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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

B4



FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER
LIN 07 030 50033

Date: **APR 06 2009**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting 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 is a Delaware corporation engaged in the development of real estate. It seeks to employ the beneficiary as its country manager/vice president. 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 based on the conclusion that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On appeal, counsel disputes the director's conclusions and submits a brief in support of her assertions. A comprehensive discussion of the director's findings and counsel's appellate brief is provided below.

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.

The primary issue in this proceeding calls for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the Form I-140, the petitioner submitted a letter dated October 4, 2006, stating that it is in the process of expanding its business by hiring additional personnel. Although the petitioner claimed that various qualified candidates have been extended job offers, Part 5, No. 2 of the Form I-140 indicates that the petitioner had only one employee at the time of filing. As such, any additional job duties the beneficiary would perform as a result of the petitioner's expanding its personnel structure would not have applied at the time of filing and need not be considered for purposes of determining the eligibility of the petitioner in the present matter. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971), stating that eligibility must be established at the time of filing. The petitioner further stated that in the meantime, the beneficiary would continue to perform the following job duties:

[The beneficiary] has been in charge of the daily operations of the U.S. subsidiary (functioning autonomously) and bears ultimate responsibility for the business development effort to find new potential customers In a first phase, [the beneficiary] has focused on (i) helping our subsidiaries to push deals through with existing leads for U.S. companies where we experience that headquarters in the U.S. are slowing down the decision-making process[;] (ii) generate transactions/leads with U.S. companies directly (only for European development)[;] and (iii) assist/coordinate activities with these companies during the construction phase. [The beneficiary] has also independently identified potential customers and undertook the necessary steps which should ultimately lead to a transaction.

In this respect, he has attended numerous industry conferences, spoke at various seminars, organized our own conferences where we invite industry specialists, and established contacts and business relationships with all the foreign investment agencies of the European countries where we are actively developing projects. He has also taken all the marketing initiatives he deemed necessary in order to achieve "name recognition of [the petitioner]" for companies that need to establish, consolidate or restructure their distribution needs in Europe. He is the senior[-]level person in the U.S. organization responsible for expanding, organizing, directing, and developing the capabilities of [the petitioner] in the U.S.

On July 30, 2007, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a more detailed description of the beneficiary's proposed job duties. The director quoted significant portions of the job description as provided in the October 2006 support letter and asked the petitioner to fully explain the specific tasks that would be performed and to assign an approximate percentage of time to each task.

In response, the petitioner provided a letter dated September 12, 2007 from [REDACTED], president of the petitioning entity, who explained that the beneficiary's position in the United States is comprised of two key responsibilities: 1) finding potential development projects; and 2) assisting his colleagues at the various European subsidiaries with closing leads in potential projects involving the U.S. entity. [REDACTED] further stated that the beneficiary would fulfill these responsibilities by doing any of the following: 1) targeting the headquarters of Fortune 500 companies by organizing "road shows;" 2) creating a "cold calling program" aimed at companies with specialized marketing/business development agencies; or 3) representing the petitioner at industry conferences

and trade organizations and attending special events. [REDACTED] described the beneficiary as the "bridge" between the U.S. petitioner and the European headquarters of potential U.S. clientele. The following percentage breakdown of the beneficiary's proposed U.S. employment was also provided:

- Establishing leads with U[.]S[.] companies directly (including business travel, contacting other executives, preparing presentations, implement and supervising "cold calling initiatives[.]") 35%
- Assisting colleagues in various countries to realize real estate projects in Europe (bridging U[.]S[.] executives and local teams)[.] 20%
- Day-to-day management of U[.]S[.] operations[.] 15%
- Focus on expansion of our activities and team in the U[.]S[.] (performing market studies, establishing contacts with potential acquisition or JV targets, [and] execution thereof)[.] 30%

The director denied the petition in a decision dated March 11, 2008, finding that the description of the beneficiary's proposed employment suggests that the beneficiary would be performing the tasks of a salesperson or marketing representative rather than those of a multinational manager or executive. The director further noted that the beneficiary's job duties do not indicate that he would be managing an organization or supervising the work of professionals.

