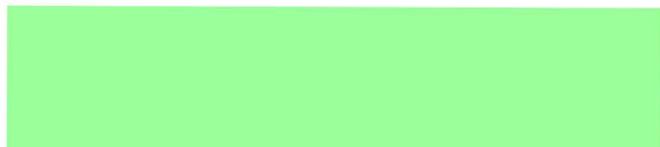




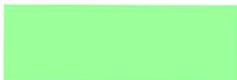
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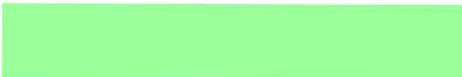
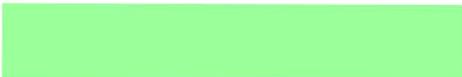
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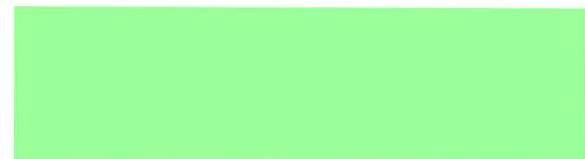
OFFICE: NEBRASKA SERVICE CENTER

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Nebraska Service Center Director denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this Form I-140, Immigrant Petition for Alien Worker, 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. The petitioner, a "Japanese food restaurant," claims to be an affiliate of [REDACTED] the beneficiary's former employer located in Japan. The petitioner seeks to employ the beneficiary in the position of Restaurant Manager.

On January 13, 2014, the director denied the petition concluding that the petitioner failed to establish that the beneficiary's employment abroad was within a qualifying managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to us for review. On appeal, counsel submits a brief disputing the director's adverse findings.

I. THE LAW

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.

Additionally, the regulations at 8 C.F.R. § 204.5(j)(3)(i) state that the petitioner must provide the following evidence in support of the petition in order to establish eligibility:

- (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
- (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
- (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
- (D) The prospective United States employer has been doing business for at least one year.

II. THE ISSUE ON APPEAL

A. Employment Abroad in a Managerial or Executive Capacity

The issue to be addressed is whether the petitioner established that the beneficiary has been employed abroad 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.

Finally, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

1. Facts

In a letter dated May 15, 2013, the petitioner explained that the beneficiary's assignment "for the two years immediately prior to coming to the USA," was to manage two restaurants in Okinawa, and a third restaurant in Kyushu. The petitioner explained that the three restaurants consisted of 50 employees, and that the beneficiary was also the "lead person to supervise the opening of 11 restaurants" for the foreign company.

The petitioner also submitted a letter from [REDACTED] President, of the foreign company. Mr. [REDACTED] stated that the letter is to confirm that the beneficiary "has been a critical part of the management of [the foreign company] of Japan since February 1, 1999." Mr. [REDACTED] also stated the following regarding the beneficiary's employment abroad:

From February 1999 to February 2011, [the beneficiary] has served in various management positions within our organization. Immediately prior to his transfer to [REDACTED] Oregon, he was our Okinawa and Kyushu Regions' General Manager. He

held his position from April 2010 to January 31, 2011 where he oversaw three restaurants which employed a total of fifty persons.

From April 2009 to April 2010, [the beneficiary] was the General Manager of our two restaurants located in the Okinawa Region. He oversaw 10 chefs and 30 employees.

On September 29, 2013, the director sent a request for evidence. In part, the director requested a detailed job description of the beneficiary's specific tasks on a normal business day including the percentage of time spent on each task when employed by the foreign company. The director also requested a letter from an authorized official of the foreign organization, clearly describing the beneficiary's actual duties. In addition, the director requested an organizational chart of the foreign company, and copies of payroll for the beneficiary and his subordinates.

