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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



By

DATE:

**FEB 21 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 a California corporation that seeks to employ the beneficiary as its 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, counsel for the petitioner submitted a statement dated May 12, 2009, which included relevant information regarding the petitioner's eligibility for the immigration benefit sought as well as a four-prong description of the beneficiary's proposed employment. The petitioner also provided a copy of its organizational chart showing the beneficiary overseeing a sales manager, who was overseeing one sales representative, and a customer service manager. Although the chart also included a design center manager/engineer position with three subordinate designers, two warehouse positions, and one additional sales representative, these positions were shown as vacant at the time the Form I-140 was filed. The petitioner provided other supporting evidence, including its financial, business, and corporate documents as well as documents pertaining to its foreign parent entity.

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 October 28, 2009 informing the petitioner of various evidentiary deficiencies. The director instructed the petitioner to provide a detailed description of the beneficiary's proposed job duties that reflects the petitioner's staffing at the time the petition was filed. The director asked the petitioner to supplement the job description with the percentage of time the beneficiary would allocate to each of his proposed job duties. The director cautioned the petitioner against grouping several tasks together, thus indicating that each job duty was to be listed individually with a time allocation assigned specifically to each task. Additionally, the director asked the petitioner to provide a copy of its organizational chart illustrating the beneficiary's position relative to other employees.

The petitioner's response included a statement from counsel dated January 5, 2010, which contained two descriptions of the beneficiary's proposed employment. One description contained no allocations but listed various tasks under four different headings, while the other job description did not list individual job duties, but rather organized the beneficiary's job responsibilities into four groups and assigned a time allocation to each group. The petitioner also provided a copy of its organizational chart, which depicted the beneficiary at the top of the hierarchy, followed by a general manager, who supervises one sales manager, one e-commerce manager, and one warehouse manager. Although the chart also shows a design department, the petitioner did not employ anyone in a position within that department. Counsel stated that the petitioner would hire independent contractors to provide accounting, technical support, customs clearance, designing, transportation, and warehouse services. Additionally, counsel stated that the beneficiary would assume the role of a function manager based on her supervision of "few subordinates."<sup>1</sup>

After reviewing the record, the director concluded that the petitioner failed to establish that the petitioner would employ the beneficiary in a qualifying managerial or executive capacity. The director also determined that the petitioner failed to establish that the petitioner has an employer-employee relationship with the beneficiary. The director therefore issued a decision dated February 23, 2010 denying the petition on both

grounds. With regard to the proposed employment, the director summarized the contents of the petitioner's organizational charts and restated the job description contained in counsel's statement. The director determined that the beneficiary would not oversee the work of managerial, supervisory, or professional employees and further found that the submitted job description was vague and of limited evidentiary value. Although the director made adverse findings based on his analysis of the petitioner's 2007 tax return, the AAO points out that the Form I-140 was filed in May 2009 and the documentation regarding the wages paid in 2007 is therefore irrelevant to the matter at hand. The AAO similarly finds that the director made irrelevant comments regarding the beneficiary's proposed salary, finding that the salary was not commensurate with that of a managerial or executive employee. The AAO will disregard the irrelevant finding and will focus on the primary issue concerning eligibility.

On appeal, counsel submits a brief in which he restates the initial job description and the statutory definition of managerial capacity. Counsel neither offers additional information about the beneficiary's proposed job duties nor provides any insight as to how the petitioning organization, given its staffing at the time of filing, was capable of relieving the beneficiary from having to primarily perform daily operational tasks that would be deemed non-qualifying. Instead, counsel asserts that even if the beneficiary does not supervise a staff of professional or managerial employees, she would nevertheless qualify for the immigrant classification sought herein because she manages an essential function of the petitioning organization.

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 and all relevant documentation that pertains directly to the key issue in this matter 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 her 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.

