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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: **MAR 11 2013** OFFICE: NEBRASKA SERVICE CENTER FILE: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 Florida corporation that seeks to employ the beneficiary in the United States as its president/CEO. 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 February 19, 2009, which contained relevant information pertaining to the petitioner's eligibility, including a job description of the beneficiary's proposed employment with the petitioning entity. The petitioner indicated that the beneficiary would be responsible for general administration of the company, market analysis, setting strategic goals and sales quotas, and managing the company's expenses. The petitioner also provided employer's quarterly reports naming three employees during the fourth quarter of 2008.

The director reviewed the petitioner's submissions and determined that an approval was not warranted. The director therefore issued a request for evidence (RFE) dated August 24, 2009 informing the petitioner of various evidentiary deficiencies. Among the issues the director addressed was that of the beneficiary's proposed employment with the U.S. entity. Specifically, the director instructed the petitioner to provide a more detailed job description enumerating the beneficiary's tasks and the percentage of time the beneficiary planned to devote to each task. The director expressly asked the petitioner not to group tasks together, but rather to individually list each task and the task's time allotment.

In response counsel provided a statement dated September 30, 2009 in which he included a job description and percentage breakdown. The job description was accompanied by the petitioner's organizational chart, depicting the petitioner's three employees, and job descriptions of the two employees subordinate to the beneficiary.

After considering the petitioner's response, the director determined that the petitioner failed to establish that the beneficiary would be employed with the U.S. entity in a qualifying managerial or executive capacity. The director therefore issued a decision dated March 5, 2010 denying the petition.

On appeal, counsel provides a brief in which he asserts that the director erroneously relied on the petitioner's staffing size in making the decision regarding the petitioner's eligibility. Counsel urges the AAO to consider the petitioner's reasonable needs and provides a restatement of the job description that was previously provided in response to the RFE.

The AAO has reviewed the record in its entirety and finds that counsel's assertions are not persuasive in overcoming the director's finding of ineligibility. The AAO will fully address the petitioner's eligibility and counsel's statements 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.

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.

Turning to the primary issue at hand—the beneficiary's employment capacity in her proposed position with the U.S. entity—the AAO will first look to the petitioner's description of the beneficiary's proposed job duties. *See* 8 C.F.R. § 204.5(j)(5). While other factors are also considered, published case law supports the pivotal role of a detailed job description, as the actual duties themselves reveal 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); *see also* 8 C.F.R. § 204.5(j)(5).

In the present matter, the AAO finds that the job description offered by counsel in his response to the RFE was vague and broadly focused on the beneficiary's discretionary authority and position within the petitioner's organizational hierarchy, rather than on providing a comprehensive list of the beneficiary's actual daily tasks. While the AAO certainly acknowledges that these factors are crucial for the purpose of establishing that the beneficiary occupies a position within a qualifying managerial or executive capacity, an affirmative determination cannot be made in favor of the petitioner without a clearly defined job description that delineates the beneficiary's actual daily tasks, indicates how much time the beneficiary would allocate to each task, and establishes that the primary portion of the beneficiary's time would be spent performing qualifying tasks rather than those that are administrative or operational in nature.

For instance, stating that the beneficiary would plan, develop, and establish policies and objectives and ensure that such objectives are met reveals nothing about the beneficiary's actual daily activities and does little to help the AAO gain a meaningful understanding of the beneficiary's role within the scope of the petitioner's business operation. In fact, this information is so general that it can be applied to most any employee who occupies a top-level position within an organization, regardless of whether that individual spends the primary portion of his or her time performing tasks within a qualifying managerial or executive capacity. Although counsel also indicated that the beneficiary has the authority to hire and fire employees, based on the few changes that have occurred with respect to the petitioner's staffing since 2008, it appears that hiring and/or firing personnel is not something that the beneficiary does on a daily, weekly, and even monthly basis. Similarly, the AAO is unclear as to the tasks involved in planning, directing, and coordinating marketing activities through the general manager. 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. *Id.*

Additionally, the AAO finds that meeting with bank representatives, attorneys, and the company accountant are more akin to administrative tasks, which, while undoubtedly crucial for the successful function of the

petitioner's business operation, are not necessarily tasks that fall within the definition of managerial or executive capacity. 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). When the petitioner provides vague statements that fail to focus on the specific tasks, as counsel has done in the present matter, the AAO cannot determine with any degree of certainty what the beneficiary would be doing or how much time would be allocated to qualifying versus non-qualifying tasks.

Finally, while counsel objects to the director's reliance on the petitioner's staffing as a means for gauging the beneficiary's managerial or executive employment capacity, the AAO finds that a company's small staffing size is often an accurate indicator of a petitioner that cannot support its beneficiary in a managerial or executive capacity because it is unable to relieve that beneficiary from having to allocate his or her time primarily to non-qualifying tasks. In other words, a small staff is often the product of necessity for an entity that has not progressed to a level of organizational complexity where a company's growth is reflected in its ability to relieve the beneficiary from having to primarily perform non-qualifying job duties and instead assign those operational and/or administrative tasks to other in-house or contracted employees.

While the AAO does not dispute that an entity with limited staffing may also require and be able to support an employee in a primarily managerial or executive capacity, any entity that files a Form I-140 petition on behalf of a beneficiary must provide adequate supporting evidence in the form of a clearly defined job description along with a thorough explanation clarifying how the petitioner's daily operational and administrative tasks will be executed without the beneficiary as their primary executor. As noted above, whenever a beneficiary's primary role involves the performance of tasks that are necessary to produce a product or to provide services that individual would not considered to be "primarily" employed in a managerial or executive capacity. *Id.*

In light of the deficiencies discussed above, the AAO finds that the petitioner has failed to establish that it would employ the beneficiary in a primarily managerial or executive capacity and on the basis of this conclusion 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.