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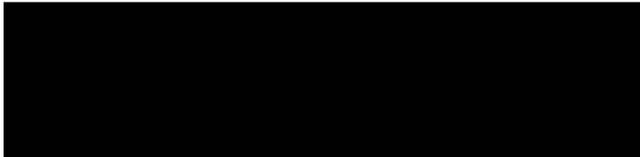
Date: NOV 03 2008

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:

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, 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, an Ohio corporation, is a chemical business which claims to have a qualifying relationship with Noveon Europe BVBA., the beneficiary's foreign employer. 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 or will be employed in a primarily managerial or executive capacity.

On appeal, counsel to the petitioner disputes the director's findings, asserts that the beneficiary will perform, and has performed, primarily the duties of a "function" manager, and submits a brief. Counsel also argues that the director was required by section 204(j) of the Act, 8 U.S.C. § 1154(j), as added by the American Competitiveness in the Twenty First Century Act of 2000 (AC21), to consider the job duties assigned to the beneficiary after the filing of the petition because these duties pertain to a position which is the "same or similar" to that described in the initial Form I-140.

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.

Title 8 C.F.R. § 204.5(j)(3) explains that a petition filed for a multinational executive or manager under section 203(b)(1)(C) 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.

The first issue in this proceeding is whether the petitioner provided sufficient evidence to establish that the beneficiary was employed abroad in a primarily 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.

The petitioner described the beneficiary's job duties abroad as a "financial analyst" in a letter dated July 28, 2006 as follows:

In this position, [the beneficiary] prepared and coordinated Europe, Middle East and Africa ("EMEA") Business Review packages for several European divisions including pharmaceuticals, resins and polymers, reporting to both EMEA Business Director and Global Finance Director. He monitored divisional income statements, balanced sheets, and cash flow statements to guarantee integrity of financials and prepared full annual budgets and long range forecasts (strategic plans). He also performed ad-hoc assignments on a project basis for several European initiatives, including project Breakthrough Europe, Corporate Segment Reporting, EMEA Forecasting and preparing total European Business Review.

On July 18, 2007, the director requested additional evidence. The director requested, *inter alia*, a more detailed job description for the beneficiary, an organizational chart, and descriptions of the duties of any subordinates.

In response, the petitioner submitted a letter dated August 22, 2007 in which counsel describes the beneficiary as a "function manager" having the following duties:

- preparing and coordinating EMEA Business Review packages for several European divisions including pharmaceuticals, resins, polymers and textiles (30%);
- serving as "business partner" to regional business managers, understanding business strategic direction and assisting in goal setting with [global business unit] leadership (30%);
- monitoring performance at the business unit level of EBITDA, Income Statement, Balance Sheet, and Funds Flow and provided timely, concise, and actionable information to both the EMEA Business Director and Global Finance Director (10%);
- performing financial analysis for capital investments including cash flow forecast (NPV and MIRR studies) (10%);
- assisting in and monitoring the coordination, development, review, analysis, consolidation and packaging of the annual Operating Plan and any Long-range Forecasts (strategic plans) and supporting interim forecasts as required (10%);
- tracking orders and integrated information from Manufacturing Plants, Sourcing & Supply Chain, Operations Finance, Segment Accounting, etc., to forecast near-term results (5%); and
- developing "rolling-forecast" methodology to accommodate update requests and interpreted monthly results (research, understand, and explain variances) (5%) [.]

The petitioner also submitted organizational charts for the foreign employer. The charts do not depict the beneficiary as having any supervisory or managerial authority over subordinate employees.

On October 18, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary was employed abroad in a primarily managerial or executive capacity.

On appeal, counsel to the petitioner asserts that the director erred and that the beneficiary performed primarily the duties of a "function" manager.

Upon review, counsel's assertions are not persuasive in establishing that the beneficiary was employed abroad in a primarily managerial or executive capacity.

In examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). 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).

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary acted in a "managerial" or "executive" capacity. To the contrary, it appears that the beneficiary primarily performed non-qualifying administrative or operational tasks which do not rise to the level of being managerial or executive in nature. For example, in performing the duties of a "financial analyst," the petitioner claims that the beneficiary devoted most of his time to "preparing and coordinating" business review packages, performing financial analysis, assisting in and monitoring the development of operating

plan and forecasts, tracking orders and information to forecast results, and developing "rolling-forecast" methodology. The petitioner also claims that the beneficiary served "as 'business partner' to regional business managers, understanding business strategic direction and assisting in goal setting." However, these financial-related duties appear to be non-qualifying administrative or operational tasks. Likewise, the petitioner has failed to establish that serving as a "business partner" or "understanding business strategic direction and assisting in goal setting" constitutes a bona fide managerial or executive duty. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Accordingly, it appears that the beneficiary devoted virtually all of his time to performing essential operational and administrative financial tasks. The fact that the petitioner has given the beneficiary a managerial or executive title does not establish that the beneficiary actually performed managerial or executive duties. An employee who "primarily" performed 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).

