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FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER Date: FEB 16 2010  
LIN 09 048 50714

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:

[REDACTED]

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 or reopen, 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 California corporation that seeks to employ the beneficiary as its vice president/general 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 the following independent grounds of ineligibility: 1) the petitioner failed to meet the requirements set forth in 8 C.F.R. § 204.5(j)(3)(i)(B), which states that the petitioner must establish that the beneficiary was employed abroad by a qualifying entity in a qualifying capacity for at least one out of the three years prior to filing the petition; and 2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity. A review of the record shows that the petitioner submitted sufficient documentation to establish that the beneficiary was employed abroad by a qualifying entity during the requisite time period. Therefore, with regard to the first ground cited for denial, the AAO will limit the scope of its analysis to a discussion of the beneficiary's employment capacity in his position with the foreign entity.

On appeal, counsel submits a brief asserting that the grounds the director cited as the bases for denial lack merit. Counsel contends that the petitioner is eligible for the immigration benefit sought.

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 November 28, 2008 claiming that the beneficiary was employed abroad and would be employed in the United States in a qualifying capacity. The petitioner stated that the beneficiary's foreign employment in the position of marketing manager included

directing and coordinating all marketing activities, directing managerial and professional subordinate employees regarding all marketing aspects, developing the company's marketing strategy, and directing sales, advertising, pricing, and public relations activities. With regard to the beneficiary's proposed employment, the petitioner stated that the beneficiary's responsibilities include field management and creating the conceptual drafting plan.

On May 19, 2009, the director issued a request for additional evidence (RFE) instructing the petitioner to provide more detailed job descriptions of the beneficiary's foreign and proposed employment. The petitioner was asked to assign a percentage of time to each of the beneficiary's job duties. The director expressly cautioned the petitioner not to group several tasks together, thereby indicating that each job description was to consist of a list of specific individual job duties supplemented with the percentage of time the beneficiary devoted to the job duties he performed abroad and would devote to the job duties he would perform in his proposed position. The petitioner was also instructed to provide each entity's organizational chart clearly illustrating the beneficiary's position relative to other employees in each organization and listing each employee's name, position title, and job description.

In response, the petitioner provided a percentage breakdown of the beneficiary's foreign employment at exhibit 9, as well as a letter dated June 25, 2009 listing a percentage breakdown of the beneficiary's proposed employment at exhibit 11. As the director has included both sets of job descriptions in his decision, the AAO will not repeat this information in the current decision. The AAO notes, however, that the percentage breakdowns offered by the petitioner are not based on the premise that each job duty represents a fraction of a whole, where the whole is the beneficiary's work day or work week and the sum of the job duties and their respective percentages of time represents 100% of the beneficiary's time at work. Instead, in describing the beneficiary's foreign employment, three sets of job responsibilities were each assigned 70% of the beneficiary's time, three other sets of responsibilities were each assigned 60% of the beneficiary's time, and one remaining job responsibility was assigned 20% of the beneficiary's time for a total of 410%. This time breakdown does not effectively convey the number of hours or days spent performing individual job duties. The main purpose of a detailed job description is to enable U.S. Citizenship and Immigration Services (USCIS) to gain an understanding of the specific tasks that comprise the beneficiary's time at work such that USCIS can determine whether the primary portion of the beneficiary's time has been and would be spent performing qualifying tasks. When, as in the present matter, the petitioner fails to effectively convey the relevant information, USCIS cannot determine how much of the beneficiary's time is allotted to qualifying tasks versus tasks that do not qualify as tasks in a managerial or executive capacity.

The petitioner also provided the requested organizational charts for both entities. The foreign entity's organizational chart depicts the beneficiary as the president's direct subordinate, a position that is second from the top level of the staffing hierarchy. The chart indicates that the beneficiary's subordinates include an assistant manager, a sales department, and an accounting department. The assistant manager is shown as managing three salesmen; the sales department is shown as overseeing three truck drivers; and the accounting department is shown as overseeing a bookkeeper. It is unclear why the sales department is overseeing truck drivers rather than the sales staff.

The petitioner's organizational chart also depicts the beneficiary in a position that is directly subordinate to the president and second from the top level of the staffing hierarchy. Although the chart depicts a field manager, a secretary, and an office manager/purchaser at the third level of the staffing hierarchy, it is unclear whether the beneficiary oversees all three positions, as only the secretary is listed in the position that is directly below

the beneficiary with an arrow indicator from the beneficiary's position to that of the secretary. The fourth level of the staffing hierarchy includes an accountant supervised by the aforementioned office manager; a secretary, who is shown as overseeing subcontractors; and a field manager, who is shown as overseeing field workers. Although a landscape architect is also depicted at the fourth level of the staffing hierarchy, the chart does not clearly indicate who oversees this individual. The petitioner's organizational chart also lists stores where the company buys supplies, but the stores are not part of the petitioning entity.

