

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 California corporation that seeks to employ the beneficiary as its chief executive officer. 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 denial and submits a brief addressing various points in the director's decision.

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 evidence of record establishes that 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 October 28, 2008, which includes the following list of the beneficiary's duties and responsibilities:

- Managing and developing the subsidiary's over-all business operations under the general supervision of the Board of Directors of Hong Kong parent company.
- Directs and supervises the daily operations of the company.
- In charge of recruiting, evaluate the work performance of managers and other personnel, hire additional employees due to company necessity or replacement.
- Review data reports from the Market Research Analyst, forecast the market trend and product demand.

- Direct and supervise the work of Market Research Analyst
- Maintain and develop customer relationship.
- Develop and maintain channel and distribution relationship.
- Direct internal policy design to coordinate function and operation between divisions and departments.
- Evaluate US market and make recommendations to Hong Kong parent company.

The petitioner concluded the support letter by stating, "[The beneficiary's] varied and detailed executive/managerial experience make him essential to the continuous success of our U.S. operations." The petitioner also provided an organizational chart naming the beneficiary as the company president, subordinate only to the board of directors. The chart depicts four positions—sales and marketing manager, chief financial officer (CFO), administration, and customer service—as being directly subordinate to the beneficiary. The chart also depicts a third tier of employees, including a market research analyst, a sales representative, and a merchandiser as the direct subordinates of the sales and marketing manager; accounts receivable and accounts payable positions as direct subordinates of the CFO; and a shipping and receiving position as directly subordinate to customer service.

On March 26, 2009, the director issued a request for additional evidence (RFE) instructing the petitioner to provide, *inter alia*, a detailed description of the beneficiary's proposed employment, including a list of the beneficiary's job duties and the percentage of time that would be allocated to each job duty based on the petitioner's staffing at the time of filing. The petitioner was asked not to group tasks together, but rather to list them separately. The petitioner was also asked to provide a detailed organizational chart including position titles, names of employees, and each employee's job duties.

In response, the petitioner provided a supplemental job description, which the director included in the denial, as well as the petitioner's organizational chart listing the petitioner's employees and the positions within the organization. It is noted that, no employees were listed in the accounts receivable and payable, administration, and shipping and receiving positions.

In a decision dated June 8, 2009, the director denied the petition concluding that the petitioner failed to establish that the beneficiary primarily performs tasks within a qualifying managerial or executive capacity. The director specifically commented on the percentage breakdown that was provided in response to the RFE, finding that the job description was vague and had limited evidentiary value. The director also discussed the organizational hierarchy that was depicted in the petitioner's organizational chart, finding that the petitioner failed to establish that the limited support staff that the petitioner retained at the time of filing would be sufficient to relieve the beneficiary from having to primarily perform non-qualifying tasks. Additionally, the director commented on the beneficiary's proffered wage, finding that the amount was not commensurate with that of "a true multinational executive."

Although the AAO will affirm the denial of the petition, it is noted that the director improperly relied on the beneficiary's proffered wage as an indicator of the beneficiary's employment capacity in the proposed U.S.

position. The director should not hold a petitioner to his undefined and unsupported view of what he deems as a salary that is commensurate with that of a multinational manager or executive. Rather, the director should instead focus on applying the statute and regulations to the facts presented by the record of proceeding. The fact that this beneficiary's salary is lower relative to other beneficiaries who seek immigrant visa classification under section 203(b)(1)(C) of the Act will not preclude the petitioner from qualifying for the same classification. For this reason, the director's irrelevant finding will be withdrawn.

Additionally, per counsel's objection, the AAO finds that the footnote contained at page three of the director's decision does not reflect the facts presented in the instant record of proceeding. Specifically, the footnote refers an organizational chart naming [REDACTED] in the position of internet sales specialist. However, as properly pointed out in counsel's appellate brief, the petitioner does not claim to employ anyone by that name; nor does the petitioner's organizational chart include a position for an internet sales specialist. As such, the AAO will disregard the referenced footnote due to its lack of relevance to the matter at hand. Nevertheless, the AAO finds that the record does not support counsel's speculation that the director relied on irrelevant documents to reach an unfavorable decision. To the contrary, the director restates, verbatim, the job description and percentage breakdown that the petitioner provided in its RFE response and goes on to summarize the organizational hierarchy that was depicted in the petitioner's organizational chart. The director then goes on to issue relevant findings with regard to information that was clearly provided by the petitioner. Therefore, counsel's speculation is simply not warranted and will not serve as a proper basis to withdraw the director's otherwise sound decision.

