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Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER Date: JAN 28 2010
LIN 08 007 55895

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 for business development. 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 argues that sufficient evidence was submitted to establish that the beneficiary would be employed in a qualifying capacity.

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 petitioner would employ the beneficiary 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 August 14, 2007 in which it claimed that the beneficiary would be employed in a managerial capacity. The petitioner also provided a description of the proposed employment, claiming that 50% of the beneficiary's time would be devoted to managing a professional staff; managing the company's operations, including pricing and policies, by reviewing local market conditions, competition, and product popularity; overseeing purchasing of gasoline, lubricants, groceries, and supplies; and setting labor apportionment policies to control costs. The petitioner stated that 20% of the beneficiary's time would be spent overseeing financial activity, setting the budget for expenditures, monitoring performance and profitability, and planning the company's development and expansion; another 20% of the beneficiary's time would be spent developing employee training programs and supervising managers and assistant managers to ensure efficiency and good customer service; and the remaining 10% of the beneficiary's time would be spent hiring and appointing staff to head the various company departments.

The petitioner also provided its organizational chart, which shows the beneficiary directly subordinate to the president. The chart shows that the beneficiary's immediate subordinates include an operations manager, who supervises two facility managers and a purchase manager, and a marketing manager, who oversees an assistant accounts manager and five assistant managers. According to the chart, all of the employees of the company are managers.

On August 27, 2008, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a more detailed description of the beneficiary's proposed employment, including a list of the actual day-to-day tasks the beneficiary would perform and the approximate percentage of time that would be attributed to each of the listed tasks. The petitioner was also asked to provide a detailed organizational chart with all the names and departments that comprise the petitioner's organizational hierarchy.

In response, the petitioner provided a letter from counsel dated October 6, 2008 in which counsel provided a supplemental job description for the beneficiary's proposed U.S. employment. Counsel separated the beneficiary's key responsibilities into four main categories, each of which was assigned a percentage of time the beneficiary would devote to the job duties within that category. The first category—managing essential functions of the organization—was allotted 25% of the beneficiary's time. The responsibilities that fall into this category would include general management activities, establishing company policies, negotiating long-term agreements with vendors, negotiating for expansion, and initiating the process to reevaluate the company's assets. Counsel provided the following list of examples of specific actions taken by the beneficiary in his management of essential functions: evaluating existing policies and market conditions to affect a price change with regard to various items the petitioner currently sells; negotiating agreements with vendors who provide the petitioner's inventory and supplies; obtaining a new appraisal of the petitioner's property, which led to renegotiations with vendors to get better prices on various products; and make policies to control costs.

The second category—general management of the company—was allotted another 25% of the beneficiary's time. The responsibilities that were listed in this category include overseeing financial activities, setting a budget for expenditures, monitoring performance and profitability, and planning for the development and expansion of the company. Counsel also provided examples of steps the beneficiary has taken to manage the company, including meeting weekly with the company's accounts manager to assess the company's finances and review the availability of funding for new projects and expansion activities; accompanying the finance manager in meeting with bankers regarding financing and refinancing options, meeting with brokers in an effort to obtain new property for development, and assisting the finance manager in appointing contractors for the expansion activities; and using his discretionary authority to appoint contractors, rather than company employees, to carry out certain tasks, such as conducting a traffic study for a new project.

The third category—exercising discretion over daily activities—was allotted 30% of the beneficiary's time. Examples that counsel listed within this category include the following: meeting with the sales/marketing and purchase managers to discuss plans to promote the company through advertising and coupons and supervising holiday celebrations; deciding to install a "Pump Top TV" to provide the petitioner with additional advertising and attract customers; meeting regularly with the operations manager to retain companies to conduct state-required training and to appoint vendors to conduct environmental safety testing of the facility; and deciding to develop a training program to improve employee skills.

The fourth category, which was left untitled, was allotted the remaining 20% of the beneficiary's time and includes supervising and controlling the work of supervisory employees, exercising discretion with regard to personnel-related issues, and supervising managers and assistant managers to ensure efficiency and good customer service. Counsel stated that the beneficiary oversees 14 employees and reviews new hires for the managerial or assistant manager positions, including checking each candidate's background and references checks as well as sitting in on the interviews. The beneficiary also reviews the work of managers and assistant managers and makes decisions regarding raises and promotions.

The petitioner also provided its organizational chart and corresponding employee list both of which reflect the petitioner's staffing as of August 2008.

In a decision dated December 4, 2008, the director denied the petition, concluding that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity. The director found it unreasonable for an eight-person entity to employ two workers who are involved primarily in directing the management of the organization. The director pointed out that in the documentation submitted at the time of filing the petitioner stated that it had 12 employees, indicating that there is an inconsistency between the organizational chart and the petitioner's other submissions. However, the AAO notes that the director's observation was incorrect, as the petitioner's organizational chart lists a total of twelve employees, the number of employees the petitioner initially claimed in the Form I-140.

Nevertheless, other deficiencies, which the AAO will address below, indicate that approval of the petition was not warranted and that the director's overall conclusion regarding the petitioner's eligibility was correct.

On appeal, counsel contends that the beneficiary manages all aspects of the petitioner's business, including two managerial employees, who are the beneficiary's direct subordinates. Counsel points out that the petitioner is fully staffed to ensure that the beneficiary is relieved from having to engage in any of the activities related to the retail business. Counsel also focuses on the beneficiary's degree of discretionary authority, pointing out the beneficiary's authority with regard to personnel decisions, issues regarding sales and marketing, the petitioner's finances, and all aspects of the petitioner's business expansion.

While the above factors are all material to an overall analysis of the beneficiary's employment capacity, the regulation at 8 C.F.R. § 204.5(j)(5) requires that the petitioner provide a detailed description of the job duties the beneficiary would be expected to perform in his proposed position.

