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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

Date:

AUG 12 2010

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The director subsequently filed a combined motion to reopen and reconsider. The director granted the motion, but affirmed the original decision to deny the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Texas corporation that seeks to employ the beneficiary as its president/director. 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.

In the decision addressing the petitioner's motion, the director summarized the statements made by the petitioner in the initial Form I-290B and determined that the petitioner failed to overcome the previously cited grounds for denial and, therefore, affirmed the prior decision denying the petition.

On appeal, counsel contends that the director failed to adequately address the arguments that were made on motion and asserts that the petitioner has established eligibility by a preponderance of the evidence.

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 10, 2007, which includes the following list of the beneficiary's responsibilities in his proposed position with the U.S. entity:

- Provide leadership in the designated area of business expansion and Marketing regarding establishing key performance indicators; coordinate efforts to put measures into place and monitor the corporate performance against established targets.
- Lead corporate efforts to reach annual targets and develop clear action plans in response to issues identified in [the] company business plan.
- Coach the managerial team on methods and means to improve overall performance by unleashing the individual potential.
- Guide the marketing team in choices around a range of corporate issues like evolving a customer driven culture, forward planning, training, etc.

The petitioner did not provide a job description of the beneficiary's employment abroad.

Accordingly, on March 3, 2008, the director issued a request for evidence (RFE) instructing the petitioner to provide a comprehensive list of the beneficiary's job duties with the foreign and U.S. entities and to include a percentage breakdown showing how the beneficiary's time was allocated among the various tasks assigned to the beneficiary in each position. The director also asked the petitioner to provide its own organizational chart to include the beneficiary's proposed position.

In response, the petitioner submitted two separate attachments, one describing the beneficiary's foreign position and the other describing the beneficiary's proposed position. With regard to the beneficiary's employment abroad, the petitioner stated that the beneficiary occupied the position of general manager in which he supervised an administrative manager, a factory manager, and a commercial manager. The petitioner provided brief job descriptions for all three subordinate positions and stated that the beneficiary "was accountable for the progress of [the] company in acquiring, preparing and delivering orders in [a] timely manner . . . ." No further information was provided with regard to the beneficiary's employment with the foreign entity.

With regard to the beneficiary's proposed employment with the U.S. entity, the petitioner stressed the beneficiary's top-most position within the company's organizational hierarchy and the wide latitude in discretionary decision-making that accompanies the beneficiary's position. The petitioner indicated that the beneficiary is tasked with the responsibility of overseeing the entire operation, which includes "working on very diverse kinds of issues." The petitioner stated that the beneficiary must be prepared to switch from one task to another ranging from visiting different sales locations to interviewing job candidates and attending jewelry association meetings. The petitioner also assigned a percentage breakdown to each of six of the beneficiary's general responsibilities, which include strategic analysis and competitive profiling, organizing and coordinating management, assisting in the coordination of departments and outside agencies, leading the corporation at external events, coordinating with and supervising the operations of the foreign entity, and mentoring managers. The petitioner further indicated that the beneficiary's responsibilities include the following: directing and overseeing the corporate operations by hiring, training, supervising, and promoting top-level managers; dealing with professional service providers such as accountants, attorneys, and banking institutions; representing the company at industry events and keeping track of industry trends and transitions; and counseling the petitioner's management team in ways of handling the issues that may come before them.

On July 13, 2008, the director issued the initial denial of the petition, finding that the petitioner submitted a deficient job description regarding the beneficiary's foreign employment and therefore failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. With regard to the beneficiary's proposed employment with the U.S. entity, the director similarly found that the petitioner provided an inadequate job description that failed to specify the beneficiary's daily job duties and therefore failed to establish that the beneficiary's proposed employment would primarily consist of managerial or executive tasks.

Although the AAO concurs with the director's conclusions regarding the petitioner's eligibility, it is noted that certain underlying findings were improper and must be withdrawn. First, the director stated that "[t]he Service must distinguish between one who operates a business from one who manages an organization." The AAO notes, however, that the director should not hold a petitioner to an undefined and unsupported view of "one who operates a business" or "one who manages an organization." Neither the statute nor regulations have provisions to make the distinction. Instead, the director should focus, as he ultimately did, on applying the statute and regulations to the facts presented in the record of proceeding. Second, the director was equally wrong in relying on the amount of the beneficiary's proffered compensation as an indicator of whether or not the proposed position is within a managerial or executive capacity. The beneficiary's proffered wage is not a factor that would preclude him from qualifying for classification under section 203(b)(1)(C) of the Act. Accordingly, both of the director's erroneous and irrelevant findings are hereby withdrawn.

Regardless, the director's decision properly focused on the lack of an adequate job description with regard to the beneficiary's employment abroad as well as his proposed employment with the U.S. entity. As such, the AAO will not withdraw the January 30, 2009 decision in which the director affirmed his prior decision after properly concluding that the petitioner failed to overcome the grounds cited in the original denial, i.e., that the petitioner failed to establish the beneficiary's qualifying managerial employment both abroad and with regard to the proposed employment in the petitioning entity.

