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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]

DATE: MAY 17 2012 OFFICE: NEBRASKA SERVICE CENTER [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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion 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 any motion to 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 an Illinois limited liability company that seeks to employ the beneficiary as its executive 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 September 14, 2009, which included relevant information regarding the petitioner's eligibility for the immigration benefit sought as well as a brief description of the beneficiary's foreign and proposed employment. The petitioner also provided supporting evidence, including the petitioner's financial and corporate documents as well as documents pertaining to the petitioner's 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 February 1, 2010 informing the petitioner of various evidentiary deficiencies. The director instructed the petitioner to describe the beneficiary's foreign and proposed employment in greater detail, listing the specific job duties the beneficiary performed abroad and would perform for the U.S. entity and supplementing both lists of duties with the percentage of time that was allocated to the tasks performed abroad and to those that would be performed in the scope of the beneficiary's U.S. employment. The director also asked the petitioner to provide the foreign entity's organizational chart and to specify the job duties of the beneficiary's immediate supervisor and subordinates. The director similarly instructed the petitioner to provide job descriptions for the beneficiary's subordinate employees as well as a complete work schedule of the U.S. business to clearly indicate the days and hours of the petitioner's staff. Lastly, the director asked the petitioner to provide IRS Form W-2 wage and tax statements and any Form 1099s issued to the petitioner's employees for 2009.

The petitioner provided a response with the requested evidence and information. In the response statement dated March 10, 2010 the petitioner identified eight employees (not including the beneficiary) using the word "seasonal" in parenthesis next to the names of three part-time employees—[redacted] both in the position of front desk clerk, and [redacted], described as holding a housekeeping position. It is noted that the petitioner did not explain what was meant by the word "seasonal" or how this component may affect those employees' work schedules.

After reviewing the record, 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. The director therefore issued a decision dated April 29, 2010 denying the petition on both grounds. The director's analysis focused mostly on the beneficiary's proposed employment, questioning how the petitioner's given staffing structure would allow the beneficiary to allocate her time primarily to the performance of tasks within a qualifying managerial or executive capacity. The director further observed that some of the employee salaries were not indicative of full-time employees, which caused the director to further doubt whether the beneficiary would in fact primarily perform managerial- or executive-level tasks.

Although the director found that the petitioner did not adequately describe the beneficiary's job duties with the foreign entity as being within a qualifying managerial or executive capacity, the AAO has conducted its own review of the record and finds that the director's adverse finding with regard to the foreign employment

was not warranted. Therefore, the AAO will withdraw one of the director's findings and devote the remainder of this decision to a discussion of the beneficiary's proposed employment with the U.S. petitioner.

On appeal, counsel submits a brief in which he disputes the denial, questioning the relevance of the director's discussion of the beneficiary's salary as an indicator of the employment capacity of the proposed position. Counsel contends that only 20% of the beneficiary's time would be allocated to operational tasks and further points to two new hotel management agreements that the petitioner has entered into as a result of the beneficiary's efforts.

The AAO finds that counsel's arguments are not persuasive and fail to overcome the director's adverse finding regarding the beneficiary's proposed employment with the petitioning entity. It is noted that all of the petitioner's submissions have been reviewed. 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.

As noted above, the primary issue to be addressed in this proceeding is the beneficiary's employment capacity in her proposed position with the 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.

As a preliminary matter, the AAO notes that the content of the instant discussion will be limited to the beneficiary's role and job duties within the scope of the petitioning entity as it existed when the Form I-140 was filed. *See* 8 C.F.R. § 103.2(b)(1). Therefore, counsel's discussion of new business that the beneficiary may have negotiated since the date the petition was filed would be deemed irrelevant for the purpose of determining eligibility at the time of filing.

In examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The AAO will then consider this information in light of other relevant factors, including 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 daily operational tasks.

Turning first to the job description offered in response to the RFE, the AAO finds that the petitioner failed to establish that the beneficiary would spend the primary portion of her time performing tasks within a qualifying managerial or executive capacity. While the beneficiary is not 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 "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).

A significant portion of the job duties that would comprise the proposed position are non-qualifying. Specifically, the petitioner indicated that 15% of the beneficiary's time would be allocated to seeking out new business and conducting market research; 5% would be allocated to purchasing supplies and services; 10% would be allocated to conducting random room inspections to check for cleanliness; 5% would be allocated to coordinating the front desk staff and interviewing job applicants; 15% would be allocated to promoting and marketing the business; and another 10% would be allocated to handling funds and recording payments. While no individual task mentioned herein would disqualify the beneficiary from the sought-after immigrant classification, when considered cumulatively, these non-qualifying tasks would consume approximately 60% of the beneficiary's time, thus indicating that she would primarily perform non-qualifying tasks.

The AAO further notes a discrepancy between information provided in the Form I-140, where the petitioner claimed eleven employees at the time of filing, and the employee list submitted in the RFE response, where the petitioner listed a total of eight employees not including the beneficiary. 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).

Lastly, in considering the nature of the petitioner's business—providing hotel management services—and the beneficiary's role therein as general manager, the AAO finds that the beneficiary is responsible for actually carrying out the underlying tasks that are directly related to managing the hotels with which the petitioner has entered into contractual agreements. To clarify further, the petitioner has indicated that it generates income by entering into management agreements with hotel establishments, which are the petitioner's clients, wherein the petitioner gets compensated for actually managing the client hotel(s). Here, it appears that the beneficiary is directly involved in managing the hotel with which it had a contractual agreement at the time of filing the petition. It can therefore be concluded that the beneficiary would actually perform the tasks necessary to provide a service (that of hotel management) and her position cannot be considered as one where she would 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).

In summary, given the deficiencies described above, the AAO cannot conclude that the petitioner was ready and able to employ the beneficiary in a qualifying managerial or executive capacity at the time of filing the petition. On the basis of this conclusion, the 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.