In response, the petitioner provided a statement from the president of the foreign company that provided the duties performed by the beneficiary as "general manager of Okinawa region" as follows:

1. Responsible for the overall economic success of two restaurants, [redacted] and [redacted] 50+hrs/week
2. Meet with chef at each restaurant regularly (2 -3 times each week) to consider menu changes, consider customer's reaction to menu, suggest menu changes and improvements. 5 hrs/week
3. Review food and beverage inventories of each restaurant to verify appropriate food items availability, monitor food and beverage sales, meet with vendors on a monthly basis to monitor inventory prices and maintain quality. 3 hrs/week
4. Responsible for the firing and [hiring] of all restaurant employees. Supervise scheduling. 2.5 hrs/week
5. Oversee the day-to-day food preparation work product of restaurant chefs. 25 hrs/week
6. Train chefs and food staff in food preparation techniques to provide best possible food dishes to customers. 2 hrs/week
7. Monitor activities of competing restaurants so that [redacted] restaurants offer the best quality in Okinawa Region. 5 hrs/week
8. Responsible to deposit each restaurants daily receipts. Verify each restaurant has daily operating cash in its tills. 1 hr/week

9. Be physically present at [REDACTED] six days per week for 7 to 8 hours/day. Be physically present at [REDACTED] each day as needed for 2 to 4 hours/day.
10. Responsible for review and approval of all vendor/supplier invoices to allow payment from [REDACTED] headquarters. 1 hr/week
11. Provide monthly reports, financial as well as customer relations/satisfaction to [REDACTED] [REDACTED]. 1 hr/week
12. Represent [REDACTED] in Okinawa community. [0].5 hr/week
13. Following [REDACTED] guidelines, oversee regional advertising and marketing. 1 hr/week
14. Responsible for the physical appearance of both restaurants. Present areas of improvements to [REDACTED] management such as renewing/replacing equipment, fixtures and décor items. [0].25 hr/week
15. Provide information to [REDACTED] management about any potential opportunities to open additional restaurants. [0].25 hr/week

The petitioner also submitted a list of employees supervised by the beneficiary. The list stated that the [REDACTED] restaurant has 8 employees and the beneficiary supervises one full-time chef and one part-time chef. The list also indicated the [REDACTED] restaurant has 15 employees and the beneficiary supervises one full-time chef and one part-time chef. The third restaurant is [REDACTED] in the Kyushu region and it has 17 employees and the beneficiary supervises one full-time chef and one full-time manager.

The petitioner provided a document entitled, "Individual Withholding Tax Record, 2010" for the Okinawa restaurant that indicated nine part-time employees and three full-time employees. The beneficiary was not listed on this payroll. The petitioner also provided a second document entitled, "Individual Withholding Tax Record for 2010" for the Kyushu region but in this payroll, the employer is listed as [REDACTED] and not the beneficiary's claimed foreign employer. The petitioner did not submit an organizational chart of the overall structure and staffing levels as requested by the director.

The director denied the petition on January 13, 2014, concluding that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. In denying the petition, the director determined that the petitioner provided an overly broad job description that failed to convey an understanding of what the beneficiary primarily did on a day-to-day basis. The director concluded that the beneficiary did not supervise a staff comprised of subordinate managerial, supervisory or professional employees, or that he was otherwise relieved from primarily performing non-managerial and non-executive functions associated with the operation of the foreign company's business.

On appeal, the petitioner submits an organizational chart and supporting payroll documentation for each restaurant managed by the beneficiary when he was employed abroad. Counsel states that “the organizational charts further demonstrate that [the beneficiary] managed, supervised and controlled the work of other supervisory, professional or managerial employees, including executive chefs, ramen and robata¹ supervisor chefs, as well as assistant managers and dinner and lunch wait staff supervisors, who performed administrative duties and managed operations in the dining areas.”

