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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

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FILE: LIN 07 174 54136 OFFICE: NEBRASKA SERVICE CENTER Date: **MAR 04 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:
[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 Delaware corporation that seeks to employ the beneficiary as president of international business development and marketing. 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 asserting that the beneficiary would be employed in an executive 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 submitted sufficient evidence to establish that 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, the petitioner submitted a letter dated May 16, 2007 in which the petitioner stated that the beneficiary's proposed position would include managing all aspects of the daily operation; supervising employees as well as hiring and firing employees; and establishing company goals and policies. In another letter, also dated May 16, 2007, the petitioner further added that the beneficiary would set sales goals, develop business strategies, and evaluate new projects.

On September 26, 2008, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a more detailed description of the beneficiary's proposed position. The petitioner was asked to list specific job duties and to assign a percentage of time that the beneficiary would devote to each task. The director asked the petitioner to identify the individuals that perform the customer service, bookkeeping, troubleshooting, and other such operational tasks in the course of the petitioner's daily operation. Additionally, the petitioner was instructed to provide a copy of its organizational chart.

In response, the petitioner provided the following breakdown of the beneficiary's proposed position:

50% Marketing Software Products.

Attend industry exhibitions worldwide. Develop and place advertisements in selected industry magazines/publications. Publish *WinWor[l]d* magazine Conduct direct marketing to potential customers. Set sales goals; develop marketing strategies to achieve those goals. Provide quarterly updates and data to [the foreign entity] detailing the results.

20% Manage Existing Clients, Customize local software

Regularly visits existing clients seeking further marketing opportunities and, in some cases, provide customized software solutions for specific needs. All software products are developed in Turkey, but certain on-sight modifications and adaptations can be developed at the customer's location. [The beneficiary] is qualified to provide limited software customization support. . . .

15% Seek Capitol Investment from [the] U.S. Window Industry

Expansion via direct investment is a practical and beneficial opportunity for [the petitioner] to more quickly research customers in the global marketplace. [The beneficiary] regularly evaluates investment proposals and seeks out certain business combinations that would allow [the petitioner] to rapidly expand its operations. . . .

10% Publish *WinWorld* magazine

Seek paid advertising to support publications and printing costs. Send *WinWorld* to 2,500 window companies on a bi-monthly basis. . . . [The beneficiary] has executive responsibilities for ad sales and article production in the U.S. . . .

5% Manage day-to-day operations, including all personnel decisions

[The beneficiary] is the general manager of the U.S. office and therefore is responsible for managing the daily operations of the office—licensing, rent, staffing, tax issues, etc. . . .

The petitioner indicated that a sales person and a bookkeeper are both contracted and that a customer service employee and an office administrator are both employed on a part-time basis. The petitioner also added that the part-time customer service employee handles the technical aspects of the business, including troubleshooting and software installation, when necessary.

After reviewing the petitioner's submissions, the director determined that the petitioner failed to establish eligibility for the immigration benefit sought and therefore issued a decision dated January 22, 2009, denying the petition. The director concluded that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity.

On appeal, counsel asserts that the job description submitted in response to the RFE establishes that the beneficiary's job duties satisfy the criteria enumerated in the definition of executive capacity. Counsel contends that the beneficiary is responsible for directing the management of the petitioning entity, which includes setting the company's goals and policies as well as choosing the business opportunities that the entity would pursue. Counsel's argument in this regard, however, is not persuasive, as the beneficiary's key policy-making role and discretionary authority are not instructive as to the nature of the job duties the beneficiary would primarily perform. It is possible, particularly where a petitioner lacks the organizational complexity or adequate support staff, for a beneficiary to assume the top-most position within an organization's hierarchy while still having to perform the daily operational tasks that are necessary to ensure that the petitioner continues to function. It is noted, however, 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 (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).

Therefore, while policy-making and discretionary authority are both undeniably necessary components of managerial and executive capacity positions, U.S. Citizenship and Immigration Services (USCIS) must first examine the petitioner's description of the proposed job duties before concluding whether or not the proposed position would be within a qualifying capacity. *See* 8 C.F.R. § 204.5(j)(5). USCIS will also consider the petitioner's organizational hierarchy in order to determine whether the company is adequately staffed with support personnel such that the beneficiary would be relieved from having to primarily perform non-qualifying tasks.

In the present matter, the petitioner indicated that 50% of the beneficiary's time would be attributed to marketing software products, which would include attending industry exhibitions, developing and placing advertisements, publishing a magazine, conducting direct marketing, setting sales goals, and updating the foreign entity with quarterly reports. Despite the fact that the job duties associated with marketing the product are indicative of daily operational tasks, the petitioner did not specify how much of the beneficiary's time would be attributed to each duty. The petitioner also failed to state what specific tasks would be involved in setting sales goals, thus leaving open the possibility that additional non-qualifying tasks may be associated with this broad job responsibility. Although the petitioner stated that the beneficiary would devote 10% of his time to publishing a magazine, the primary task associated with this responsibility is seeking paid advertisers to support the publication. The AAO notes that this is a daily operational task necessary to provide a product. *See* sections 101(a)(44)(A) and (B) of the Act.

The petitioner also indicated that the beneficiary would spend 20% of his time visiting clients to further promote the company's product and provide software solutions for customers' specific needs. Despite the claim that the petitioner employs a customer service representative, the petitioner readily states that at least some portion of the customer-related tasks would continue to be taken on by the beneficiary, thus adding to his list of non-qualifying tasks.

The AAO further notes that in evaluating the petitioner's organizational hierarchy, it is not readily apparent that the petitioner has the required support staff to relieve the beneficiary from having to perform non-qualifying tasks. Although a determination of the beneficiary's proposed employment capacity cannot be based solely on the size of the petitioning entity, USCIS can and should consider the size of the petitioner's support staff in order to gauge the company's ability to employ the beneficiary in a primarily managerial or

executive position. *See Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003).

In the present matter, while the petitioner claimed four employees at the time of filing, the petitioner's 2007 corporate tax return shows that the petitioner paid only \$7,439 in salaries and wages the year during which the I-140 was filed. Based on this information, it is not apparent that the petitioner employed an adequate support staff to relieve the beneficiary from having to perform non-qualifying tasks. In light of the above, the AAO cannot conclude that the petitioner had progressed to a stage of development that would require the employment of a primarily managerial or executive employee. Moreover, the job description submitted strongly indicates that the primary portion of the beneficiary's time would be spent performing daily operational tasks rather than tasks within a managerial or executive capacity. Therefore, on the basis of this initial conclusion, the instant 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.