



U.S. Citizenship
and Immigration
Services



B4

FILE: SRC 04 137 51190 OFFICE: TEXAS SERVICE CENTER Date: DEC 24 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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas 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 manufacturing and engineering software, and in sales and support services. It seeks to employ the beneficiary as its manager of professional services. 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 July 2, 2003, which includes descriptions of the beneficiary's foreign and proposed employment. With regard to the latter, the petitioner stated that the beneficiary would oversee individual project managers at client sites where the company's software would be installed and consulting services provided. In a separate submission, the beneficiary provided the following list of his proposed job duties:

- Overall Project Management responsibility for all [REDACTED] implementation projects at client sites, with individual Project Managers reporting directly to me.
- Manage other Project Managers within [the petitioner].

- Manage the day[-]to [-]day activities of U[.]S[.] Implementation Support Staff.
- Manage the day[-]to[-]day management of [the] U[.]K[.] Support Staff.
- Assist in the day[-]to[-]day management of the [REDACTED] team.
- Assist the overall Product Management of the [REDACTED] product, including determination of future product and direction.
- Liaise with customer site senior management to ensure a professional implementation methodology.
- Identify and assign appropriate staff resources to meet project resource requirements across all projects.
- Coordinate the assigned staff resource to achieve project commitments.
- Analyze, prepare and review reports on program and project performance, including areas of product development and provide recommendations for appropriate actions.
- Manage the development, maintenance and use the [REDACTED] Help Desk[.]
- Work with other employees and external organizations to facilitate project completion.
- Coordinate the activities of all involved parties to ensure that all clients and vendors worked together effectively.
- Manage all phases of the implementation to insure a smooth cut transition for the client to the new system.
- Complete formal orientation meetings with the client's project conclusion.
- Provide and manage testing staff resource for new software releases.
- Provide in-house training to new staff.
- Interviewing and recruitment of new staff.
- Design of a formal project management model to be used as the [petitioner's] standard.
- Recommend appropriate solutions to clients in regard to business needs to ensure a high level of satisfaction with [the petitioner's] products, services and staff.
- Provide managerial backup in the absence of [the] Vice President [of] Professional Services.

The petitioner also provided its organizational chart, which depicts a president at the top of the hierarchy, the vice president of professional services and development as the president's direct subordinate, and the beneficiary's position at the next tier of the hierarchy. The beneficiary's position is shown as overseeing a development group, whose locale is unclear, and support staff located in the United States and in the United Kingdom. The U.S. support staff includes a senior application consultant/project manager and application and technical support and project management staff. The chart does not include any names or position titles of anyone in the development group. The U.K. staff, whom the beneficiary would oversee, include application and technical support employees.

With regard to the beneficiary's foreign employment, the petitioner stated that the beneficiary performed the same type of KAPES project implementation and management as he would perform in his proposed position with the petitioning entity.

On January 4, 2005, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a more detailed job description for the beneficiary's foreign employment, explaining how the beneficiary's specific job duties fall within the criteria set forth in the statutory definitions of managerial and executive capacity. The director expressly stated that if the beneficiary was a first-line supervisor during his employment abroad, the petitioner must establish that the employees he supervised were managers, supervisors, or degreed professionals. The petitioner also instructed the petitioner to provide organizational charts for the beneficiary's foreign and U.S. employers. The director asked that the charts include employee names, position titles, and job duties as well as professional degrees for the employees the beneficiary managed or would manage.

In response, the petitioner submitted a letter dated March 14, 2005 along with supporting evidence, which includes the following partial percentage breakdown accounting for 62% of the beneficiary's time:

- Provide first line support for the U.S. based operations staff including pre-sales, sales and post sales support[.] (35%)
- Provide Training for all U.S. based staff[.] (2%)
- Conduct training for all U.S. based clients[.] (5%)
- Provide Consulting services to all U.S. based clients[.] (5%)
- Assist in the overall project management [*sic*] of ████████ implementations in the U.S. (10%)
- Provide pre-sales support to U.S. based sales staff, including preparing and presenting software presentations[.] (5%)

The remaining the items on the list were not assigned a percentage of time. They are as follows:

- Assist in the day[-]to[-]day management of U[.]K[.]based Consultants[.]
- Assist in the overall project management of ████████ implementations in the U.K.

- Provides Customer Helpdesk Support and maintenance[.]
- Provide Software Installation services to client projects.
- Performs new product and bug fix testing to ensure correct function of features[.]
- Provides Training Services for [REDACTED] projects.
- Works cooperatively with other employees and private organizations to facilitate project implementation and completion[.]
- Assist Managing Director to identify appropriate solutions to clients in regard to business needs to ensure a high level of satisfaction with [the petitioner]'s products and services.
- Provide Account Management service to clients, to identify ways to improve product usage and increase [the petitioner's] revenue[.]
- Produce Requirement and Functional specifications as required for client[-]based product development.
- Helps coordinate all phases of an implementation to ensure a smooth cut transition.
- Work with the Managing Director to ensure training will take place in a timely fashion and will cover the appropriate systems and features.