2. Analysis

When examining the executive or managerial capacity of the beneficiary, we review the totality of the record, starting first with the petitioner's description of the beneficiary's job duties. See 8 C.F.R. § 204.5(j)(5). A detailed job description is crucial, as the duties themselves will reveal the true nature of the beneficiary's foreign and proposed 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). We will then consider this information in light of other relevant factors, including job descriptions of the beneficiary's subordinate employees, the nature of the business that is conducted, the petitioner's subordinate staff, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role within the petitioning entity. While an entity with a limited support staff will not be precluded from the immigration benefit sought herein, it is subject to the same burden of proof that applies to a larger entity with a moderate or large subordinate staff. In other words, regardless of an entity's size or support staff, the petitioning entity must be able to provide sufficient evidence showing that it has the capability of maintaining its daily operations such that the beneficiary was relieved from having to primarily perform the operational tasks.

In the present matter, upon review of the totality of the record, the evidence does not support a finding that the beneficiary allocated his time primarily to the performance of tasks that are within a qualifying managerial or executive capacity.

On review, the petitioner provided a vague and nonspecific description of the beneficiary's duties with the foreign company that fails to demonstrate what the beneficiary did on a day-to-day basis. For example, the petitioner stated vague duties such as the beneficiary was responsible for “the overall economic success of two restaurants, [REDACTED]” “oversee the day-to-day food preparation work product of restaurant chefs;” “be physically present at [REDACTED] six days per week for 7 to 8 hours/day;” “be physically present at [REDACTED] each day as needed for 2 to 4 hours/day;” and, “represent [REDACTED] in Okinawa community.” This description provides little insight into what the beneficiary primarily did on a day-to-day basis and did not explain the corporate financial goals and objectives and how the beneficiary ran the “economic success” of the restaurants. The petitioner also did not clearly explain which employees and departments assisted the beneficiary in performing his job duties. Furthermore, reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide sufficient details about the beneficiary's activities in the course of his daily routine.

¹ Robata refers to “fire-side cooking.”

The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

The job description also includes several non-qualifying duties such as the beneficiary would “meet with vendors on a monthly basis to monitor inventory prices and maintain quality;” “train chefs and food staff in food preparation techniques to provide best possible food dishes to customers;” “monitor activities of competing restaurants so that [REDACTED] offer the best quality in Okinawa Region;” “responsible to deposit each restaurant daily receipts;” “verify each restaurant has daily operating cash in its tills;” “provide monthly reports, financial as well as customer relations/satisfaction to [REDACTED]” “oversee regional advertising and marketing” “responsible for the physical appearance of both restaurants” and “present areas of improvements to [REDACTED] management such as renewing/replacing equipment, fixtures and décor items.” The petitioner did not indicate who was in charge of the market research, the development of the marketing program, or the development of the expansion strategies, or who was responsible for the financial operations and who would prepare the financial reports. It appears that the beneficiary was in charge of marketing, training chefs, and preparing financial reports rather than directing such activities through subordinate employees. 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 Intn’l.*, 19 I&N Dec. at 604.

In the instant matter, the job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary performed abroad. While the petitioner has provided a breakdown of the percentage of time the beneficiary spent on various duties, the petitioner has not articulated whether each duty was managerial or executive.

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involved supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

Though requested by the director, the petitioner did not provide the level of education required to perform the duties of the beneficiary’s subordinates such as the restaurant managers or chefs. In the director’s request for additional evidence, the director specifically requested information regarding the beneficiary’s employment abroad, including a list of employees in the beneficiary’s immediate division, department or team, a summary of their job duties, position requirements, education level, and salary. On appeal, the petitioner provided organizational charts for each restaurant managed by the beneficiary but failed to submit job duties for each position and education level. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Thus, the petitioner has not established that these employees possessed or required an advanced degree, such that they could be classified as professionals. Nor has the petitioner shown that these employees supervised subordinate staff members or manage a clearly defined department or function of the foreign company, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary’s subordinate

employees abroad are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The term "function manager" 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). 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. § 214.2(l)(3)(ii). 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)). In this matter, the petitioner has not provided evidence that the beneficiary managed an essential function for the foreign company.

In light of the foregoing discussion, the petitioner has not established that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

III. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reason. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.