In a decision dated August 20, 2009, the director denied the petition concluding that the petitioner failed to establish that the beneficiary had been employed abroad or that he would be employed in the prospective position with the U.S. entity in a qualifying managerial or executive capacity. With regard to the beneficiary's proposed employment, the director questioned whether suppliers and subcontractors who provide pool, patio, and electrical services can be deemed as the petitioner's employees. The director also commented on the descriptions of the beneficiary's foreign and proposed employment, finding that they were vague and general, thus resulting in the information having very limited probative value.

On appeal, counsel disputes the director's findings, asserting that the beneficiary's proposed employment would be within a managerial capacity. In reviewing the beneficiary's role within the petitioning entity, counsel emphasizes the beneficiary's discretionary authority with regard to personnel and personnel-related issues as well as his prominent role in matters concerning the petitioner's finances and business goals and strategies. Counsel asserts that the beneficiary oversees six professional employees and that he is relieved from having to primarily perform non-qualifying tasks. However, it is noted that without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. 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). In evaluating the submissions in the present matter, the AAO finds that the evidence is not sufficient to support the petitioner's claim.

Despite counsel's focus on the beneficiary's discretionary authority and his position within the petitioner's organizational hierarchy, the petition cannot be approved without a detailed description of the beneficiary's proposed job duties, which is expressly required by regulation. See 8 C.F.R. § 204.5(j)(5). Precedent case law also places a high value on a detailed job description, finding that the petitioner cannot satisfy the regulatory requirement by merely reciting the beneficiary's vague job responsibilities or broadly-cast business objectives, as 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). The job description offered by the petitioner in the present matter falls far short of the detailed job description with percentage breakdown that was requested in the RFE.

First, as indicated above, the percentage breakdown the petitioner provided precludes USCIS from being able to determine how much time the beneficiary would devote to specific job duties. Second, the job description is primarily comprised of general job responsibilities rather than specific tasks, which further hinders a proper analysis of the beneficiary's day-to-day activities and a determination of how much time the beneficiary plans to spend on those job duties that fall within the definition of what is deemed as being within a managerial or executive capacity. For instance, the petitioner indicated that the beneficiary would set organizational policies, exercise discretion, and take charge of long-term marketing and investment strategies. Based on the percentages that were assigned to each set of job responsibilities, it appears that the beneficiary would spend a significant portion of his time in all three areas. However, the petitioner failed to cite specific tasks the

beneficiary would perform with regard to setting policies, exercising discretion, and taking charge of marketing and investment strategies. The petitioner also failed to clarify exactly who, if not the beneficiary, would carry out the marketing strategies. Additionally, the petitioner claimed that the beneficiary would be responsible for negotiating with clients and subcontractors, a task that is not readily deemed as qualifying. While it appears that a great deal of the beneficiary's time would be spent on client and subcontractor negotiations, the AAO is unable to determine exactly how much time of the beneficiary's time would be spent performing this non-qualifying task. 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, the petitioner neither specified the beneficiary's daily job duties nor clarified how much time would be devoted to each specific task. In light of these significant deficiencies, the AAO lacks the information that is necessary to determine just what the beneficiary would be doing on a daily basis and whether the primary portion of his time would be spent performing tasks within a qualifying capacity. Rather, the information provided suggests that the beneficiary would spend a considerable amount of time performing non-qualifying tasks. Given the petitioner's claim that it had a total of four employees at the time of filing, the AAO cannot rule out the strong possibility that the primary portion of the beneficiary's time would be devoted to daily operational tasks. Therefore, the AAO cannot conclude that the petitioner would employ the beneficiary in a qualifying managerial or executive capacity.

Much like the deficient job description of the beneficiary's proposed employment, the petitioner provided an equally deficient job description of the beneficiary's employment abroad, which is discussed using general terms that fail to convey a meaningful understanding of the actual job duties that consumed the beneficiary's time. For instance, the petitioner stated that the beneficiary directed marketing strategy, sales, advertising, promotion, and pricing for 70% of his time and that the beneficiary also developed the foreign entity's marketing strategy for 70% of his time. The petitioner did not, however, discuss what specific tasks are involved in directing and developing these strategies. The petitioner also failed to explain how subordinate employees were utilized in the directing and developing processes so as to relieve the beneficiary from having to perform the underlying tasks that are not within a qualifying managerial or executive capacity. Although the petitioner stated that the beneficiary developed pricing strategy, exercised discretionary authority over personnel issues, and was in charge of planning and directing development, for a total of 140% of his time, no specific tasks were used to describe how the beneficiary accomplished any of these general responsibilities. Additionally, as with the description of the beneficiary's proposed employment, the petitioner failed to clearly quantify the proportion of time that was allotted to any of the beneficiary's responsibilities. Thus, in light of these numerous deficiencies, the AAO cannot conclude that the beneficiary was employed abroad or would be employed in the United States in a qualifying managerial or executive capacity.

Accordingly, 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.