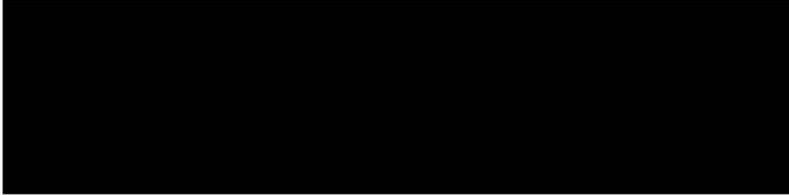


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Office: VERMONT SERVICE CENTER

Date: **MAY 18 2007**

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Petitioner:  
Beneficiary:



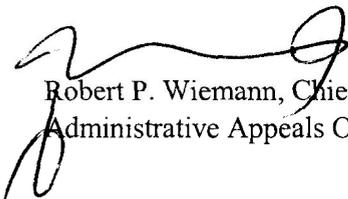
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the employment-based immigrant petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner, a New York corporation, is an international management consulting firm established in 1926. It seeks to employ the beneficiary as a management consultant. 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 on November 22, 2005, determining that the petitioner had not established: (1) that the beneficiary had been employed abroad in a primarily managerial or executive capacity prior to entering the U.S. as a nonimmigrant to work for the petitioner; or (2) that the beneficiary would be employed by the U.S. company in a primarily managerial or executive capacity. The director noted that the petitioner's response to the director's request for evidence consisted of an unsupported statement from an individual identified as "Immigration Counsel" for the petitioning company, despite the director's instruction that an attorney's synopsis of the beneficiary's former and current duties would not be sufficient. The director, citing *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988) and *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980), stated that the assertions of counsel do not constitute evidence, and therefore found that the petitioner had failed to submit the specific evidence requested with respect to the beneficiary's employment capacity with the foreign and U.S. entities.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the petitioner's response to the request for evidence was prepared by an employee of the petitioning company who holds the internal position title of "Immigration Counsel." Counsel submits that the petitioner's employee, notwithstanding her job title, is authorized to present facts to U.S. Citizenship and Immigration Services (USCIS), and her response did not amount to an "attorney's synopsis of the beneficiary's job duties," as suggested by the director. Counsel requests that the petition and supporting evidence be reviewed on their merits. Counsel submits a detailed brief and documentary evidence in support of the appeal.

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).

Preliminarily, the AAO will review the issue of whether the director properly determined that no evidentiary weight should be given to the petitioner's response to the director's request for evidence. As noted above, the director found that the petitioner's response consisted solely of the unsupported assertions of counsel, and citing *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988) and *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980), declined to consider the merits of the petitioner's response to the directors' request. Therefore, the director denied the petition for lack of evidence of eligibility.

The director issued the request for evidence on July 28, 2005, requesting more detailed information regarding the beneficiary's employment capacity as a management consultant with the foreign entity, and the responsibilities to be performed in his proposed role as a management consultant for the U.S. company. The director requested specific evidence with respect to each role, and advised the petitioner as follows: "Please note that an attorney's synopsis of the alleged duties of the beneficiary abroad or in the United States will not suffice in this regard."

The petitioner submitted a response received on October 24, 2005, which consisted of: (1) a brief cover letter from external immigration counsel, dated October 21, 2005; (2) a seven-page letter on the petitioner's company letterhead detailing the beneficiary's duties during his employment as a management consultant with the foreign and U.S. entities, signed on behalf of the petitioner by an individual identified as "Immigration Counsel," and referring any further requests to the external law firm representing the petitioner; and (3) a "Power of Attorney to Sign Immigration Materials," wherein the petitioner's "Immigration Counsel" attests to the truth and accuracy of information contained in immigration-related forms, and appoints external counsel as attorney-in-fact to sign on her behalf "all papers, documents, and forms requiring [her] signature, to be submitted in connection with all filings with the United States Citizenship and Immigration Services."

At the conclusion of its October 21, 2005 letter, the petitioner specifically acknowledged the director's instruction that the petitioner not submit an attorney's synopsis of the beneficiary's duties. The petitioner stated:

We wish to take this opportunity to clarify that our response was prepared by [the petitioner], and was not simply an attorney synopsis, as stated in your notice of action. The undersigned is an internal employee of [the petitioner] and as such is authorized by the firm to present

facts to USCIS. Although the undersigned is an attorney, my signature is on behalf of [the petitioner] as an employee of the firm.

On appeal, counsel for the petitioner distinguishes the facts of this case from those of *Matter of Ramirez-Sanchez* and *Matter of Obaigbena*, noting that both cases apply to the assertions of hired, external counsel. Counsel asserts that as an employee of the petitioner, the petitioner's internal immigration counsel "possesses factual knowledge of the positions and job duties and is clearly authorized and designated by [the petitioner] to present facts to USCIS." Counsel concludes that "there is nothing in the law that prohibits a petitioner from submitting written statements by an employee of the company with knowledge of the facts, simply because that employee is also an attorney."

