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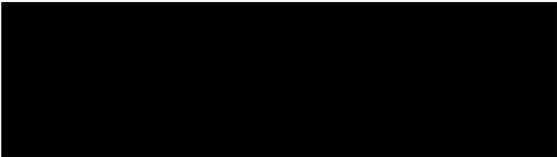
Petitioner:

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a professional services firm organization that seeks to permanently hire the beneficiary as a senior tax associate. 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. The director denied the petition concluding that the petitioner failed to establish that the beneficiary has been and would be employed in a managerial or executive capacity.

On appeal, counsel disputes the director's conclusions and submits a brief in support of her assertions.

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 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 issue in this proceeding is whether the beneficiary's duties abroad were primarily of a 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.

In a letter dated July 11, 2002, which was submitted in support of the petition, the petitioner stated that from 1993 to June 1997 the beneficiary was employed by the foreign entity in a "key managerial role." The petitioner illustrated the beneficiary's role abroad with the following description:

- Managing a portfolio of key client projects within the computer, information processing, publishing, manufacturing/retailing and hotel service industries, involving project selection, staff scheduling and monitoring completion date with respect to project budget;
- Coordinating the preparation of tax returns and tax computations, reviewing client tax provisions and rendering tax advice and conducting due diligence studies and special investigation projects;

- Provided recommendations for application of tax incentives with the Economic Development board of Singapore/Trade Development Board;
- Served as a liaison between the client and government organizations, made decisions for project plans and collected client project fees; and
- Coached, mentored and counseled tax staff, involving assignment of project duties, work product reviews and evaluations, led staff training and development activities, and provided recommendations for hiring and promotion decisions.

The petitioner also provided the following description of the beneficiary's proposed duties in the United States under an approved petition:

- Overseeing client service team and other third party consultants' work product, holding full budgetary and hiring responsibility for projects; and
- Overseeing quality assurance work product, involving project staff selection and scheduling, monitoring completion date with respect to the project budget, ensuring the adherence to firm's proprietary methodology and documentation, holding project budgetary responsibility;
- Managing, developing and maintaining strong client relationships/project management, ensuring customer satisfaction through high quality services deliverables, conducting client presentations and assisting head management executives with practice development activities; and
- Coaching and mentoring staff members, focusing on staff recruitment and retention, training and development of auditing staff, conduct[ing] staff appraisals and mak[ing] promotion recommendations.

The petitioner further indicated that the beneficiary has discretion over "the management and coordination of tax consulting projects, creatively solving complex business problems, and providing advice to top-tier clients for improvements involving their business operations."

In a notice, dated July 21, 2003, the director requested that the petitioner submit additional information regarding the beneficiary's position with the qualifying overseas entity. Namely, the petitioner was instructed to submit the foreign entity's organizational chart illustrating the managerial hierarchy and highlighting the beneficiary's specific position. The petitioner was also asked to specify whether any of the beneficiary's time was spent performing non-managerial duties and if so to indicate the percentage of time spent performing such duties.

In response, counsel submitted a letter dated August 18, 2003 with the following breakdown of the beneficiary's duties abroad:

- Client management and liaison with tax authorities = 30%

- Supervision of degreed professionals = 30%
- Budgetary planning for tax assignments (preparing budgets, billings, collections) = 20%
- Training and coaching = 15%
- Hiring and recruitment = 5%

The petitioner also submitted a letter dated June 3, 1997, which was presented with the petitioner's non-immigrant petition to classify the beneficiary as an L-1B intracompany transferee possessing specialized knowledge. In that letter the petitioner provided the following description of the beneficiary's duties with the foreign entity:

[The beneficiary] has been employed in the Singapore office as a [s]enior [t]ax [a]ssociate since 1993. In this capacity, she is responsible for managing a portfolio of key clients in the computer, information processing, publishing, manufacturing/retailing and hotel service industries. . . . [The beneficiary] prepares companies['] tax returns and tax computations, reviews companies['] tax provisions, renders tax advice . . . , deals with tax queries from the tax authorities and assists companies in their application for tax incentives In addition to handling Singapore tax compliance matters, [the beneficiary] also handles cases of Malaysian and Brunei tax compliance matters. Further, she has been involved in cases of due diligence study and special investigation projects. . . . Finally, [the beneficiary] is also responsible for the training and supervision of junior staff.

In addition, the petitioner complied with the director's request for the foreign entity's organizational chart, which illustrated five tiers within the foreign company's personnel hierarchy. The petitioner listed the company's partners at the top of the hierarchy followed by the tax managers. Directly subordinate to the tax managers are the senior tax associates (one of whom was the beneficiary), followed by the associates. At the bottom of the organizational structure are the company's interns.