Furthermore, the petitioner has also failed to establish that the beneficiary supervised and controlled the work of other supervisory, managerial, or professional employees, or managed an essential function of the organization. As noted above, it does not appear as if the beneficiary had any direct supervisory or managerial responsibilities over other employees. Moreover, the record is not persuasive in establishing that the beneficiary managed an essential function of the organization. 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. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary managed an essential function, the petitioner must furnish a job description that clearly describes the duties 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. §§ 204.5(j)(2) and (5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary managed the function rather than performed the tasks related to the function.

In this matter, the petitioner has not provided evidence that the beneficiary managed an essential function. As explained above, the record indicates that the beneficiary more likely than not primarily performed the non-qualifying financial tasks related to the function. Although the petitioner vaguely describes the beneficiary as "monitoring" and "coordinating" the performance of tasks related to the purported function, the petitioner failed to describe with specificity how, exactly, the beneficiary was relieved from performing the non-qualifying financial-related tasks inherent to his job duties. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties were managerial, if any, nor can it deduce whether the beneficiary was primarily performing the duties of a function manager. See generally *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). Accordingly, the petitioner has not established that the beneficiary was employed primarily in a managerial capacity.

Similarly, the petitioner has failed to establish that the beneficiary acted in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary acted primarily in an executive capacity. As explained above, it appears more likely than not that the beneficiary primarily performed non-qualifying administrative or operational tasks as a financial analyst. Therefore, the petitioner has not established that the beneficiary was employed primarily in an executive capacity.

Accordingly, the petitioner has failed to establish that the beneficiary primarily performed managerial or executive duties abroad, and the petition may not be approved for that reason.

The second issue in the present matter with whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive position.

The petitioner described the beneficiary's duties in the United States as "finance manager" in the July 28, 2006 letter as follows:

[The beneficiary] directs and coordinates the financial activities of [the petitioner's] Performance & Coatings/Textiles Unit. Specifically, [the beneficiary] monitors performance of the Paint & Coatings business unit income statement, balance sheet, and funds flow. He provides timely, concise, and actionable information to Senior Management. He also proactively tracks orders and integrates information from Supply Chain, Operations Finance, Corporate Accounting, etc., to forecast near-term results. He develops "rolling-forecast" methodology to accommodate update requests. He interprets monthly results. He also researches, understands, and explains variances. He integrates [global business unit] financials globally. He works with manufacturing plants in Europe/Asia Pacific and their Finance teams. He also assists in the coordination, development, review, and analysis of the Paint & Coatings "liaison" to support [the petitioning organization's] analysts. He assists development of financial metrics and enhanced reporting which support informed decisions and overall improved business execution. He also "validates" results and ensures key metrics and presents an accurate portrayal of product and business performance. He works with Sales and Marketing teams on sales proposals, product pricing, terms and negotiations. Finally, he handles special projects as assigned.

On July 18, 2007, the director requested additional evidence. The director requested, *inter alia*, a more detailed job description for the beneficiary, an organizational chart, and descriptions of the duties of any subordinates.

In response, counsel submitted a letter dated August 27, 2007, in which he asserts that the beneficiary "has recently been assigned the new functional manager position of Manager, Investor Relations." Relying on AC21, counsel argues that the instant petition "remains valid as this position is the 'same or similar' to his previous position of Finance Manager," and, thus, CIS should consider these new job duties in determining the beneficiary's eligibility for the benefit sought as the concurrently filed Form I-485 has been pending for more than six months.

The petitioner also claims in the letter dated August 22, 2007 that the beneficiary's duties in the United States as "finance manager" were similar to his duties abroad, and that he performed the following additional duties:

[The beneficiary] was responsible for the coordination, development, review and analysis of the annual Operating and Strategic Plans (e.g., for Textile Coatings, \$150M annual sales). He supported interim forecasts as required and provided "liaison" support to [petitioning organization] analysts. He also assisted in the development of financial metrics and enhanced reporting which supported informed decisions and overall improved business execution. He was responsible for validating results to ensure key metrics and accurate portrayal of product and business performance. He collaborated with Sales and Marketing teams on sales proposals, product pricing, terms and negotiations.

The petitioner also described the duties ascribed to the beneficiary after his purported promotions to "Manager, Financial Planning and Analysis" and "Manager, Investor Relations." However, as noted above, the beneficiary assumed these positions and corresponding duties after the filing of the instant petition.

The petitioner also submitted organizational charts for the United States operation. However, the beneficiary's position as described in the initial petition, i.e., finance manager, is not clearly depicted in these charts. It does not appear as if the beneficiary will supervise any subordinate workers in the United States as a "finance manager."

On October 18, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. The director also noted that the duties and positions ascribed to the beneficiary after the filing of the petition "may not be considered when determining the beneficiary's eligibility for the benefit sought." Instead, the petitioner must establish that the beneficiary possesses "the necessary qualification[s] as of the filing date of the visa petition." *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Accordingly, the director only considered the beneficiary's position as "finance manager" in concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity.

