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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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FILE:



OFFICE: NEBRASKA SERVICE CENTER

Date:

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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.

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 Michigan corporation that seeks to employ the beneficiary as its marketing and engineering manager. 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 two independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and 2) 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 his arguments.

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 two primary issues in this proceeding call for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the beneficiary was employed abroad and whether he 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 January 31, 2007, which includes the following description of the beneficiary's proposed U.S. employment:

Will manage Human Resources:

- Manage hiring and interviewing of new employees, requiring in[-]depth knowledge of all positions in the plant, so as to train and recognize appropriate placement of new and potential employees;
- Manage weekly schedules, in addition to overtime schedules;
- Manage, supervise and train 15-20 employees.

Will manage [the] Laboratory:

- Manage [the] chemical inventory for [the] production line in addition to [the] analysis of chemicals;
- Application of expertise in metallurgy and metal finishing re [sic] behavior of various alloys and their reaction to various in-house treatments

Will manage Production Scheduling:

- Responsible, through regular contact with clients and transportation companies, staggering production to encompass shipping deadlines;
- Responsible to [sic] schedule production to provide the optimum finishing environment for varying products, i.e., stagger certain parts in daily schedules, and concentrating parts during the highs and lows of the chemical cycle.

Will manage Quality Control:

- Responsible to [sic] test surface finishes, corrosion resistance, and coating thickness of all processed parts;
- Liaison to customers and independent research facilities to maintain the highest echelon of quality in product;
- Responsible to [sic] maintain and institute efficiency standards, furthermore, ensure all procedures are ISO 9001 compliant.

Will manage plant and equipment maintenance:

- Manage and maintain all in[-]house equipment in addition to adhering to strict service schedules while establishing and maintaining a maintenance and equipment budget;
- Manage and provide expertise with respect to plumbing, welding, electrical repair in order to maintain the capacity and schedules of [the] plant as well as emergency situations to contain varying occurrences . . . in order to limit losses and collateral damage until correction can be implemented;

- Manage and apply in-house procedures with respect to the maintenance of equipment in a manner that will result in optimum efficiency

Will manage closely held Chemical Concentrations:

- Responsible to measure and analyze the "baths", [sic] as well as necessary adjustments with respect to precise calculation in order to maintain stability in the process and maintenance of equilibrium in the fixed components re [sic] process.

The petitioner also stated that the beneficiary would oversee 15-20 employees. It is noted that, while the petitioner generally stated that the beneficiary was employed abroad by the petitioner's affiliate entity, a formal description of the beneficiary's duties and responsibilities during his employment abroad was not provided.

On August 7, 2007, the director issued a request for additional evidence (RFE) instructing the petitioner to provide detailed descriptions of the beneficiary's foreign and proposed employment. The director stated that the job descriptions should include the job titles, levels of authority, and specific job duties that are associated with the beneficiary's foreign and proposed employment. The petitioner was also asked to describe the types of employees the beneficiary supervised and would supervise. Additionally, the director instructed the petitioner to provide both entities' organizational charts illustrating the beneficiary's position with respect to other employees within each entity's organizational hierarchy.

In response, the petitioner provided a letter dated August 30, 2007 from [REDACTED], president of the petitioning entity. [REDACTED] stated that he assumes responsibility for most of the executive level job duties, but claimed that he delegates certain executive level tasks to the beneficiary as the company's vice president. [REDACTED] stated that the beneficiary is directly responsible for production as well as sales and marketing in his capacity as the company's vice president and marketing and sales manager. [REDACTED] claimed that the beneficiary carries out both executive and managerial level tasks, including managing human resources, which the beneficiary does by overseeing accounting and office management and by hiring and firing personnel. [REDACTED] further stated that the beneficiary supervises all employees, except for the president himself, and that none of these employees, with the exception of the accountant, are degreed professionals. Mr. [REDACTED] repeatedly referred to the beneficiary as a function and people manager as well as an executive level employee. Although [REDACTED] referred the director to a November 25, 2003 statement that was initially submitted in support of a previously filed nonimmigrant petition, it is noted that the description referenced is virtually identical in content to the description submitted in support of the instant petition. As the previously submitted description conveys no new or additional information, it will not be restated in this decision.

With regard to the requested organizational charts, the petitioner provided a chart illustrating its own hierarchical structure, which shows the president in the top-most position and the vice-president as the second-in-command. Directly subject to the vice-president's oversight are the sales and marketing department, the production department, and the accountant. It is noted that the beneficiary is named as the person in charge of the sales and marketing and production departments, thus indicating that the beneficiary in his capacity as vice-president oversees himself in the two

subordinate positions. The chart further shows that the beneficiary oversees three lab technicians, who have no subordinates, and a plant manager, who oversees employees in two types of shift production, shipping, and maintenance. The petitioner did not comply with the director's request for a more detailed description of the beneficiary's foreign employment and the foreign entity's organizational chart. It is noted that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In a decision dated January 23, 2008, the director denied the petition finding that the petitioner failed to establish that the beneficiary was employed abroad and that he would be employed by the U.S. petitioner in a qualifying managerial or executive capacity. With regard to the beneficiary's foreign employment, the director observed an undated résumé in which the beneficiary claimed to be responsible for quality control and communication with the company's customers. The director observed that no additional evidence was submitted to establish that the beneficiary's employment abroad was within a qualifying capacity. With regard to the beneficiary's proposed position, the director observed that the beneficiary has no subordinates in his position as sales and marketing manager. The director further observed that the beneficiary's position as the head of production does not involve supervising professional employees.

