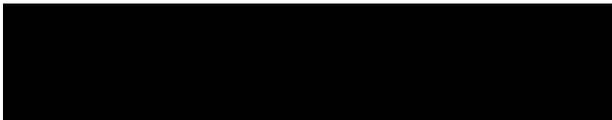




U.S. Citizenship  
and Immigration  
Services

B4



FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER Date: **DEC 03 2009**  
LIN 07 149 51271

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).

Perry Rhew  
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 Florida corporation that seeks to employ the beneficiary as its 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 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. After reviewing the record in its entirety, including the appellate brief and additional documentation that was submitted in support of the appeal, the AAO finds that the petitioner established by a preponderance of the evidence that the beneficiary was employed abroad in a qualifying managerial or executive capacity. Accordingly, this decision will address the remaining issue of the beneficiary's proposed employment with the U.S. petitioner.

On appeal, counsel disputes the director's conclusions, asserting that the beneficiary has been and would continue to be positioned at the top tier of the petitioner's organizational hierarchy and would continue to have discretionary authority with regard to all key factors that affect the petitioner's educational/daycare facility.

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 is whether the petitioner would employ the beneficiary 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 February 8, 2007 in which the petitioner included a description of the beneficiary's proposed employment. As the director has restated that description, verbatim, in the denial, the AAO need not repeat the same description in the current discussion. The petitioner's support letter also stated the beneficiary would exercise daily discretionary authority in

managing the petitioner's staff and implementing decisions regarding the petitioner's finances and the scholastic program.

On May 8, 2008, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a more detailed description of the beneficiary's proposed employment, including a list of the beneficiary's actual day-to-day tasks and an estimate of the percentage of time that would be allotted to each task. The director expressly listed an item that was included in the initial job description and requested additional clarification of the beneficiary's proposed job description. The petitioner was also asked to provide a detailed organizational chart illustrating the staffing levels and departments within the petitioning organization, clearly depicting the beneficiary's proposed position and placement within the hierarchy.

In response, the petitioner provided a letter, dated July 30, 2008, from counsel, who provided a description of the beneficiary's proposed employment. As with the initial job description, the director has included the more recent job description in the denial. Therefore, the AAO need not restate the petitioner's statements in the current discussion. Counsel expressly stated that the beneficiary's proposed position would not involve either caring for or educating children and further stated that the beneficiary would spend 90% of her time on managerial and executive functions.

In a decision dated September 22, 2008, the director denied the petition noting that the job description provided in response to the RFE failed to state exactly what job duties the beneficiary would perform on a day-to-day basis. The director noted that the petitioner failed to supplement the record with a job description of the beneficiary's subordinates and an organizational chart illustrating the petitioning entity's staffing hierarchy. 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).

Additionally, the director noted several of the petitioner's employees' salaries, pointing out that of the fifty one total employees, thirty two were paid less than \$10,000 annually based on the information conveyed in the Form W-2s that were submitted in response to the RFE. The director also named those employees who were compensated more than \$20,000 annually in 2007.

On appeal, counsel vehemently opposes the director's decision, claiming that the director's references to employee salaries serve as an indication that the adverse decision is arbitrary and capricious. However, a more thorough reading of the director's statements indicates that counsel fails to make a valid point. Specifically, while the director admittedly made reference to employee salaries, there is no indication that the director made any adverse findings with respect to those employees whose names and salaries were specifically enumerated. Rather, the director seems to have focused more on the fact that more than 50% of the petitioner's staff—thirty two employees, to be exact—was comprised of employees who were compensated less than \$10,000. While counsel is correct in stating that an adverse decision cannot rely solely on employee salaries, this factor can and should be considered, as it is a valid indicator of whether an employee was employed on a full-time basis or perhaps was not employed for an entire tax year.

In the present matter, where such an overwhelming number of staff was compensated below \$10,000 in 2007, it is valid for the director to question which employees, both part- and full-time, were actually working for the petitioner at the time the Form I-140 was filed. In other words, in order for the petitioner to establish that the beneficiary would be employed in a qualifying managerial or executive capacity, the petitioner must provide evidence showing that it had the capability, by means of an adequate support staff, to relieve the beneficiary

from having to primarily perform non-qualifying tasks. The director was justified in pointing out that a majority of the petitioner's staff were either employed on a limited part-time basis or may not have been employed during the time the Form I-140 was filed. As the petitioner failed to comply with the director's request for a detailed organizational chart, the AAO is unable to determine exactly which positions were filled during the relevant time period. Although the AAO acknowledges the petitioner's submission of an organizational chart as one of the supporting documents on appeal, the recent submission will be considered in light of the fact that the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. Given the petitioner's failure to submit the requested evidence in compliance with the director's original request, the AAO will not consider the newly submitted organizational chart as supporting evidence. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