In the present matter, the RFE provided express instructions as to the content of the job description and the format in which it was to be presented. Specifically, the petitioner was asked to list the beneficiary's actual daily tasks and to assign a percentage of time that would be allotted to each task. These instructions indicate that the purpose of the RFE was to elicit very specific information about the activities that the beneficiary would perform and the amount of time that would be allotted to qualifying job duties versus the non-qualifying ones. Instead of complying with the director's express instructions, counsel used broad job responsibilities and examples of various ways in which the beneficiary has used his discretionary authority to describe the beneficiary's proposed employment. Counsel cited very few of the beneficiary's specific tasks and assigned a percentage of time to each of four broad categories that were used to compartmentalize the overall job responsibilities. For instance, counsel indicated that 25% of the beneficiary's time would be spent performing tasks associated with the first category, i.e., managing an essential function. Although performing management functions and establishing policies are included within this category, it is unclear which specific

tasks the beneficiary undertakes in meeting these responsibilities. It is noted that the examples counsel provided in his effort to convey a clearer understanding of these broad responsibilities fail to specify any daily tasks. For example, counsel stated that the beneficiary evaluates existing marketing policies to determine when a change in pricing is required. However, there is no explanation as to how the beneficiary obtains information regarding local marketing conditions, competition, and popularity of certain merchandise, all of which serve as the foundation for the beneficiary's ultimate determination of when a price change is warranted. Counsel also included long-term vendor negotiation and negotiation for expansion in this first category of essential management functions. However, the petitioner has not established that the beneficiary's negotiating responsibilities translate into qualifying managerial or executive tasks.

Counsel indicated that the beneficiary would attribute another 25% of his time to the second category—general management of the company—which includes overseeing the company's financial activities. Counsel stated that such oversight requires the beneficiary to accompany the finance manager to meetings with bankers and contractors. However, it is unclear how attending meetings with bankers to discuss financing and refinance or attending meetings with appointing contractors to assume certain tasks with regard to the company's expansion can be readily understood as qualifying duties. While meeting with the accounts manager to review funding may be deemed a qualifying task, the petitioner's original organizational chart, which was submitted at the time of filing, does not include an accounts manager position. Based on the information conveyed in the organizational chart that was submitted in response to the RFE, it appears that the accounts manager position was filled after the Form I-140 was filed. A petitioner must establish eligibility based on the facts and circumstances that exist at the time of filing; 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).

The third category indicates that it consists of tasks that illustrate the beneficiary's use of his discretionary authority over daily activities—a category that was assigned 30% of the beneficiary's time. The category included such duties as meeting with the sales/marketing, purchase, and operations managers. However, it is unclear how much of the beneficiary's time was allotted to meeting with each of the different managers. This information is particularly important with regard to the beneficiary's supervision of the purchase manager, who, according to the organizational chart submitted at the time of filing, had no subordinate employees and was therefore not a managerial or supervisory employee, despite what his position title may indicate. See section 101(a)(44)(A)(ii) of the Act.

The fourth and final category, to which 20% of the beneficiary's time was allotted, has no general heading, but rather cites the beneficiary's supervisory responsibilities with respect to the petitioner's supervisors, managers, and assistant managers. It is unclear how these job responsibilities can be distinguished from those referenced in the third category, as both clearly indicate that the beneficiary has supervisory authority over the company's employees. The examples counsel cites to explain how the beneficiary carries out his supervisory role merely restate other information that was previously provided. For instance, counsel stated that the beneficiary supervises the accounts and marketing departments and the company's managers and assistant managers. Reciting these job responsibilities does not provide a clearer explanation of how these responsibilities would be carried out. Counsel also stated that the beneficiary ultimately evaluates each candidate that would assume a management or an assistant management position. However, it is unclear how much of the beneficiary's time would actually be attributed to this task, nor is there any indication that due consideration was given to the petitioner's specific needs and whether those needs include frequently hiring managers and assistant managers. While the petitioner may need to fill these positions more frequently in the

future, given its plans to expand its business, it is not apparent that the petitioner had such hiring needs at the time of filing, thereby leading the AAO to question how much of the beneficiary's time would be attributed to tasks associated with the hiring of managerial employees.

Lastly, in contrast to the job description counsel provided in response to the RFE, counsel's statement on appeal focuses significantly on the beneficiary's involvement in overseeing all aspects of the petitioner's installation of a new car wash. Counsel states that the beneficiary oversaw the safety and operations training of all company employees once the new carwash was installed. The duties associated with such oversight, which presumably involve overseeing contractual employees, cannot be deemed as qualifying. The beneficiary's oversight of other such projects gives rise to similar questions, which can only be addressed with a specific explanation of the beneficiary's actual daily tasks. 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).

Counsel equally focuses on the beneficiary's significant role as the key employee charged with the expansion of the petitioner's business. While such a role relieves the beneficiary from having to perform the operational tasks associated with the petitioner's current retail business, it is not apparent that the duties associated with the expansion, including interacting with brokers who would find and contractors who would develop property that would house the petitioner's additional retail locations, can be deemed as qualifying.

The petitioner has failed to provide a detailed description of the beneficiary's proposed job duties, which prevent the AAO from being able to assess whether they would be primarily managerial or executive in nature as of the date the petition was filed. Furthermore, based on the additional information provided by counsel in the appellate brief, it appears that a portion of the beneficiary's time, which the petitioner has failed to adequately account for in either of the provided job descriptions, would be devoted to overseeing the petitioner's business expansion, a project that would involve non-qualifying tasks. In view of these findings, the AAO cannot conclude that the beneficiary's proffered position would primarily involve the performance of tasks within a qualifying managerial or executive capacity. On the basis of this conclusion, this petition cannot be approved.

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.