On appeal, counsel asserts that "the denial is against the weight of the evidence" and contends that the petitioner has met its burden of proof. It is noted, however, that the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 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). Here, counsel's objection to the latest denial is based primarily on the generality of the decision and the lack of statements specifically addressing counsel's earlier arguments, which he made in support of the motion to reopen and reconsider. The AAO notes, however, that the director's initial decision provided adequate clarification of the key elements that are necessary to establish that the beneficiary was employed abroad and that he would be employed by the petitioning entity within a qualifying managerial or executive capacity. The director properly focused on the petitioner's failure to provide a detailed description of duties for either of the beneficiary's positions. In fact, in reviewing the director's express instructions in the RFE, it is clear that the petitioner failed to provide a list of the beneficiary's job duties abroad and the requested percentage breakdown. 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). While the petitioner provided a longer description of the beneficiary's proposed employment, including the requested percentage breakdown, the content of the description was only marginally more informative and still failed to convey a meaningful understanding of the beneficiary's specific job duties.

In examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). As the director previously pointed out, reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient. Rather, 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). Despite the director's express criticism of the deficient job descriptions submitted by the petitioner in the present matter, little was done to overcome this finding. In fact, while counsel asserts unequivocally that the petitioner has met its burden of proof, he provides no discussion explaining how the deficient job descriptions further USCIS's understanding of what exactly the beneficiary did on a daily basis during his employment abroad or what he would be doing on a daily basis in his proposed position with the U.S. entity.

With regard to the beneficiary's employment abroad, the petitioner merely repeated the beneficiary's position title and indicated that the beneficiary was responsible for the company's progress and for overseeing three employees with managerial position titles. The petitioner did not specify any actual tasks the beneficiary performed in order to ensure the company's successful acquisition, preparation, and timely delivery of orders. Moreover, with regard to his personnel management role, the petitioner did not specify how the beneficiary managed his subordinates nor did it establish that the subordinates were in fact managerial employees as their position titles indicate. *See* section 101(a)(44)(A)(ii). Simply claiming that the beneficiary's subordinates abroad were managerial employees on the basis of position title is insufficient. More information is required to determine whether and/or whom these subordinates were managing within the foreign entity's organizational hierarchy. 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)).

With regard to the beneficiary's proposed employment, the petitioner focused on general job responsibilities that emphasized the beneficiary's decision-making authority and level of seniority. However, the petitioner did not expressly list the tasks that would occupy the beneficiary's time. For instance, the petitioner indicated that 25% of the beneficiary's time would be allocated to the strategic analysis of opportunities and competitive profiling. Without further information explaining how these duties fall within the category of a qualifying managerial or executive capacity, it appears that the beneficiary's search for business opportunities and his research of the petitioner's competitors are both indicative of tasks necessary to produce a product or to provide services and are therefore non-qualifying. The petitioner indicated that another 25% of the beneficiary's time would be allocated to organizing and coordinating managerial employees. However, the petitioner's Form I-140 indicates that the petitioner was operating an eight-person retail establishment at the time of filing. In the RFE response, the petitioner indicated that it currently operates a wholesale and retail convenience store. Thus, given the nature of the petitioner's business operation, the roles of a vice president, a business development manager, and an accountant require further explanation. In other words, neither the organizational hierarchy that the petitioner depicts in the organizational chart nor the petitioner's claims are sufficient to establish that the petitioner employed a full managerial staff for the beneficiary to manage at the time of filing. As stated above, documentary evidence must support the petitioner's claims. *Id.*

Similar reasoning gives the AAO cause to question whether the beneficiary would actually spend 15% of his time mentoring managerial employees, as the petitioner has not established the need for or the existence of managerial employees at the time of filing. The petitioner's claim that 15% of the beneficiary's time would be allocated to assisting with the coordination of departments is equally perplexing without further clarification as to why a convenience retail operation would have a need for departments headed by managerial and/or

professional employees. Lastly, the beneficiary's coordination with the foreign entity and supervision of that entity's employees is not readily evident as being within a qualifying managerial or executive capacity with the petitioning entity.

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). The above analysis of the information submitted indicates that the petitioner has failed to provide sufficient evidence and information to establish that the primary portion of the beneficiary's time would be allocated to tasks within a qualifying managerial or executive capacity. The petitioner has failed to provide the requested degree of detail specifying the beneficiary's actual daily tasks and instead has provided information that generally depicts a managerial employee without explaining how the petitioner either requires or is able to support such an employee within its organization. Although the petitioner seeks to employ the beneficiary in its pursuit of future growth, the petitioner cannot expect USCIS to approve the visa petition based merely on claims and speculations. Rather, the petitioner must establish eligibility at the time the petition is filed; 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).

In summary, the petitioner has failed to establish that the beneficiary was employed and would be employed in the United States within a qualifying managerial or executive capacity. Despite express requests from the director clearly stating what type of information the petitioner would need to submit, the petitioner has provided general statements that preclude USCIS from gaining the necessary insight into the beneficiary's daily tasks. Without this pertinent and crucial information the AAO cannot conclude that the primary portion of the beneficiary's time has been and would be allocated to tasks within a qualifying managerial or executive capacity. Therefore, on the basis of these two conclusions the instant petition cannot be approved.

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.