Counsel's assertions are persuasive. The facts of this case are clearly distinguishable from established case law prohibiting the consideration of the unsupported assertions of counsel as evidence. The petitioner should not be prejudiced simply because its designated internal representative for immigration matters happens to be an attorney. Accordingly, the director should have reviewed the merits of the petitioner's response to the request for evidence, rather than denying the petition based upon a lack of evidence of eligibility. Therefore, the director's decision dated June 26, 2006 is withdrawn.

The AAO notes that counsel filed this matter as a motion to reopen and reconsider, yet the director declined to reopen the matter and forwarded to the AAO to be treated as an appeal. As the AAO's review is conducted on a *de novo* basis, the AAO will herein address the petitioner's evidence and eligibility. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The substantive grounds for denial in this matter surround the beneficiary's employment capacity. Therefore the issues to be discussed are whether the beneficiary was previously employed by the foreign entity in a managerial capacity, and whether the U.S. petitioner would employ him in a managerial capacity, specifically as a function manager. The petitioner does not claim that the beneficiary has been or would be employed in an executive capacity. As the petitioner indicates that the beneficiary performed essentially the same duties for both the foreign and U.S. companies and has been continuously employed in the position of management consultant, the AAO will discuss the beneficiary's employment capacity with both entities concurrently.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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.

The immigrant petition was filed on April 14, 2005. The petitioner indicated its intention to employ the beneficiary as a management consultant at an annual base salary of \$132,000, and provided evidence that he received compensation in the amount of \$160,333, in 2004. The petitioner described itself as an international management consulting firm whose function is to "assist the management of corporations, government entities and charitable organizations worldwide in solving major business problems." In a supporting letter dated March 31, 2005, the petitioner stated that while employed with the petitioner's Singapore branch office as a management consultant, the beneficiary performed both "functional managerial responsibilities in the form of project planning, project management and resource deployment management as well as people management in the form of leading and guiding both client and [company] teams to achieve their respective goals on the studies." The petitioner also provided a summary of projects managed by the beneficiary while employed by the foreign entity, noting that he exercised discretionary authority over the control of his assigned projects, and managed day-to-day activities performed by members of client and internal consulting teams reporting to him. The petitioner further stated that the offered U.S. position of management consultant also involves managerial responsibility over various client management consulting engagements, involving duties similar to those he performed with the overseas entity. The petitioner provided a brief description of three projects managed by the beneficiary since his transfer to the United States in L-1A status in 2004.

As noted above, the director issued a request for evidence on July 28, 2005, in part, instructing the petitioner to submit: additional information regarding the management and personnel structure of the foreign and U.S. entities; information regarding the job titles and job duties of the employees managed by the beneficiary in both positions; an explanation as to how the beneficiary's time has been and would be divided among managerial and non-managerial duties; and the degree of discretionary authority over day-to-day operations exercised by the beneficiary.

In a response letter dated October 21, 2005, the petitioner further described the beneficiary's role as a management consultant as follows:

[Throughout] the beneficiary's tenure in the position of Management Consultant with [the petitioner and foreign entity], he has served as a senior level manager in each engagement project in which he was involved, maintaining independent autonomy and discretion over project planning, project management, resource deployment management, and management of other professional employees.

Please note that as a management consulting firm, [the petitioner] provides consulting and advice regarding business strategies to our clients; we do not simply supply professionals in different fields to clients. Our goal at [the petitioner] is to help our clients achieve substantial,

lasting improvements in their performance. We work jointly with our clients and our firm never performs job duties that can be performed by the client's employees.

In a typical engagement at [the petitioning organization], [the beneficiary] leads a team composed of various professional-level employees, all of whom report to [the beneficiary]. The team size varies upon the size and complexity of the project ranging from five to thirty subordinate supervisors. However, in general, a team might be composed of: a Management Consultant ([the beneficiary]) who leads the entire project and all team members; Associate Management Consultant(s) (1-2 [year] tenures, employed post-PhD or MBA degree), Junior Associate Management Consultant(s) (1-2 [year] tenures, employed post-MBA but without significant work experience), Business Analyst(s) (1-3 [year] tenures employed straight after undergraduate degrees). The team will also have a Team Assistant, as well as support from visual aid and research specialists, the latter of whom are degreed professionals. These team members are managed by the lead Management Consultant ([the beneficiary]), but report to other professional members of the team.

The petitioner provided job descriptions for the positions of associate, junior associate, business analyst, team assistant, visual aid assistant and research specialist, and described each position's role within a typical client engagement project. The petitioner stated that the position descriptions for the beneficiary's subordinates clearly show that the beneficiary does not primarily perform the tasks necessary to provide the petitioner's services to clients but rather guides professionals who perform these tasks.

