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]

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DATE: DEC 20 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 California corporation that seeks to employ the beneficiary in the United States as its vice president. 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 August 23, 2010, which contained information pertaining to the petitioner's eligibility. The petitioner briefly discussed the beneficiary's history with the petitioner's foreign parent entity and provided a general description of the beneficiary's proposed employment with the petitioning entity, stating that the beneficiary would set up policies in collaboration with the petitioner's president, study the American market to set business objectives, exercise his hiring and firing authority, review financial and other reports in order to make investment decisions, control the company budget, and develop relationships with key customers, commercial buyers, and industry leaders. The petitioner also provided documentary evidence in the form of business, corporate, and tax documents.

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 January 13, 2011 informing the petitioner of various evidentiary deficiencies, including the petitioner's submission of insufficient job descriptions pertaining to the beneficiary's foreign and proposed employment. The director instructed the petitioner to provide further evidence to establish that the beneficiary qualifies for classification of multinational executive under the statutory definition.

The petitioner's response included a statement from counsel, dated April 4, 2011, in which counsel addressed the RFE by paraphrasing the statutory definition of executive capacity, claiming that the beneficiary's proposed position in the United States "is genuinely that of an executive who will direct the general development and management of the company, establish goals and policies and exercise wide latitude in discretionary decision making." Counsel assured that the beneficiary is a high-level executive and relied on the beneficiary's employment verification letter and salary abroad as valid evidence of the beneficiary's qualifying employment. The petitioner also provided additional supporting evidence along with counsel's response statement. Such evidence included the foreign entity's bank documents, annual report, and evidence of its ownership of the petitioning entity, as well as the petitioner's balance sheet and income statement for 2010, its 2010 tax return, and evidence of the foreign entity's transfer of the funds used to purchase the petitioner's stock.

After considering the petitioner's response, the director determined that the petitioner failed to establish eligibility. The director summarized the evidence submitted pertaining to the beneficiary's foreign and proposed employment and found that the record lacks evidence to demonstrate the beneficiary's job duties with either entity. In light of the petitioner's failure to supplement the record with the required evidence pertaining to the beneficiary's job duties, the director concluded that the petitioner failed to establish that the beneficiary was employed abroad or that he would be employed in the United States in a qualifying managerial or executive capacity. Based on these two grounds of ineligibility, the director denied the petition in a decision issued on August 19, 2011.

On appeal, counsel contends that the director's decision is erroneous in law or fact. Counsel goes on to discuss a minor discrepancy pertaining to the salary paid to the beneficiary during his employment abroad, despite the fact that such a discrepancy was not noted in the director's decision and thus was not the focus of the adverse findings. Finally, counsel contends that in the absence of contradictory evidence, the director's adverse findings were not warranted and the petition should be approved.

The AAO finds that counsel's assertions are not persuasive and do not overcome the director's decision. The discussion below will provide an analysis of the factors that are relevant to the matter at hand.

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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> * * *
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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 two primary issues in this proceeding call for an examination of the beneficiary's managerial or executive employment capacity in his positions with the foreign and U.S. entities.

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 description of the beneficiary's job duties in the position(s) in question. *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 appropriate and often necessary to consider other relevant factors, including the employing entities respective organizational hierarchies and overall staffing, which establish who actually performed and would perform the daily non-qualifying tasks of either organization.

The record is effectively devoid of any detailed information pertaining to the beneficiary's job duties in either position. As previously noted, the only job description the petitioner provided pertained to the proposed U.S. employment and consisted of paraphrased versions of the statutory definition for executive capacity. Although the petitioner provided organizational charts pertaining to both entities, depicting the beneficiary's position with each employer, these documents are meaningless if they cannot be considered within the context of a detailed delineation of the beneficiary's actual daily job duties in his position with the foreign entity and the projected job duties the beneficiary would be expected to perform in his proposed employment with the

U.S. entity. An entity's organizational chart is simply insufficient evidence of the beneficiary's employment capacity. As previously indicated, specifics about the beneficiary's job duties are clearly an important indication of whether the beneficiary's employment abroad and his proposed employment consisted and would consist of duties that are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The mere fact that the petitioner provided some factually valid evidence containing no contradictions is not sufficient to affirmatively establish that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity. The petitioner has the burden of establish eligibility for the immigration benefit sought. 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 performed or would perform were/are only incidental to the position in question. 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). Without a detailed job description, the petitioner simply cannot meet its evidentiary burden.

The overall lack of information explaining what job duties the beneficiary performed abroad and would perform during his employment with the petitioning entity precludes the AAO from issuing a favorable finding pertaining to the petitioner's eligibility. Accordingly, the AAO finds that the instant petition must be denied.

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.