Additionally, counsel contends that the beneficiary is responsible for ensuring that the petitioner is in compliance with the provisions of various state sponsored programs that entitle the petitioner to certain financial incentives and tax breaks. Counsel further explains that this responsibility entails monitoring and maintaining teacher certifications and facility requirements. Counsel states that in one instance, the beneficiary carried out her responsibility by ensuring that certain staff members completed the Behavioral Observation and Screening program, while in another instance the beneficiary was responsible for overseeing the erection of a shade structure in the playground area. While both examples establish that the beneficiary has the necessary degree of discretionary authority to manage the petitioner's daily activities, it is unclear that such authority translates into the performance of primarily qualifying tasks. Specifically, with regard to the both examples, counsel does not cite the specific tasks the beneficiary performed on a daily basis. The AAO is therefore precluded from being able to gauge the degree to which the beneficiary's involvement extended to overseeing non-professional in-house employees or outside contractors, both of which would fall within the parameters of what is deemed to be non-qualifying.

In light of the above, the AAO notes that in examining the executive or managerial capacity of the beneficiary, U.S. Citizenship and Immigration Services (USCIS) will look first to the petitioner's description of the proposed job duties. *See* 8 C.F.R. § 204.5(j)(5). In the instant matter, the director expressly instructed the petitioner to provide a detailed description of the beneficiary's proposed employment. *See id.* The director also provided an example to illustrate the degree of detail the job description should contain and the type of information it should convey. The petitioner did not, however, provide the information required by the director to adjudicate the petition. Next, while the director clearly asked the petitioner to list the beneficiary's proposed tasks and to assign the percentage of time the beneficiary would allot to each task, the petitioner did neither. Instead, the petitioner provided the three paragraphs from counsel, who only generally discussed the beneficiary's broad job responsibilities and merely indicated that 90% of the beneficiary's time would be allotted to tasks within a qualifying capacity. However, counsel failed to specify any the actual tasks, thereby denying USCIS the opportunity to conduct an independent analysis of the prospective job duties. **It is noted that the unsupported assertions of counsel do not constitute evidence.** *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). While counsel's statements provide an overall sense of the beneficiary's decision-making authority with respect to both business and personnel matters, this factor is not sufficient to establish that the specific tasks the beneficiary would perform on a daily basis in carrying out her overall responsibilities will be primarily managerial or executive in nature. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a

detailed description of the beneficiary's daily job duties. The actual duties themselves will 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 light of these requirements, merely stating that the beneficiary would, for example, make decisions with regard to the preschool's compliance with legal and academic standards means little without a more precise description of the actual underlying tasks the beneficiary performs in order to reach a decision. While counsel also stated that the beneficiary would exercise her discretionary authority in supervising and directing faculty members in their efforts to develop a comprehensive learning curriculum, the petitioner has not actually discussed who puts together the curriculum and what specific steps the beneficiary takes on a daily basis in fulfilling her supervisory role.

Additionally, counsel further adds to the confusion and lack of clarity by referring to the beneficiary as director, despite the fact that the proffered position is that of vice president and, in fact, the support letter that was submitted with the petition was actually signed by someone who claimed that he signed the letter in his capacity as director. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Lastly, counsel mentioned a number of responsibilities that indicate that the underlying tasks would not be within a qualifying capacity. For instance, the petitioner claimed that the beneficiary would coordinate the academic and administrative tasks and supervise faculty and administrative professionals. However, the petitioner did not provide sufficient information or evidence to enable the AAO to conclude that the administrative professionals are in fact professional employees. Merely referring to someone as professional does not establish that the employee can actually be deemed as such. Finally, while counsel stated that the beneficiary would only manage budgetary issues, it is unclear whether the beneficiary will actually perform the underlying non-qualifying tasks of managing the budget. It is noted that an employee who "primarily" performs 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). In the instant matter, the petitioner has failed to assign time constraints to any of the above-mentioned non-qualifying aspects of the beneficiary's job. It is therefore impossible for the AAO to affirmatively conclude that the beneficiary would primarily perform managerial or executive duties. As such, on the basis of this finding, the instant 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.