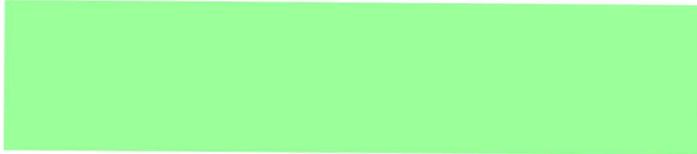


(b)(6)

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

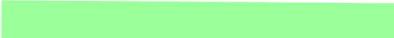


DATE: JUN 04 2013

OFFICE: TEXAS SERVICE CENTER

FILE: 

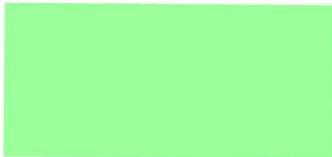
IN RE:

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.

Thank you,

A handwritten signature in black ink, appearing to read "Eric Feldman".

for Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, ("the director") denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The U.S. petitioner is a company incorporated in Delaware in December 2005. The petitioner states on the Form I-140, Immigrant Petition for Alien Worker, that its type of business is "spreadsheet management technology." The petitioner indicates that it employs five personnel, and reported a gross annual income of over \$4.1 million (worldwide) when the petition was filed. It seeks to employ the beneficiary as its Vice-President Americas. 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.

On September 14, 2012, the director denied the petition determining that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.¹

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the evidence of record is sufficient to satisfy the petitioner's burden of proof in that the evidence establishes the beneficiary's eligibility for the requested classification.

I. The Law

To establish eligibility for the employment-based immigrant visa classification, the petitioner must meet the criteria outlined in section 203(b) of the Act. 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

¹ Counsel for the petitioner addresses the issue of the beneficiary's managerial/executive capacity for the foreign entity on appeal; however, although the director references the description of the beneficiary's job duties for the foreign entity as being insufficient to establish the beneficiary's managerial/executive capacity for the petitioner, the director does not make a determination that the petitioner failed to establish the beneficiary's managerial capacity for the foreign entity. Upon review of the totality of the record, the director correctly did not find a lack of eligibility on this issue.

continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

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 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.

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.

II. The Issue on Appeal

The issue in this proceeding is whether the petitioner submitted sufficient evidence to establish that the beneficiary would be employed in a primarily managerial or executive capacity.

In a letter appended to the petition, the petitioner stated that it provides technology for managing, analyzing, and auditing the activity and data generated by Excel spreadsheets. The petitioner noted that it conducts sales, consulting, training and product implementation activities out of its New York office, has ongoing contracts with global banks and hedge funds to provide support and maintenance, and that it is looking to broaden the scope of its operation to encompass more technical aspects of the business. The petitioner indicated that the beneficiary had initially entered the United States in L-1A visa status to assume the position of Head Software Architect, responsible for all decisions relating to the functional and technical evolution of the company's proprietary products. The petitioner indicated further that the beneficiary was promoted to the position of Vice-President, Technology less than a year after entering the United States and was promoted again in March 2011 to the position of Vice-President, Americas. The petitioner stated that it now wished to employ the beneficiary permanently in this position and indicated the beneficiary's responsibilities as Vice-President, Americas included: the day-to-day operations of the company in the United States; carrying out policies; and operating within the guidelines set forth by the international management team. The petitioner noted that the beneficiary provides direction and leadership to the regional staff and is responsible for ensuring customer satisfaction and market share within the Americas region. The petitioner also provided an overview of the beneficiary's job duties.

In response to the director's Notice of Intent to Deny (NOID) the petition, the petitioner provided a detailed description of the beneficiary's duties that elaborated upon the duties summarized in the initial submission. The petitioner also allocated the beneficiary's time to specific aspects of the petitioner's management operations as well as provided specific documentary examples illustrating the beneficiary's work in defining the petitioner's standards of operation and policies, work with senior figures in major investment banks, and day-to-day work making discretionary decisions.

Upon review, the director determined that the petitioner had not established the beneficiary would be employed in either a managerial or executive capacity. The director determined that the beneficiary would be engaged primarily in producing the petitioner's product or service.

On appeal, counsel for the petitioner observes that the director failed to consider the detailed description of the beneficiary's job duties submitted in rebuttal to the NOID and furthermore, failed to consider the documentary evidence submitted demonstrating the beneficiary's management of the organization. Counsel asserts that the director also failed to understand the petitioner's organizational

structure when determining that the beneficiary was the individual who produces the petitioner's product. Counsel notes that the software solution products that the petitioner provides to clients are produced at the London office of the petitioner's affiliated company and are not produced by the petitioner. Counsel also references the organizational chart that had been provided which details the corporate structure of the petitioner and its affiliated company in support of her assertion. Counsel concludes that the petitioner has established that the beneficiary functions at a senior level within the organization, exercises discretion for managing the U.S. operations, supervises and controls the work of other professionals, as well as develops new sales operations and product implementation policies and processes.

III. Analysis

Upon review, the petitioner has established that the beneficiary will be employed in the United States in a managerial capacity as a function manager. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

When 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 petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* To establish eligibility the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity.

In this matter, the petitioner establishes that the beneficiary will perform the duties of a function manager. The statutory definition of "managerial capacity," allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). The term "essential function" is not defined by statute or regulation. 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 in managing the essential function, 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. *See* 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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 Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)).

On appeal, counsel for the petitioner clarifies that the beneficiary manages the process of developing new sales operations and product implementation policies and that this is an essential function of the organization. A review of the petitioner's detailed description of the beneficiary's actual duties provides sufficient information to demonstrate that the beneficiary will not primarily perform the development of the software solutions and will not primarily perform the sales operations or product implementation but that the work will be performed by others inside and outside of the organization.

The petitioner initially provided a broad description of the beneficiary's primary duties which did not include sufficient information to ascertain the beneficiary's actual role within the organization. In response to the NOID, the petitioner provided the detail and time allocation necessary to establish that the beneficiary primarily performs duties in a managerial capacity. The description provided included elements that suggested the beneficiary would spend some time performing non-qualifying functions; however, a review of the totality of the record including the documentary evidence supporting the beneficiary's role within the organization establishes the beneficiary will primarily perform in a managerial capacity.

The petitioner has established that the beneficiary is the individual who manages the entire process by which the petitioner's products are sold in the United States and how the products are implemented. As the director recognized, the actual sales, implementation, and training of clients' personnel in the use of the petitioner's product are carried out by other employees. Moreover, a review of the totality of the record, including clarifying evidence submitted on appeal, establishes that the beneficiary will not be involved primarily in producing the petitioner's product or service.

The review of the totality of the record in this matter included not only the beneficiary's job description, but also the petitioner's organizational structure, the duties of all the petitioner's employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and other factors that contributed to a complete understanding of a beneficiary's actual duties and role in the business. Upon that review, the record includes sufficient evidence to establish that the beneficiary will be employed in a bona fide function manager position for the U.S. business entity. Accordingly, the director's decision will be withdrawn and the appeal will be sustained.

IV. Conclusion

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. Here, the petitioner has sustained that burden. Accordingly, the director's decision is withdrawn. The appeal will be sustained and the petition approved.

ORDER: The appeal is sustained.