On appeal, counsel submits a letter dated March 11, 2008, in which he asserts that a thorough position description was previously provided. Counsel claims that the beneficiary was managing human resources during his employment abroad and continues to do the same in his current U.S. position. Counsel's statements, however, are not persuasive in establishing eligibility, particularly in the matter of the beneficiary's employment abroad for which no supplemental information was provided in response to the RFE, despite the director's express request for a detailed description of the beneficiary's specific job duties. Contrary to counsel's assertions, merely claiming that the beneficiary managed human resources during his employment abroad does not constitute the type of detailed description of job duties the director asked for in the RFE, a description that was deemed necessary to establish eligibility in this matter.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The AAO will then consider this information in light of the company's organizational hierarchy and the beneficiary's position therein. In the present matter, the petitioner did not provide a detailed description of job duties; nor did it provide the requested organizational chart illustrating the foreign entity's staffing hierarchy and the beneficiary's position therein. Thus, due to the petitioner's failure to submit this highly relevant information, the AAO has no basis upon which to conclude that the beneficiary's employment abroad primarily involved the performance of tasks within a qualifying managerial or executive capacity.

With regard to the beneficiary's proposed employment, the petitioner provided a supplemental job description and organizational chart. However, neither document is sufficient to establish that the beneficiary would be relieved from having to primarily perform non-qualifying tasks on a daily basis. The supplemental job description, which was provided by the president of the petitioning entity, is confusing in its attempt to establish the beneficiary as both a personnel and function manager as well as someone that is employed in an executive capacity. First, with regard to the claim that the beneficiary is both a personnel and function manager, the AAO must note that 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. *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). Thus, the mere fact that [REDACTED] is claiming that the beneficiary is both a personnel and a function manager suggests either an inconsistency or confusion with regard to the difference between the two significantly different types of management positions.

Additionally, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. In the present matter, the record lacks a comprehensive description of the beneficiary's day-to-day tasks, thus further confusing the distinction between someone who is employed in a managerial capacity and someone employed in an executive capacity. While the AAO acknowledges that certain positions may fit both statutory definitions, the burden is on the petitioner to fully discuss the beneficiary's specific job duties (which were requested in the present matter) and explain how those job duties fall within the given statutory definitions. Here, the petitioner has failed to provide a detailed description of specific job duties, often relying on general terminology that discusses broad responsibilities and job objectives rather than the specific tasks that allow the beneficiary to reach those objectives. For instance, the petitioner stated that the beneficiary would manage hiring and firing, weekly schedules, and a staff of 15-20 employees. However, the actual tasks associated with these managerial responsibilities were not specified. The petitioner also claimed that the beneficiary would manage chemical inventory and apply his claimed expert knowledge of metallurgy. Again, the petitioner did not specify the tasks that would be involved in fulfilling these business objectives. It is noted that 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). Thus, merely conveying the beneficiary's discretionary authority is not a detailed list of underlying tasks and an explanation establishing how such tasks fit the definition of managerial and/or executive capacity.

The AAO further notes that portions of the job description indicate that some of the beneficiary's time would be attributed to the performance of non-qualifying tasks, including maintaining regular contact with clients and independent research facilities and testing the petitioner's finished products for quality control purposes. In light of the petitioner's legal burden of establishing that the beneficiary would spend the primary portion of his time performing tasks within a qualifying

capacity, it is increasingly important for the petitioner to specify how much of the beneficiary's time would be attributed to non-qualifying tasks. Here, not only has the petitioner failed to provide an adequate job description containing sufficient details to convey an understanding of what tasks the beneficiary would perform on a daily basis, but the petitioner has also failed to establish how much of the beneficiary's time would be attributed to tasks that are outside the qualifying capacity.

Lastly, while a review of the petitioner's organizational chart illustrates the beneficiary's position as one entailing significant authority and oversight, the record does not establish that the beneficiary's personnel management would primarily involve overseeing supervisory, professional, or managerial employees. In fact, the record clearly states that the only degreed professional among the beneficiary's subordinates is the accountant. Thus, any time spent managing or overseeing the remaining, non-professional, non-supervisory, or non-managerial members of the beneficiary's subordinate staff cannot be considered as time spent performing tasks within a qualifying capacity. That being said, the petitioner is not required to establish that all of the beneficiary's time would be spent performing qualifying tasks, such as overseeing professional, supervisory, or managerial personnel. However, when claiming that a significant portion of the beneficiary's time is devoted to personnel management, the petitioner must clearly establish that the primary portion of that time would be spent managing individuals that can be deemed professional, supervisory, or managerial. Here, in light of the fact that the beneficiary has only one subordinate that can be deemed a degreed professional, it is unlikely that the primary portion of the time that would be devoted to personnel management could be deemed as time spent performing tasks within a qualifying capacity.

In summary, the petitioner has not provided sufficient evidence or information to establish that the beneficiary was employed abroad and that he would be employed in the United States in a qualifying managerial or executive capacity. Based on these two independent grounds of ineligibility, the AAO cannot approve this petition.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.