Counsel also supplements the record with an additional job description in which he provides a list of seven job responsibilities and specifies some of the tasks that fall under the responsibility of meeting with department heads and making final decisions. Counsel specifies the beneficiary's decision-making authority to include decisions regarding pricing and credit terms for new customers, production and shipping delivery issues, reviewing and approving contract proposals before presenting such to customers, reviewing the merchandiser's sample sketches, supervising the customer service department in the preparation of a production and shipping report, devising a marketing strategy and overseeing the market research analyst, supervising personnel in the accounting department, and reviewing and approving the company's quarterly financial statements. Counsel's supplemental description also included various administrative tasks, including calling executives on the petitioner's key accounts, consulting with counsel regarding legal issues, and reporting to the board of directors.

The AAO finds that the additional information provided by counsel is not persuasive in overcoming the ground cited as the basis for denial. While counsel's job description specifies the types of discretionary decisions the beneficiary makes, the primary purpose of the RFE was to obtain a time allocation for the beneficiary's specific job duties. Therefore, even when a job description contains a comprehensive list of all of the beneficiary's job duties, a determination of whether or not the beneficiary is employed within a qualifying capacity hinges on the amount of time that is allocated to managerial or executive tasks versus the amount of time that is allocated to daily operational tasks. While the AAO acknowledges that the beneficiary is not required to allocate 100% of his time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to his/her proposed position. 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).

Since counsel's job description lacks the necessary time breakdown, it does not establish that the beneficiary would primarily perform tasks within a qualifying capacity.

The AAO further notes that, while the job description the petitioner provided in response to the RFE does include a timing component, it does not establish that the primary portion of the beneficiary's time would be spent within a qualifying capacity. First, with regard to the director's role as supervisor of daily operations, the petitioner failed to specify the actual tasks the beneficiary performs in fulfilling this general responsibility. Although it appears that supervising daily operations includes overseeing the company's three main departments and making discretionary decisions, these general statements do not translate into daily tasks. Counsel, in the supplemental job description he provides on appeal, specifies the types of discretionary decisions that the beneficiary makes. However, the petitioner does not provide insight into the process that precedes the actual decision, i.e., the specific tasks the beneficiary performs that lead up to the actual making of a decision on a particular subject.

The petitioner also stated that 10% of the beneficiary's time would involve recruiting and evaluating the performance of managers and other personnel. As the petitioner has only one managerial employee who oversees the work of others, the remainder of the personnel is not comprised of managerial employees, regardless of position title. However, the petitioner has not specified how much time would be spent overseeing the other personnel, nor has the petitioner established that the other personnel whom the beneficiary would supervise consist of professional employees. See section 101(a)(44)(A)(ii) of the Act. Additionally, the petitioner indicated that 10% of the beneficiary's time would be allocated to supervising the market research analyst. However, the petitioner failed to specify what specific tasks would be involved in such supervision. Moreover, the organizational chart depicts a hierarchy where the sales and marketing manager would be overseeing the work of the market and research analyst. Thus, it appears that the organizational chart and the job description are at odds in this regard. 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, the petitioner indicated that maintaining and developing customer relationships, attending trade shows and exhibitions, and developing and maintaining relationships with distributors will be allocated 10%, 15%, and 10% of the beneficiary's time, respectively. However, it is unclear how these service-providing tasks fall within the spectrum of what is deemed as qualifying within a managerial or executive capacity.

In 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). 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; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604. The AAO will then consider the beneficiary's job description in light of other pertinent factors, such as the petitioner's organizational hierarchy, the beneficiary's position therein, and the petitioner's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks. In the present matter, the record lacks a comprehensive job description that conveys a meaningful understanding of the beneficiary's day-to-day tasks. The record also fails to adequately establish that the petitioner's support staff at the time of filing was capable of relieving the beneficiary from having to primarily perform daily operational tasks. In light of these

findings, the AAO cannot conclude that the beneficiary's proposed position with the U.S. entity would be within a qualifying managerial or executive capacity.

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.