The petitioner asserted that the beneficiary devotes 100 percent of his time to performing managerial duties, acting as the leader of his team for every engagement he manages, once an initial assessment of the client's business performance is completed. In response to the director's request for evidence regarding the extent of the beneficiary's discretionary authority, the petitioner stated:

[The beneficiary] in his current and previous role as Management Consultant, exercised discretionary authority over operations and supervises all day-to-day activities on the engagement for the [petitioner's] team of Consultants (Associates and Analysts). He also manages activities of client team members; guides team members on their respective pieces/analyses, but primarily concentrates on the overall picture; has discretion over leave authorization for [the petitioner's] team members; is directly responsible for evaluations for all [company] team members on study. Overall evaluation ratings for year-end performance, including bonus/compensation, promotions, and exit counseling/fire decisions are based on each study/evaluation, such as those written by [the beneficiary] for each team member on his studies.

Upon review of the petition and the evidence on record, the petitioner has established that the beneficiary was previously employed by the foreign entity, and will be employed by the petitioning entity, in a primarily managerial capacity, specifically as a function manager.

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. The term "essential" is commonly defined as "inherent" or "indispensable." *Webster's II New College Dictionary* 384 (2001). Accordingly, based on the plain meaning of the word "essential," the petitioner must establish that the function managed by the beneficiary is inherent and indispensable to the petitioner's operations rather than a non-essential or superfluous task.

Based on the statutory definition of managerial capacity, a petitioner must prove the following elements to establish that a beneficiary is primarily serving as a function manager within an organization:

First, the beneficiary must manage an "essential function" within the organization, or a department or subdivision of the organization;

Second, the beneficiary must function at a "senior level" within the organizational hierarchy or with respect to the function managed; and

Third, the beneficiary must control and "exercise discretion" over the day-to-day operations of the function.

See sections 101(a)(44)(A)(ii), (iii), and (iv) of the Act.

When 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. § 214.2(l)(3)(ii). If a petitioner claims that the beneficiary is primarily managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in that capacity, 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. In addition, the petitioner's description of the beneficiary's daily duties must clearly demonstrate that the beneficiary primarily *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. *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm. 1988); see also, *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991); *Boyang Ltd. v. INS*, 67 F.3d 305 (Table), 1995 WL 576839 at \*5 (9th Cir. 1995 (unpublished))(citing to *Matter of Church Scientology Int'l*. and finding an employee who primarily performs operational tasks is not a managerial or executive employee).

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In the case of a function manager, where subordinates may not be directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's organizational structure, the scope of the beneficiary's authority and its impact on the petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

In this matter, upon review of the totality of the record, the petitioner has established that the beneficiary has been and would be primarily serving as a function manager. First, the AAO is satisfied that the beneficiary's role within the organization is that of a manager of an "essential function," specifically, individual client engagement projects which constitute the central purpose of the petitioning organization. The petitioner in this case derives its income from providing complex business consulting services to leading global corporations, government entities, and other organizations. Within the scope of the petitioner's business, it is clear that the function of managing individual client engagement projects is an "inherent" or "indispensable" function, and therefore, an "essential" function as required by the plain language of the statute.

Second, the petitioner has established that the beneficiary functions at a "senior level" with respect to the projects he manages. In performing his daily activities, the beneficiary works closely with management-level staff within client companies, and leads internal project teams composed of professional employees. The petitioner has established that the beneficiary occupies the senior position with respect to the client projects he manages, with accountability for managing the planning, coordination and delivery of assigned projects, and determining the strategies and goals for each project.

Third, the petitioner has established that the beneficiary "exercises discretion" over the day-to-day operations of the function in that he controls a broad range of activities associated with managing his assigned projects. Finally, although the director concluded that the beneficiary primarily provides the services of the petitioning organization, the petitioner has submitted sufficient evidence to establish that the projects managed by the beneficiary are staffed with lower-level consultants, analysts, researchers, and support staff, leaving the beneficiary free to primarily engage in developing project strategies and goals and overseeing execution of the client projects by lower-level professional employees. The AAO is satisfied that the beneficiary primarily manages, rather than performs, the function.

Finally, the AAO notes that while a function manager is not required to directly supervise personnel, the evidence of record indicates that the beneficiary does regularly supervise teams of professionals, although he has no permanent subordinate staff. While the beneficiary does not appear to have the authority to hire personnel, it appears that he does have the authority to recommend personnel actions, such as promotion and leave authorization, as well as perform personnel evaluations that impact firing decisions. Accordingly, the beneficiary could also meet the statutory requirements for a personnel manager set forth at section 101(a)(44)(A) of the Act.

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. For the foregoing reasons the decision of the director will be withdrawn and the petition will be approved.

**ORDER:** The appeal is sustained.