The petitioner complied with the director's request for organizational charts. The U.S. entity's organizational chart again identified the president as the head of the entity with an office manager assisting him and the vice president of professional services and product development as his direct subordinate. The latter position oversees the beneficiary as well as the future product development, which is partially outsourced to an outside service provider and partially handled by one of the petitioner's three consultants. The beneficiary's three subordinates appear at the bottom tier of the hierarchy and are all three consultants. The job titles of the three subordinates are senior consultant, consultant,¹ and technical consultant.

The petitioner also provided an organizational chart for the foreign affiliate where the beneficiary was previously employed. The chart shows the managing director as head of the entity, the beneficiary as his direct subordinate in the position of professional services manager, and a senior consultant, an application consultant, and technical consultant as his three direct subordinates. It is noted that the beneficiary's position with the foreign entity was indicated as being based in the United States and the three subordinates named in the foreign entity's chart were the same as those named in the petitioner's organizational chart.

¹ The AAO takes note of the fact that the individual occupying this position is the same in the petitioner's and the foreign entities' organizational charts. The AAO further notes that the foreign entity's organizational chart more precisely identified Chris Pearce's position as that of application consultant. This observation is stated for the record.

The petitioner's submissions were reviewed and a decision was issued on February 13, 2008 denying the Form I-140. The director determined that the primary portion of the beneficiary's employment with the foreign entity as well as his prospective employment with the U.S. petitioner has been and would be spent performing tasks as a first-line manager of non-professional employees. The director therefore concluded that the beneficiary was not employed abroad and would not be employed in the United States in a qualifying managerial or executive capacity.

While the director was correct in generally stating that first-line management of non-professional employees is deemed as a non-qualifying duty, the record does contain sufficient information to affirmatively conclude that the beneficiary's subordinates are non-professional employees. As such, the AAO does not concur with the director's analysis of the record. However, based on a thorough examination of the beneficiary's job descriptions, the AAO finds that the director's ultimate conclusion—that the petitioner failed to establish that the beneficiary was employed abroad and would be employed by the U.S. petitioner in a qualifying managerial or executive capacity—was accurate.

First and foremost, 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 present matter, while the petitioner did not assign a percentage of time to each of the beneficiary's job duties, the list is replete with statements suggesting that the beneficiary has and would continue to carry out tasks that equate to the provision of services. In other words, while counsel asserts on appeal that the beneficiary assumed a supervisory role, the job description provided suggests that the beneficiary performed a large number of the necessary tasks that were client-based. It also appears that counsel has misconstrued the term "function manager," which 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). Contrary to counsel's claim that the beneficiary "occupied 'an essential function,'" one cannot "occupy" a function; rather, one can perform the underlying duties of an essential function and/or one can manage an essential function, keeping in mind that a function manager is someone who *manages* the function rather than *performs* the duties related to the function.

In the present matter, the beneficiary does not fit the description of a function manager. First, the beneficiary's job description indicates that he supervises the work of others, thus clearly indicating that he has been and would be a personnel manager rather than a function manager. Second, as stated above, anyone who spends the primary portion of his/her time performing the duties underlying the essential function cannot be deemed a function manager. As the beneficiary appears to have spent the primary portion of his time performing operational tasks, the AAO cannot conclude that he primarily performed or would perform tasks within a qualifying capacity. It appears that counsel has assumed that the beneficiary's performance of key tasks and his integral role within the foreign and U.S. entities are sufficient to warrant approval of the instant petition. Such an assumption, however, would be incorrect. The beneficiary's own description of his foreign and U.S. job duties indicates that the beneficiary has been and would continue to be involved in providing sales support as well as consulting services to each entity's clients, which would include training the clients on the use of the petitioner's software. The beneficiary has been and would continue to be engaged in preparing and executing software presentations, providing customer support and maintenance at a company helpdesk, assisting with installation services, and managing client accounts. Although the beneficiary did not provide a

complete percentage breakdown for all of the items in the list, he did account for 62% of his time, 52% of which has been and would be comprised of operational, non-qualifying job duties. Thus, even if the AAO were to only focus on the portion of the job description for which the beneficiary did provide a time constraint, a majority of the beneficiary's time has been and would be spent on tasks that are necessary to provide services. 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. at 593. While the AAO does not dispute that the beneficiary's past and proposed employment includes managerial components, the above discussion adequately explains that in order for a position to fit the definition of managerial or executive capacity, the beneficiary must primarily perform qualifying managerial or executive job duties. A thorough analysis of the beneficiary's job duties establishes that the beneficiary has not primarily performed, and would not primarily perform, tasks within a qualifying capacity. Therefore, on the basis of these two independent grounds of ineligibility, the instant petition cannot be approved.

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.