

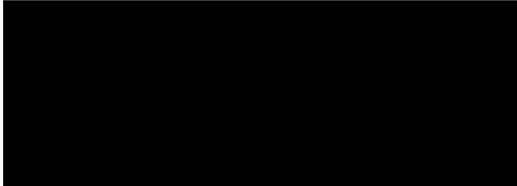
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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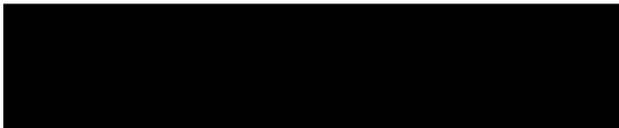
FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER Date:
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JAN 07 2010

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:

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 sole proprietorship that seeks to employ the beneficiary as its 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 determined that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity and denied the petition on that basis. On appeal, counsel submits a brief in which he disputes the director's conclusions and attempts to overcome the ground for denial.

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 beneficiary 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, _____ submitted a letter dated January 30, 2007, which includes the following description of the beneficiary's proposed employment in the United States:

[The beneficiary] will direct and coordinate activities of our company to obtain optimum efficiency, economy of operations and maximize profits. In coordination with company owners, he will plan and develop new organizational policies and goals, implementing through organizational personnel. He will confer with our subsidiary company's production managers to assist in assuring quality control, in developing new product lines and specific needs of customers. He will direct investigation of customer complaints regarding quality, tolerances, specifications, and delivered condition of our products. He will analyze [the] overall budget and make any necessary adjustments. [The beneficiary] will have authority to hire and fire personnel including supervisors. . . .

The supporting documents also included the U.S. entity's organizational chart, which illustrated a three-tiered hierarchy, including the beneficiary as his direct subordinate in the proffered position of general manager, and four direct subordinates of the beneficiary, including a warehouse employee, a sales person, a purchasing department employee, and an accounting department employee.

On July 25, 2008, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a more detailed description of the beneficiary's employment, including a specific list of the beneficiary's proposed job duties and the percentage of time that would be assigned to each of the enumerated duties. The petitioner was also asked to provide the job title and job duties of the beneficiary's supervisor as well as information about the beneficiary's subordinates, including their position titles, position descriptions, educational levels and salaries. Additionally, the petitioner was asked to provide quarterly tax returns and state unemployment compensation forms for all four quarters of 2007.

In response, the petitioner submitted the following percentage breakdown:

1. Develop and establish the company's policies and business operation procedures in accordance with CEO; (5%)
2. Make the annual business plan; (10%)
3. Conducting general administration, directing sales activities, advising on solutions to internal issues, allocating resources, and meeting with subordinates to ascertain project and transaction progress; (30%)
4. Exercise discretion over purchasing and import operations and important investment issues; (10%)
5. Direct the related cooperation between [the petitioner] and Shanghai ANC; (5%)
6. Make decisions on personnel management such as compensation, benefits, training, hiring, and firing of managerial and profession[al] employees; (5%)
7. Develop the long-term busniess [sic] relationship with key customers and supliers [sic] and to identify new or potential areas of development in the U.S. markets; (15%)
8. Oversee the management of financial matters including review and approve divisions' budget requests; oversee the effective utilization of long and short term debt; oversee preparation of annual budget, regular variance statements and annual audit; (15%)
9. Make reports to CEO. And assume the CEO's duties in the US when the CEO is working in China. (5%)

The petitioner also provided information about the beneficiary's subordinates, indicating that two subordinates possessed associate degrees and one received no salary based on the explanation that she is the company owner's wife. The petitioner's quarterly wage report for the 2007 quarter during which the Form I-140 was filed also shows that the petitioner had a total of four employees in February 2007 when the petition was filed.

the owner's wife, who assumed the accounting department position, was not paid a salary, thereby leading the AAO to question whether she was actually employed by the petitioner at the time of filing.