On October 7, 2003, the director denied the petition concluding that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. The director noted that when the petitioner submitted the initial petition to classify the beneficiary as an L-1B intracompany transferee, the description of the beneficiary's duties abroad differed from the description provided with the current I-140 petition.

On appeal, counsel accounts for the difference between the two petitions by focusing on the fact that the non-immigrant petition was meant to classify the beneficiary as a specialized knowledge individual, while the current immigrant petition seeks to classify the beneficiary as a multinational manager or executive. While the difference in the types of petitions is noted by the AAO, the fact remains that the beneficiary's duties abroad would have been the same, regardless of which petition has been or currently is being filed in the United States. In the instant case, the supporting statement submitted with the initial I-129S petition suggests that the beneficiary provided accounting services for the foreign entity. While the foreign entity's associates may be deemed professional employees, there is no indication that the beneficiary's primary duty was to manage these individuals. Nor is there any evidence to suggest that the beneficiary managed an essential

function. 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, 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. 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 employed in a managerial or executive capacity. *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. 1988)). In this matter, the petitioner's description of the beneficiary's duties as provided in support of the non-immigrant petition suggests that the beneficiary was primarily performing duties associated with the foreign entity's essential function, which was to provide tax advice and other types of consulting services to its clientele.

The AAO notes that the petitioner provided a percentage breakdown of the beneficiary's duties in response to the director's request for additional evidence. The AAO also acknowledges that this more recent job description indicates that approximately 50% of the beneficiary's time would be spent performing duties that are directly related to the supervision of personnel, which is comprised of professional employees. However, even if 50% of the beneficiary's time was spent supervising professional employees, the petitioner indicates that the remaining 50% of the beneficiary's time was spent actually providing tax-related services to the foreign entity's clients. Based on this breakdown of duties, it cannot be concluded that the beneficiary *primarily* performed managerial or executive duties during her employment with the overseas entity. Furthermore, 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). The fact that the petitioner's description of the beneficiary's duties abroad differs significantly from one petition to another leads the AAO to question what the beneficiary was actually doing and whether she was employed abroad in a qualifying capacity as claimed.

On appeal, counsel provides an additional description of the beneficiary's duties abroad claiming that the beneficiary supervised the work of up to eight professional employees and indicates that the beneficiary assigned non-qualifying tasks to her subordinates. However, the statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). In the instant case, the percentage breakdown submitted in response to the request for evidence indicates that only 50% of the beneficiary's overseas employment involved personnel management, while counsel claims on appeal that the beneficiary's primary focus during her employment abroad was supervising, mentoring, and assigning tasks to professional employees that were her subordinates. After comparing the different descriptions of the beneficiary's duties, it appears that counsel's description on appeal differs significantly from the descriptions provided earlier by the petitioner. While counsel's description more accurately illustrates the job duties of a manager, the record does not establish that this description is an accurate illustration of the duties actually performed by the beneficiary during her employment overseas. It is noted that a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to Citizenship and Immigration

Services' (CIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Thus, the supplemental description provided by counsel on appeal will not serve to overcome the director's objections. Although counsel cites a previously issued AAO decision in support of the appeal, the decision cited is unpublished and is therefore not binding on CIS employees. *See* 8 C.F.R. § 103.3(c).

In examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the instant case, the various descriptions of the beneficiary's job duties indicate that the beneficiary's position abroad required the beneficiary to spend at least as much time performing the company's essential functions as she spent supervising and delegating duties to other employees. Therefore, based on the evidence of record, the AAO cannot conclude that the beneficiary *primarily* performed managerial or executive duties during her overseas employment. For this reason this petition cannot be approved.

In addition, counsel states on appeal that the director's denial focused only on the beneficiary's duties abroad, thereby indicating that the petitioner adequately demonstrated that the beneficiary's proposed employment in the United States would be of a qualifying nature. However, contrary to counsel's assumption, the director's omission of a key issue is not indicative of an affirmation that the petitioner has met its statutory burden in its entirety. It is noted that an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). Therefore, beyond the decision of the director, the AAO concludes that the petitioner's description of the beneficiary's proposed duties in the United States fail to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. The petitioner's description of the beneficiary's proposed duties is much too broad and fails to convey an understanding of what the beneficiary would actually be doing on a day-to-day basis. 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). The description of duties also suggests that the beneficiary would continue to carry out the petitioner's essential function by providing consulting services to the petitioner's clientele. As previously stated, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. at 604. The evidence of record does not sufficiently demonstrate that the beneficiary would primarily perform managerial or executive duties in the United States. For this additional reason, the AAO cannot approve the petition in the instant matter.

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.