relevant information pertaining, in part, to the beneficiary's employment abroad and with the petitioning entity. The petitioner also provided evidence of its corporate structure to establish the existence of a qualifying relationship with the beneficiary's foreign and U.S. employers.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a request for evidence (RFE) dated May 17, 2010 informing the petitioner of various evidentiary deficiencies. Specifically, the director instructed the petitioner to provide more detailed job descriptions pertaining to the beneficiary's foreign and proposed employment as well as detailed organizational charts depicting the staffing structure of the departments and teams that comprised the foreign organization during the beneficiary's employment abroad. The petitioner was asked to provide the same information pertaining to the beneficiary's proposed employment with the U.S. entity.

The response included a statement from counsel dated June 24, 2010 and a statement from the petitioner dated June 15, 2010, each containing descriptions of the beneficiary's foreign and proposed employment. It is noted that the petitioner's statement contained a list of the beneficiary's job duties and a percentage breakdown to establish how much time the beneficiary allocated to each of the listed tasks during his employment abroad and how much time he would allocate to each task in his proposed position with the U.S. entity. The petitioner also complied with the director's request for organizational charts pertaining to the beneficiary's foreign and U.S. employers.

After reviewing the petitioner's response, the director found that the evidence provided indicates that the beneficiary primarily performs tasks of a non-qualifying nature and thus cannot be deemed as someone who was employed abroad and who would be employed in the United States in a qualifying managerial or executive capacity.

On appeal, counsel disputes the director's decision, asserting that the director erroneously focused on the beneficiary's lack of subordinate employees, thus failing to consider the beneficiary as a function manager who does not oversee personnel, but rather manages an essential function. Counsel points out that the beneficiary functions autonomously and with little oversight from superiors, other than periodic verification to determine whether he continues to meet desired revenue targets. Additionally, the petitioner introduces new evidence in the form of opinion letters—one letter dated March 8, 2011 from Sony Pictures Entertainment's travel services director, and one letter dated March 9, 2011 from the dean of William F. Harrah College of Hotel Administration at the University of Nevada Las Vegas—both asserting that the beneficiary's position as sales manager at a luxury hotel is of a managerial nature.

Notwithstanding the relevance of the statements and documents put forth in support of the appeal, the AAO finds that the opinion letters have little probative value in terms of establishing the beneficiary's qualifying

managerial or executive employment either in his foreign or in his proposed position with the multinational entity. Despite Sony Picture's relationship with the petitioning entity (and with the beneficiary in particular) and regardless of the dean's in-depth knowledge on the subject of hotel administration, there is no evidence that either party has acquired expert knowledge of the term "managerial capacity" within the scope of its statutory definition as found in the Act. In fact, the statements of both parties inadvertently indicate that, while the beneficiary's position may be that of a professional, the job duties he has performed and would continue to perform are not primarily those that are common to someone employed within a qualifying managerial or executive capacity.

The AAO may, in its discretion, use as advisory opinion statements that the petitioner submits as expert testimony. When an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). There is no evidence that either of the individuals whose expert opinions the petitioner has offered in support of its claim is an export in or has considerable knowledge of section 203(b)(1)(C) of the Act and the relevant statutory definitions. Therefore, the AAO finds that these statements have little probative value and are insufficient to overcome the director's decision.

The AAO has also considered counsel's assertions in which he contends that the beneficiary has and would continue to serve as a function manager. The AAO finds that, given the information provided in response to the RFE concerning the beneficiary's job duties, counsel's assertions are not persuasive and are therefore insufficient to overcome the director's adverse findings. The discussion below will provide an analysis of the relevant documentation and will explain the underlying reasoning for the AAO's 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):
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> * * *
>
> > (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 issues in this proceeding calls for an analysis of the beneficiary's employment capacity in his past employment with the foreign entity and his proposed employment with the U.S. petitioner. Specifically, the AAO will examine the record to determine whether the petitioner submitted sufficient evidence to establish that the beneficiary was employed abroad and would be employed 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.

In examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the beneficiary's proposed job duties. *See* 8 C.F.R. § 204.5(j)(5). Published case law supports the pivotal role of a clearly defined job description, deeming the actual duties themselves as the factors that determine 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). Additionally, the AAO finds that it is often appropriate to consider other relevant factors, including an entity's organizational hierarchy and overall staffing, which establish who actually performs the non-qualifying tasks of the entity or department where the beneficiary's position is placed.

The petitioner provided critical information in the form of a June 15, 2010 letter, written by [redacted] the human resources vice president. As [redacted] indicated that the beneficiary's position abroad entailed the same job duties as those in his proposed position with the U.S. entity, the AAO will address the employment capacity of both positions by discussing the single percentage breakdown [redacted] provided to elaborate on the beneficiary's job duties.

After having considered the list of the beneficiary's job duties and the corresponding time constraints, the AAO finds that the beneficiary's time, both abroad and in the United States, has been and would continue to be primarily allocated to the performance of non-qualifying operational tasks that are necessary to provide marketing and sales services. The statements of [redacted] indicate that the beneficiary has and would continue to allocate his time to the following non-qualifying sales and administrative tasks: negotiating with clients to achieve maximum profit, soliciting business to achieve budgeted sales and profitability, traveling for the purpose of soliciting business, following up with personal and sales calls, contacting customers in-house to foster good business relations, following sales leads and maintaining a good relationship with the national sales offices, acquiring knowledge of local competitors, representing the petitioner at industry events and sales meetings, and providing monthly reports regarding sales goals. These non-qualifying tasks consumed and would continue to consume approximately 54%, or the majority, of the beneficiary's time. Additionally, the petitioner has not established that developing and executing projects to increase sales volume qualify as a managerial or executive task, thus indicating that even more of the beneficiary's time may have been and may continue to be allocated to matters that are non-qualifying.

While counsel is correct in asserting that the beneficiary does not have to serve as a personnel manager in order to qualify for the immigrant classification of multinational manager or executive, in order to establish that the beneficiary is a function manager, the petitioner must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. Additionally, while the AAO acknowledges that no beneficiary is required to allocate 100% of his or her 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 job description provided indicates that the beneficiary's role is not limited to merely managing the essential sales function, but rather requires the beneficiary to take considerable steps in actually carrying out a number of underlying sales tasks that are directly related to that function. Merely establishing that the job duties the beneficiary performed and would perform are of a professional nature is not sufficient unless those

tasks rise to the level of a managerial or executive capacity. The record strongly indicates that the beneficiary's time in his position with the foreign entity and in his proposed position with the petitioning entity has been and would be allocated primarily to the performance of tasks of a non-qualifying nature. Therefore, the AAO finds that the beneficiary was not employed abroad and would not be employed in the United States in a qualifying managerial or executive capacity. Based on these two grounds of ineligibility, the instant 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 sustained that burden.

ORDER: The appeal is dismissed.