In a decision dated September 29, 2008, the director denied the petition, noting that the beneficiary's salary "is considerably lower than the salaries of most multinational executives or managers." The AAO notes, however, that while salaries may be a factor for consideration, the proposed salary, by itself, does not establish or disprove the managerial or professional nature of employment. The description of job duties and the complete circumstances of the proposed employment must be reviewed to determine the nature of a particular job. Therefore, while the AAO concurs with the overall determination that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity, the AAO's analysis is based on more relevant factors that will be addressed below.

On appeal, counsel asserts that the beneficiary will oversee the work of professionals, two of whom have associate's degrees and two with advanced degrees. Counsel's claim, however, is not persuasive. Section 101(a)(32) of the Act states that the term "profession" includes, but is not limited to architects, engineers, lawyers, physicians, surgeons, and teacher of elementary or secondary schools, colleges, academies, or seminaries. Additionally, as provided in 8 C.F.R. § 204.5(k)(2), the term "profession" includes not only one of the occupations listed in section 101(a)(32) of the Act, but also any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. Although counsel asserts that the two employees with associate's degrees have the work experience necessary in order to be deemed professional, 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 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). Thus, as two of the beneficiary's subordinates do not possess a baccalaureate degree or its foreign equivalent, the AAO cannot conclude that either of those individuals is a professional. Also, as noted above, at least one of the beneficiary's claimed subordinates receives no compensation at all. It is therefore unclear how the petitioner can claim this unpaid individual as a company employee and the beneficiary's subordinate. 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)). In light of these factors, counsel's claim that the beneficiary oversees the work of professionals is not supported by the evidence of record.

Additionally, counsel contends that the size of the petitioning organization is not a factor that diminishes its complexity. Counsel describes the petitioner as a "lean but highly sophisticated chain organization" whose staffing structure addresses the petitioner's planning, managing, purchasing, logistics, manufacturing, sales, and customer service needs. However, in order to establish that the beneficiary will be employed in a qualifying capacity, the petitioner must establish that it has the ability to relieve the beneficiary from having to primarily perform duties of a non-qualifying nature, as 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). Thus, for the purpose of determining whether the petitioner has the requisite capability, the AAO will consider the petitioner's staffing as one of the contributing factors along with the description of the beneficiary's proposed job duties. See 8 C.F.R. § 204.5(j)(5).

In the present matter, neither the petitioner's staffing structure nor its description of the beneficiary's proposed employment indicates that approval of the petition is warranted. First, with regard to staffing structure, the petitioner's 2007 first quarterly wage report, which incorporates the month during which the petition was filed, indicates that the petitioner employed four individuals, including the beneficiary, thereby leaving the beneficiary with a total of three subordinate employees (two of whom were not professionals) to carry out the daily operational tasks. It is unclear how such a staffing structure is sufficient to relieve the beneficiary from having to primarily engage in non-qualifying tasks. The AAO recognizes that it is not impossible for an organization with a smaller support staff to employ a multinational manager or executive. However, in order to enable the AAO to reach this conclusion, the petition must provide a detailed description of the beneficiary's proposed daily tasks, which leads to the AAO's second finding—that the petitioner failed to provide an adequate job description to explain what specific tasks the beneficiary would perform on a daily basis. 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. Relevant case law has confirmed that 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 the present matter, while the beneficiary's job description conveyed information about the beneficiary's level of authority, it fails to state the specific tasks he would perform in carrying out his overall responsibilities as the company's manager. For instance, the petitioner stated that the beneficiary would establish company policies, conduct general administration, direct sales activities, allocate resources, exercise discretion over purchasing and import operations, and oversee aspects of the petitioner's finances, which cumulatively would consume 60% of the beneficiary's time. However, the petitioner fails to translate this broad terminology into actual daily tasks. Thus, while the petitioner may have the degree of discretionary authority that is required of a multinational manager or executive, the record does not have sufficient information about the beneficiary's specific day-to-day job duties to determine that the primary portion of his day would be comprised of tasks within a qualifying capacity. On this basis, the AAO cannot approve this petition.

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.