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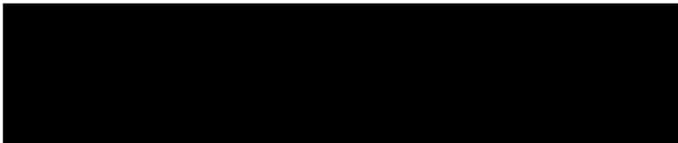
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FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER Date: MAY 06 2010
LIN 09 049 50780

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 reopen or 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 an Ohio corporation seeking to employ the beneficiary as its senior development engineer. 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 on two separate 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 the beneficiary would be employed in a managerial or executive capacity. On appeal, counsel challenges the director's analysis and disputes the grounds cited 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 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 December 8, 2008, which included descriptions of the beneficiary's foreign and proposed employment. The petitioner claimed that the beneficiary's foreign and proposed employment fits the definition of managerial capacity. Accordingly, the petitioner listed the four criteria that are the basis of the statutory definition of "managerial capacity" and described the beneficiary's foreign employment as follows:

1. Manages the organization, or a department, subdivision, function, or component of the organization:

[The beneficiary] was responsible for technology and quality issues related to tire manufacturing. He had overall responsibility for introduction of new tires to the plant, meeting all customer, government and company requirements, directing all tire development

activities and designing, implementing and respecting all systems in these areas. He oversaw and directed action to prevent occurrences of new product process and quality system nonconformities; identified and recorded problems relating to product, process and quality systems; initiated, recommended or provided solutions; verified implementation or provided solutions; and controlled further processing, delivery, or installation of nonconforming product until deficiency or unsatisfactory condition had been corrected. He was responsible for ensuring that the business center objectives were supported with respect to safety, product and waste.

[The beneficiary] had accountability for the team's quality assurance, results and corrective actions. He identified opportunities for improvement and implemented action plans to address quality issues.

2. Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function . . . [:]

[The beneficiary] provided leadership, direction and development to his team and oversaw team member involvement while striving to facilitate their personal development and training to maximize successful team decisions.

[He] was responsible for team building and team facilitation. He delegated responsibility to team members as well as involved the team in the decision making process. He had overall responsibility for time management and organizational skills of his team and development and trained team members He was responsible for maintaining his team performance within the plant, regional and corporate and objectives. He planned, motivated, coached and lead team setting tasks and monitored performance of members

3. Has authority to hire and fire or recommend subordinate managers, supervisors and employees along with other personnel actions . . . [:]

[The beneficiary] directly oversaw the activities of the following subordinate associates who reported directly to him: Quality Technician, Quality/Die Technician and two Tire Building Drum Technicians over whom he provided leadership and technical support, provided recommendations with respect to hiring, firing and disciplinary actions; indirect reports included four Production Machine Set[-]Up Technicians who provided reports when required.

4. Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority[:]

[The beneficiary] provided day-to day guidance, direction in managing his team to ensure the achievement of goals and objectives. He led his assigned team to reach the overall organization objectives. He managed workload, workflow, and compliance to maximize efficiency....

Additionally, with regard to the fourth criterion, the petitioner stated that the beneficiary was responsible for ensuring a safe work environment, minimizing waste by evaluating and analyzing scrap tires to determine

appropriate corrective actions, improving productivity by initiating, evaluating, and integrating new systems and optimizing existing systems, and revising and maintaining procedures for "ISO 14001/QS900/TS16949."¹

With regard to the beneficiary's proposed employment, the petitioner provided a similarly formatted job description. The petitioner listed the four criteria that comprise the statutory definition of "managerial capacity" and provided the following statements to explain how the beneficiary's job duties would fit within the parameters of each criterion:

1. Manages the organization, or a department, subdivision, function, or component of the organization:

[The beneficiary] provides management and technical leadership of all functions involving installation and evaluation of new highly complex curing software at Goodyear's North American and Latin American tire plants. He leads the advancement of the level of technical contribution to the business. He has broad[-]based discretionary authority and responsibility and has significant impact on driving the overall business through the direction, development, management, and coordination of activities involving new curing software He oversees, develops, and implements technical strategy and manages technical relationships and technology transfers between manufacturing locations and provides leadership that provides support for compounding process optimization. He ensures a safe work environment and leads process safety compliance He facilitates the implementation of systems and processes He coaches and trains associates to develop, implement, and monitor safety procedures.

He oversees and directs the measurement and assignment of types of tire cures . . . to ensure a differentiating competitive advantage of Goodyear products and processes. He has overall responsibility and serves as Goodyear's expert for assessment of the correctness of tire cures assigned by the North American and Latin American cure compounders.

He oversees and directs audits, analyzes and evaluates cure audit data, and recommends changes to technology based on results of assessments. He assists as necessary during inspections and product reviews, and ensures that documentation and procedures are consistent and in place to maintain plant compliance.

2. Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function . . . [:]

[The beneficiary] provides leadership, direction and development and oversees and coordinates the activities, including supervision, control and assignment of work, methods to be used, and has overall responsibility for work of subordinate technical support associates Additionally, one to two Cure Compounders at each North American and Latin American plant report to him for instructions on the installation and proper use of the new software and provide [the beneficiary] with periodic assessments of the software [The beneficiary]

¹ While reference to "ISO 14001/QS900/TS16949" may be understood within the petitioner's given industry, the petitioner did not expressly define these symbols in layman's terms. The AAO is therefore unclear as to what these terms actually mean or what it means to revise and maintain procedures with respect to "ISO 14001/QS900/TS16949."

assesses the correctness of tire cures assigned to the Plant Cure Compounders and provides feedback. . . . Additionally, he is directly responsible for the management of the technology initiative function through the use of new curing related software.

He is highly visible to staff and peers and promotes hands-on, high involvement approach to problem solving. . . . He effectively interacts with multiple disciplines, cross-functional teams and business unit functions He interfaces with other Goodyear departments and management to plan and adjust priorities quickly to respond to customer and manufacturing needs. He acts as a liaison with Research science, Chemical division, QTEC and Production.

3. Has authority to hire and fire or recommend subordinate managers, supervisors and employees along with other personnel actions . . . [:]

[The beneficiary] directly oversees the activities of the following subordinate professional associates who report to him: R&D Associate and Lead Compounder (who is specific to compounding in general). [The beneficiary] has discretionary authority with respect to promotional recommendations and actions and takes part in their annual performance appraisals. He also oversees the activities of one to two Cure Compounders at each North American and Latin American Plant who report to him for instructions on the installation and proper use of the new software.

With regard to the fourth criterion—exercises discretion over the day-to-day operations of the activity or function for which the employee has authority—the petitioner provided the following list of the beneficiary's principal responsibilities:

- Formulate, conceptualize, and implement technical strategy to optimize curing specifications for North America and Latin America Plants[.]
- Serve as [a] resource to major capital projects[.]
- Investigate and utilize new technologies to improve the development process and communicates advancements to cross-functional teams[.]
- Identify product strengths and weaknesses to teams, Line, Advanced and Material Support[.]
- Provide highly complex technical leadership and direction and support the technical team regarding product validation issues to deliver commercial results[.]
- Manage problem resolution concerning customer complaints involving product performance relative to material quality throughout the development cycle and follow products to production release[.]
- Direct and support Plant cure level audits for the North America and Latin America tire plants[.]
- Review North America and Latin America cure assignment practices.

It is noted that the petitioner also provided separate percentage breakdowns to better explain how the beneficiary allocated his time during his employment abroad and how he would allocate his time in the proposed position with the U.S. entity. As the director incorporated both percentage breakdowns into the denial, the AAO need not repeat this information.

On December 24, 2008, the director issued a request for additional evidence (RFE) instructing the petitioner to provide organizational charts of the foreign and U.S. employers, clearly depicting the beneficiary's placement within each entity's organizational hierarchy and describing the job duties of the beneficiary's immediate supervisors and subordinate employees. The petitioner was also asked to provide a copy of the approved Form I-129S and the supporting documents that were used to classify the beneficiary as an L-1B nonimmigrant.

The petitioner complied with the director's RFE, submitting organizational charts for both entities as well as the approved L-1B petition and supporting documents. The organizational chart pertaining to the foreign employer depicted a plant manager as head of the organization with eight subordinate positions directly subordinate to him. It is noted that the individual who was identified as the plant manager also held the position of manager of technology quality systems to which the beneficiary was directly subordinate. The beneficiary's subordinates included a quality technician, a die technician, two drum technicians and four set-up technicians. The petitioner provided a list of job duties describing the tasks assigned to the quality technician, the die technician, and the two drum technicians, respectively.

The petitioner also provided its own organizational chart, which depicted the beneficiary's position as immediately subordinate to the chief engineer of global processing and cure technology, which was shown as one of two top-most positions within the hierarchy. The beneficiary's three subordinates included one lead compounder in charge of the North American plant, the Asia compounding plant consisting of nine compounders, and a Latin American plant consisting of seven compounders. It is noted that the chart did not list a lead compounder either for the plant in Asia or the plant in Latin America. In a separate submission, the petitioner indicated that the education requirements for general compounding include a bachelor of science degree in engineering or science.

Lastly, the petitioner provided a copy of the support letter dated January 2, 2008, which was submitted in support of the previously filed Form I-129S. The letter included a list of seven primary job responsibilities that were used to describe the beneficiary's employment abroad.