On appeal, counsel to the petitioner asserts that the director erred and that the beneficiary will perform primarily the duties of a "function" manager. Counsel also argues that the director was required by AC21 to

consider the job duties assigned to the beneficiary after the filing of the petition because (1) these duties pertain to a position which is the "same or similar" to that described in the initial Form I-140; and (2) the concurrently filed Form I-485 has been pending for more than six months.

Upon review, counsel's assertions are not persuasive in establishing that the beneficiary will be employed in a primarily managerial or executive capacity.

As a threshold issue, it is noted that counsel's reliance on AC21 in this matter is misplaced.

Section 106(c) of AC21 added the following to section 204(j) to the Act:

Job Flexibility for Long Delayed Applicants for Adjustment of Status to Permanent Residence.-
A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

Section 204(j) of the Act, 8 U.S.C. § 1154(j).

Counsel argues that this provision permits a petitioner to offer a new "same or similar" job to a beneficiary after the filing of a Form I-140 and, if a concurrently filed Form I-485 has been pending for more than six months, CIS is required to consider these new job duties in determining whether a beneficiary will be employed in a managerial or executive capacity. The AAO disagrees with counsel on the scope of AC21. The statute clearly states that petitions "shall remain valid," thus limiting its scope to petitions which have already been approved by CIS. Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). AC21 does not serve to overturn the longstanding principle that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. at 49. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Therefore, the petitioner must establish eligibility based on the position offered to the beneficiary at the time the petition was filed. Under AC21, if this petition is ultimately approved and the concurrently filed Form I-485 remains unadjudicated for longer than six months, the petitioner, or another employer, may offer a "same or similar" position to the beneficiary without affecting the validity of the approved Form I-140 petition and the applicant's eligibility to adjust status to that of a permanent resident in the United States. However, AC21 does not permit a petitioner to offer a new position to the beneficiary, and compel CIS to consider this new position, without first filing a new petition.

Accordingly, the director properly considered the beneficiary's job duties as a "finance manager" in determining whether the petitioner established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

In view of the above, and as explained above, 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). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. At 1108, *aff'd*, 905 F.2d 41.

In this matter, and similar to the position abroad, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary will act in a "managerial" or "executive" capacity. To the contrary, it appears that the beneficiary will primarily perform non-qualifying administrative or operational tasks which do not rise to the level of being managerial or executive in nature. For example, in performing the duties of a "finance manager," the petitioner claims that the beneficiary will have duties "similar" to his foreign duties and, thus, will devote most of his time to performing non-qualifying financial tasks. *See supra*. Furthermore, the petitioner claims that the beneficiary "directs and coordinates" financial activities; monitors income statements, balance sheets, and funds flow performance; advises management; tracks orders and integrates information to forecast results; develops forecast methodology; interprets monthly results; researches and explains variances; integrates financials globally; "works with" finance teams; assists in the "coordination, development, review, and analysis of the Paint & Coatings 'liaison' to support" analysts; assists development of financial metrics and enhanced reporting; validates results and ensures key metrics and presents an accurate portrayal of product and business performance; "works with" sales and marketing teams on proposals, product pricing, terms and negotiations; and handles "special projects as assigned." However, these financial-related duties appear to be non-qualifying administrative or operational tasks as it has not been established that any of these duties constitutes a bona fide managerial or executive duty. Once again, 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). Accordingly, it appears more likely than not that the beneficiary will devote virtually all of his time to performing essential operational and administrative financial tasks. The fact that the petitioner has given the beneficiary a managerial or executive title does not establish that the beneficiary will actually perform managerial or executive duties. An employee who "primarily" performed 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; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

Furthermore, the petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As noted above, it does not appear as if the beneficiary will have any direct supervisory or managerial responsibilities over other employees. Moreover, the record is not persuasive in establishing that the beneficiary will manage an essential function of the organization. As explained above, 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. As noted above, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary will manage the function rather than perform the tasks related to the function.

In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. As explained above, the record indicates that the beneficiary will more likely than not primarily perform the non-qualifying financial tasks related to the function. Although the petitioner vaguely describes the beneficiary as "directing" and "coordinating" the performance of tasks related to the purported function, and "working with" various colleagues, the petitioner failed to describe with specificity how, exactly, the beneficiary will be relieved from performing the non-qualifying financial-related tasks inherent to his job duties. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties will be managerial, if any, nor can it deduce whether the beneficiary will primarily perform the duties of a function manager. *See generally IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d at 24. Accordingly, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.

Similarly, the petitioner has failed to establish that the beneficiary acted in an "executive" capacity. As explained above, it appears more likely than not that the beneficiary will primarily perform non-qualifying administrative or operational tasks as a finance manager. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

Accordingly, the petitioner has failed to establish that the beneficiary will primarily perform managerial or executive duties, and the petition may not be approved for that reason.

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.