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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

DATE **DEC 06 2013**

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

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 Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) rejected the petitioner's appeal and dismissed its subsequent motion to reopen. The matter is now before the AAO on a second motion to reopen. The motion to reopen will be granted and the appeal will be dismissed.

The petitioner is engaged in furniture distribution, and it seeks to employ the beneficiary as its Chief Financial Officer. 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 November 14, 2011, the director denied the petition concluding that the petitioner failed to establish: (1) that the beneficiary was employed by the petitioner's parent company for one full year prior to her admission to the United States as a nonimmigrant; (2) that the beneficiary was employed abroad in a managerial and executive capacity; or (3) that it would employ the beneficiary in a managerial or executive capacity. The director also noted in his decision several unresolved inconsistencies in the record that raised questions regarding the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

On December 20, 2012, the AAO rejected the appeal as untimely filed and subsequently dismissed the petitioner's motion. The petitioner subsequently filed the current motion to reopen with additional evidence. The AAO will grant the motion in order to consider the merits of the petitioner's appeal.

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 the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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 that 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. *See* 8 C.F.R. § 204.5(j)(5).

Pursuant to 8 C.F.R. § 204.5(j)(3)(i), a petition for a multinational manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

- (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.

Finally, 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 Issues on Appeal

A. Overseas Employment

The first issue to be addressed is whether the petitioner established that the petitioner provided evidence that the beneficiary was employed abroad for the requisite one year during the three years preceding her admission to the United States as a nonimmigrant in October 2009.

The director noted that the petitioner's claim that the beneficiary worked for the company abroad from February 18, 2008 until March 1, 2010 is inconsistent with the employment information the beneficiary provided when she applied for B1/B2 visa applications on June 26, 2008 and on July 9, 2009. The director advised the petitioner that, on the visa application submitted by the beneficiary to the U.S. Department of State on June 6, 2008, the beneficiary claimed that she was employed by [REDACTED]. Furthermore, on the visa application submitted by the beneficiary on July 9, 2009, she stated that her employer was [REDACTED] rather than the petitioner's claimed Chinese parent company, [REDACTED].

On appeal, counsel for the petitioner explained that the beneficiary "hired a local visa service agency to renew her visa every year." Counsel also stated that the beneficiary used to work with [REDACTED] and started working for the foreign company in February 2008. Counsel explained that when the beneficiary renewed her B1/B2 visa in June 2008, she did not update her employment information. Counsel further stated that "it was assumed that all information provided before remained accurate since she had successfully renewed her visa two times previously," with the visa service agency.

Counsel also explained the discrepancy on the visa application submitted in July 2009 as an error. Counsel contends that the beneficiary was employed by the foreign company and was offered new employment with [REDACTED]. When she applied for the visitor visa, she updated her employment information as [REDACTED] since she had already submitted a letter of resignation to the foreign company. However, once the foreign company offered her "a better job opportunity and higher compensation," the beneficiary decided to stay in her employment with the foreign company.

As evidence of the beneficiary's employment abroad with the foreign company, the petitioner submitted an "Appointment Certificate," dated February 18, 2008. The certificate states that "this is to appoint [the beneficiary] as Deputy Supervisor of Financial Department. Her employment term will be from February 18, 2008 to December 31, 2010." It is unclear how an appointment certificate written in February 18, 2008 can state the exact dates of employment the beneficiary worked at with the foreign company. In addition, it is unclear how the beneficiary signed the visa application in 2008 without noticing the claimed error with regard to the name of her foreign employer. Finally, it is not clear why the beneficiary indicated her prospective new employer on the visa application she submitted in July 2009 if she had not yet commenced employment with that company. At that time, she claimed that she was still working with the foreign employer and had only submitted her letter of resignation. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

On appeal, the petitioner does not provide any evidence to overcome the director's finding that the petitioner failed to establish that he beneficiary had the requisite one year of employment with the petitioner's parent company. Going on record without supporting documentary evidence is not

sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Accordingly, the appeal will be dismissed.

B. Employment in a Managerial or Executive Capacity

The remaining issues addressed by the director are whether the petitioner established that the beneficiary was employed abroad in a qualifying managerial or executive capacity, and whether she would be employed in the United States in a qualifying managerial or executive capacity.

In examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). Published case law clearly supports the pivotal role of a clearly defined 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 addition, USCIS reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the petitioner's business, the employment and remuneration of employees, as well as the job descriptions of the beneficiary's subordinates, if any, and any other facts contributing to a complete understanding of a beneficiary's actual role within a given entity.

The petitioner stated that the beneficiary held the position of Deputy Supervisor of Financial Department during her claimed period of employment with its parent company. The petitioner stated that the beneficiary assisted the company's Controller; formulated and improved the company's financial systems; supervised and controlled expenses; reviewed and audited accounting books; supervised accounting staff; reviewed annual financial reports; evaluated financial data for investment projects; and examined the release of financial data. However, due to the overly general and vague list of job duties, the AAO is unable to gain a meaningful understanding of how much time the beneficiary spent performing qualifying tasks versus those that would be deemed non-qualifying. Merely using the term "manage" to describe the beneficiary's function does not establish that the supervisory tasks the beneficiary performed were of a qualifying nature. 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 any detail or explanation of the beneficiary's activities in the course of her daily routine. The actual duties themselves will 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).

Further, as discussed above, there are unresolved inconsistencies in the record with respect to the beneficiary's dates of employment with the foreign entity. As the petitioner has not established that the beneficiary was employed by the foreign entity for one full year preceding her admission to the United States, it cannot meet the eligibility requirement at 8 C.F.R. § 204.5(j)(3)(i)(B) and the petition cannot be approved.

In addition, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity.

In support of the petition, the petitioner submitted a list of the beneficiary's proposed duties along with the percentage of time she would allocate to each area of responsibility. In response to the director's notice of intent to deny the petition, the petitioner provided a list of day-to-day tasks to be performed by the beneficiary which bore almost no resemblance to the position description provided at the time of filing. The tasks include, "prepare and review the afternoon meeting related documents or review financial reports submit [sic] by Accounting manager or other department manager"; "contact major customers, review sales reports provided by the department chief and provide comment or further instruction"; "meeting with Database administrator"; and, "make inspection tour to workshop and handle occurring onsite [sic]." These four duties are repeated for every day of the week. The petitioner did not explain why it requires its chief financial officer to tour the warehouse or meet with a database administrator on a daily basis. The vague and general job description provided by the petitioner does not convey a true understanding of the tasks performed by the beneficiary and whether the tasks performed are of a qualifying nature. 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

In addition, as noted in the director's denial decision, the Form I-140 states that the petitioner employs 89 individuals, and its organizational chart lists 91 employees. However, the company's quarterly tax returns show anywhere from 17 to 25 employees.

On appeal, counsel for the petitioner contends that "the number of employees on Form I-140 was also an overlook." Counsel states that the inconsistent information was a "typographical error." Claiming a typographical error is not sufficient information to overcome the director's concerns. On appeal, counsel contends that error is the sole reason for all of the inconsistencies noted in the director's decision. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

In summary, the petitioner has failed to provide sufficient evidence to establish that the beneficiary was employed abroad and that she would be employed in the United States in a qualifying managerial or executive capacity and based on these findings, the instant petition cannot be approved.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. 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 motion is granted. The appeal is dismissed.