On March 2, 2009, the director issued a decision denying the petition. The director concluded that the petitioner failed to establish that the beneficiary was employed abroad or that he would be employed by the U.S. entity in a qualifying managerial or executive capacity. With regard to the beneficiary's foreign employment, the director found that at least 50% of the beneficiary's time was spent performing daily operational tasks, which did not fit within the definition of managerial or executive capacity. The director also found that the foreign job description that the petitioner submitted in support of the Form I-129S, which was filed to classify the beneficiary as a specialized knowledge employee, was inconsistent with the description of foreign employment that was submitted in support of the instant Form I-140 that seeks to classify the beneficiary as a multinational manager. Namely, the director noted that the petitioner did not refer to any supervisory or managerial duties when describing the beneficiary's foreign employment in the submissions used to support the nonimmigrant petition.

On appeal, counsel challenges the director's analysis of the percentage breakdown that was submitted to establish the beneficiary's time allocation during his foreign employment. After reviewing the document in question, the AAO finds that counsel's objection was based on mere semantics and did not substantively raise a valid deficiency in the director's finding. A thorough reading of the job description in question indicates that the beneficiary did in fact spend 20% of his time on the manufacturing engineering methods, theories, and techniques that would correct any problems with scrap tires. While the director's assessment may not convey the specialized nature of the beneficiary's involvement with scrap tires, the goal of the director's analysis was to determine how much of the beneficiary's time was spent performing non-qualifying tasks. The fact that a task may require specialized knowledge does not mean that the task is of a qualifying managerial or executive nature. Here, the petitioner indicated that the beneficiary not only investigated the root cause of the problems, but he also provided solutions to those problems, thus indicating that the tasks associated with scrap tires were necessary to provide quality products. It is noted 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).

In light of the above statutory requirement, the AAO agrees with the director's questioning of the beneficiary's role as it pertains to customer relations. In the present matter, the percentage breakdown that was specifically addressed by the director indicates that 20% of the beneficiary's time was devoted to customer and internal requirements regarding quality and performance issues of the products as well as finding solutions to those issues. Again, the petitioner does not clarify or provide sufficient information to enable U.S. Citizenship and Immigration Services (USCIS) to conclude that the beneficiary is not directly involved in finding the solutions for customer quality requirements. If the beneficiary is not so involved, the petitioner must establish with sufficient clarity what specific tasks the beneficiary performed in relation to the more general job responsibility. 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).

Moreover, the petitioner indicated both in the additional job description that was submitted in the support letter dated December 8, 2008 and in the percentage breakdown that a portion of the beneficiary's time was spent overseeing the work of others. The percentage breakdown more specifically indicated that 20% of the beneficiary's time focused on providing leadership to the subordinates named in the foreign entity's organizational chart. However, the evidence of record does not establish that the beneficiary's subordinates were supervisory or professional employees. Thus, the 20% of the beneficiary's time that was spent overseeing the work of such subordinates would not be deemed as time spent within a qualifying managerial or executive capacity.

Lastly, despite the fact that the director expressly requested that the petitioner explain why the job description submitted in support of the Form I-129S failed to mention any managerial or supervisory aspects of the beneficiary's foreign employment, counsel did not address this issue on appeal.

In summary, the petitioner has failed to establish that the beneficiary's employment abroad consisted primarily of qualifying managerial or executive tasks. As discussed above, it appears that the beneficiary spent a considerable portion of his time providing technical solutions to complex issues. While this may establish that the beneficiary was employed in a specialized knowledge capacity, it does not establish that he

was employed in a primarily managerial or executive capacity as required for the immigrant classification sought in the present matter. Therefore, on the basis of this determination this petition cannot be approved.

Next, the director questioned the managerial or executive nature of the beneficiary's proposed employment given the information in the petitioner's organizational chart, which indicates that the beneficiary would manage subordinate employees who work in plants that are located in Asia and South America. The director surmised that the primary portion of the beneficiary's time would be spent developing and implementing testing software, drafting the operating manual, and training cure compounders.

On appeal, counsel repeats the percentage breakdown provided initially in support of the petition and argues that the beneficiary would fill the role of function manager. However, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. As previously stated, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be 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. at 604.

In the present matter, the AAO finds that the director's assessment of the percentage breakdown describing the beneficiary's time allocation was on point in that 60% of his time would be spent using test analysis software to create an operating manual. Although the petitioner indicated that a portion of that 60% would be spent overseeing the review and modification of the manual, it is unclear who would be charged with underlying modification and/or expansion tasks. While the beneficiary's tasks may be highly specialized in nature, the petitioner has failed to establish that such tasks amount to managing an essential function. Therefore, the AAO cannot conclude that the beneficiary would be employed in a qualifying managerial or executive capacity. On the basis of this additional determination 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.