First, the AAO will address the term "function manager," which 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). Although the term "essential function" is not defined by statute or regulation, merely stating that the beneficiary manages an entire organization is not sufficient for the purpose of establishing that the beneficiary is a function manager. Rather, 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, 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. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily job duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. While the AAO acknowledges that no beneficiary is required to allocate 100% of 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 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 petitioner has not provided evidence to establish that the beneficiary manages an essential function. Merely acknowledging that the beneficiary does not supervise managerial or professional employees and relying on the term function manager as an alternate route of qualifying under one of the statutory definitions is simply insufficient. Nor can the petitioner meet the statutory criteria simply by establishing that the beneficiary has discretionary authority and occupies a senior-level position within the petitioner's organizational hierarchy. Regardless of whether the beneficiary is a function or personnel manager, a detailed description of the beneficiary's proposed job duties is essential.

Counsel's assertion that the beneficiary will be a function manager is not credible given the organizational chart that was submitted in support of the petition. The chart depicts the beneficiary at the top of an organizational hierarchy in which two employees with managerial position titles were depicted as the beneficiary's direct subordinates. The chart strongly indicates that the beneficiary's role would not be limited to managing a function. The beneficiary's role appears to more broadly encompass managing the company's employees and/or directing the overall management of the entire entity. See sections 101(a)(44)(A) and (B) of the Act (citing criteria for managerial and executive capacity). The fact that only one of the beneficiary's direct subordinates has subordinates of her own indicates that the customer service manager is a manager in title only, as the warehouse employees, who were meant to serve as the customer service manager's subordinates, had not yet been hired when the petition was filed. It is therefore unclear who within the petitioner's staff was carrying out the warehouse- and design-related tasks.

In reviewing the more detailed list of job duties that counsel offered in her January 5, 2010 response statement, it appears that the beneficiary performed a considerable number of non-qualifying operational tasks, including: attending shows to market and promote the petitioner's products; communicating with designers; supervising employees and contractors, many who would not be deemed as managerial, supervisory, or professional employees; and negotiating sales contracts and agreements. As there were no time allocations assigned to any of these non-qualifying job duties, the petitioner has not shown that the beneficiary's time would be spent primarily within a managerial or executive capacity.

With regard to the second job description where time allocations were provided, the content was overly vague and focused on broad job responsibilities rather than specific daily tasks. For instance, counsel indicated that 45% of the beneficiary's time would be allocated to determining company goals and policies, which would include considering the petitioner's marketing, financial, and human resources capabilities, researching the "business environments in which the company operates," and setting market share, revenue, and profit goals. Counsel indicated that another 25% of the beneficiary's time would be allocated to assigning tasks to subordinates and creating a system for evaluating those subordinates. Although counsel indicated that this set of responsibilities would include supervising other managers, as previously noted, the petitioner employed only one subordinate manager at the time the petition was filed. Additionally, while counsel also indicated that the beneficiary would review marketing and financial reports, it is unclear who within the petitioner's hierarchy was actually generating these reports for the beneficiary to review at the time of filing. Specifics are clearly an important indication of whether a beneficiary's duties 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).

Neither the beneficiary's job description nor the petitioner's organizational composition supports the claim that the petitioner was ready and able to employ the beneficiary in a qualifying managerial or executive capacity at the time the petition was filed. As previously noted, the job descriptions offered in the present matter are insufficient, as one indicates that the beneficiary would perform numerous non-qualifying tasks without specifying precisely how much of her time would be allocated to such tasks, and the other description is overly vague in its restatement of broad job responsibilities without supplementing the generalities with an explanation of the specific tasks the beneficiary would perform to meet her job responsibilities. The petitioner also failed to establish that the petitioner's organizational composition at the time of filing was capable of relieving the beneficiary from having to allocate the primary portion of her time to the performance of non-qualifying job duties.

In light of the deficiencies discussed above, the AAO finds that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. On the basis of this finding this petition cannot be approved. Therefore, the AAO need not address the employer-employee issue, which the director cited as the second basis for the 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.