On appeal, counsel asserts that the beneficiary directs the petitioner's marketing department, explaining that the beneficiary is availed the opportunity to seek the assistance of "the matrix organization of the companies' support departments at the European headquarters in Brussels." Counsel further contends that the beneficiary uses the marketing department in Brussels, Belgium to implement specific programs. The AAO notes, however, that the petitioner is an entity that is separate from its European affiliates. As such, the employees of the petitioner's foreign affiliates are not part of the petitioner's organizational hierarchy and therefore cannot be deemed as the beneficiary's subordinates, who would relieve the beneficiary from performing non-qualifying tasks. Rather, any indication that the petitioner benefits from the services provided by the employees of other entities must be corroborated with documentary evidence. In the present matter, counsel asserts that the beneficiary is, to some degree, being relieved from having to perform certain non-qualifying tasks, yet the record contains no evidence to support this assertion. 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)).

Counsel also asserts that the petitioner is still in a start-up phase of developing, indicating that U.S. Citizenship and Immigration Services (USCIS) should keep this factor in mind when assessing the beneficiary's employment capacity. The AAO notes, however, that regardless of its stage of development, the petitioner is in no way relieved of the burden of having to meet the applicable statutory criteria, requiring the petitioner of a Form I-140 to establish that the beneficiary would primarily perform job duties of a qualifying nature. See sections 101(a)(44)(A) and (B) of the Act. Any petitioner that justifies a beneficiary's performance of non-qualifying tasks as the primary

portion of his/her proposed employment is merely indicating that it has not reached a stage of development where it requires and can sustain the beneficiary of a petition in a primarily managerial or executive capacity.

Counsel continues her argument for the petitioner, placing heavy emphasis on the multimillion dollar transactions that the beneficiary has negotiated. However, the beneficiary's performance and discretionary authority are not being questioned. In fact, it is often the case that a fully capable individual with the highest level of discretionary authority cannot be classified as a multinational manager or executive due in large part to a petitioner's inability to establish that the beneficiary, on whose behalf the Form I-140 has been filed, would primarily perform duties of a qualifying nature. It follows, therefore, that a beneficiary's position title cannot be relied upon as an accurate indicator of the nature of the work to be performed, as it is possible for a top-level manager or executive to devote the primary portion of his or her time to performing the tasks necessary to produce a product or to provide services. It is noted that any employee who "primarily" performs such tasks cannot be considered to be 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).

Although counsel maintains the argument that the beneficiary is not primarily involved in rendering services or producing a product, this assertion is directly contradicted by the beneficiary's job descriptions, which focus heavily on the beneficiary's marketing and sales-related responsibilities. Despite counsel's argument that the beneficiary's marketing duties are at a higher level than "a mere 'marketeer'" and that the beneficiary's tasks primarily involve directing the management of an organization, the record does not support her claims. Aside from the dollar figures attached to the transactions of which the beneficiary may have been a catalyst, counsel fails to adequately distinguish between the marketing tasks performed by the beneficiary and those performed by other employees in other industries. In other words, there is an insufficient basis upon which to conclude that the marketing and sales tasks performed by the beneficiary are more than operational tasks that amount to the provision of services.

The AAO further points out that in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). In the present matter, the fact remains that at the time the Form I-140 was filed, the beneficiary was the petitioner's only employee. Any claims suggesting otherwise have simply not been documented and cannot be accepted as fact. Thus, in light of the petitioner's lack of an organizational complexity at the time of filing, the AAO is unclear as to exactly how the beneficiary would be relieved from having to primarily perform non-qualifying tasks such that the majority of his time would be devoted to performing tasks in a managerial or executive capacity.

Lastly, counsel contends that "[i]t is illogical to assume that business development is not a primary function of an executive at an emerging company," pointing out that the petitioner was only recently incorporated in 2005. While the AAO does not dispute that business development may be a key

function, the petitioner must nevertheless establish that the beneficiary does not perform the job duties related to that function. In light of the beneficiary's status as the petitioner's sole employee coupled with the job description provided herein, the evidence strongly indicates that the beneficiary does perform the duties associated with the essential function. USCIS cannot make an exception to the statutory provisions based on the petitioner's date of incorporation or its current stage of development. 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. 45, 49 (Comm. 1971). Therefore, if the petitioner's stage of development at the time of filing was such that the petitioner lacked the capability to sustain the beneficiary in a qualifying managerial or executive capacity, then the petition cannot be approved. This appears to have been the case in the matter of the current petitioner. While it is possible for circumstances to change and for the petitioner to eventually become eligible for the immigration benefit sought herein, the record indicates that eligibility had not been established at the time of filing. Accordingly, due to the petitioner's failure to establish at the time of filing that it would employ the beneficiary in a qualifying managerial or executive capacity, this petition cannot be approved.

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.