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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

[Redacted]

B4

DATE:

APR 13 2011

OFFICE:

[Redacted]

FILE:

[Redacted]

IN RE:

Petitioner:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, [REDACTED]. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a [REDACTED] corporation that seeks to employ the beneficiary as its vice president.¹ 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 three independent grounds of ineligibility. The director determined that the petitioner failed to establish that: 1) it had been doing business for one year prior to filing the instant Form I-140; 2) the beneficiary was employed abroad in a qualifying managerial or executive capacity; or 3) the beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, counsel disputes all three grounds for denial and refers to the supplemental documents that have been provided in support of the appeal. After reviewing the petitioner's submissions, the AAO finds that the petitioner has overcome the first two grounds for denial. As such, the focus of this decision will be on the remaining ground concerning the beneficiary's proposed employment with the U.S. entity.

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

¹ Although the petitioner's Form I-140 indicated that the beneficiary's proposed position with the U.S. entity would be that of director, the support letter that was submitted along with the petition indicated that the position title of the beneficiary's proposed employment is that of vice president.

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 calls for an analysis of the beneficiary's job duties in his proposed employment with the U.S. entity. Specifically, the AAO will examine the record to determine whether the petitioner provided 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, [REDACTED] director of the [REDACTED] provided a letter on behalf of the petitioner in which she discussed the beneficiary's proposed employment with the petitioning U.S. entity. [REDACTED] referred to the beneficiary's experience with the petitioner's foreign parent company and asserted that his familiarity with the foreign business rendered him a prime candidate for the proposed position with the U.S. entity. The beneficiary's time would be allocated to responsibilities in five categories—growth, finances, business procurement, personnel, and conducting business.

With regard to the first category—growth—[REDACTED] stated that the beneficiary would be responsible for establishing and ensuring the execution of policy in accordance with the corporate charter, coordinating functions and operations with the [REDACTED] office, setting growth targets, and establishing procedures to ensure that the company reaches its business objectives. The second category—finances—would require the beneficiary to assume responsibility for reviewing financial statements, directing the formulation of financial programs to provide funding, meeting with investors, reviewing activity reports, and budgeting all aspects of the business. [REDACTED] went on to state that job duties in the category of business procurement would be of key importance and would require the beneficiary to negotiate distribution agreements with suppliers and identify new products to export to [REDACTED]. The beneficiary's responsibilities with regard to personnel would include recruiting candidates who are familiar with Swiss business protocol and exporting formalities, negotiating salaries, and evaluating employees' work performances. Lastly, the beneficiary's responsibilities in the conducting business category would include negotiating with suppliers, communicating with certain [REDACTED] customers, and delegating shipping and other routine tasks to the office assistant. [REDACTED] stated that the beneficiary functions at a senior management level within the proposed entity's organizational hierarchy and manages a subordinate staff of supervisory employees.

On February 9, 2009, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a list of the beneficiary's proposed day-to-day job duties with a percentage of time assigned to each duty, list the beneficiary's subordinates and briefly describe their respective job duties and educational levels, provide an organizational chart depicting the petitioner's management and personnel hierarchy, and submit the petitioner's financial documents, including 2008 quarterly tax returns, payroll summaries, IRS Forms W-2, and IRS Forms 1099.

In response, the petitioner provided the following list of the beneficiary's duties and responsibilities in his proposed position with the U.S. Entity:

- Creation and implementation of the policies, procedures and long-range goals [The beneficiary] formulated, upgraded and implemented the policies and procedures by which the company operates. . . . Once the policies and procedures are created, they are implemented through subordinate management personnel on the staff.
- Selection of [REDACTED] vendors
- Selection of American vendors
- Implementation of the routes to take advantage of the Free Trade Agreement
- Selection of show room locations.

- Responsibility for management and staffing of the company[.] The Beneficiary is responsible for the retention and termination of all personnel.
- Acting as liaison and representative for the subsidiary The Beneficiary confers and consult[s] with the Executive and managerial people of [the foreign entity] on a continual basis to report the progress and activities of the operation in the United States
- Overall performance of the company via supervision of subordinate managers [including] the director of operations[.] [T]he beneficiary has been responsible for the overall performance [of] each project or member of the staff on a daily basis to ensure that procedures are being complied with. Any decisions or adjustments to be made that exceed the authority of the respective managers are addressed during the daily briefings. Additionally, [the beneficiary] evaluates the efficacy of the current policies and how they can be improved and refined to streamline the efficiency of the operation.
- Assess any outside sub-contracting.
- To represent the company in business with other corporations and official entities.
- To coordinate the preparation and diffusion of the material that [was] prepared to such effect by the [redacted] supplier [and] to guide and facilitate the work of the installations in the United States.

Rather than assigning a percentage of time to each of the above listed items, the petitioner generally stated that 70% of the beneficiary's time would be allocated to managerial- and executive-level tasks, while the remaining 30% of his time would be allocated to daily operational tasks. The petitioner also provided a separate employee list, which included 1) the beneficiary; 2) an assistant manager/sales associate, who reviews client negotiations and prepares technical proposals; 3) a sales manager, who manages client phone calls, writes letters, and prepares proof of payment; and 4) a sales associate, who is responsible for customer service and managing sales information and project proposals. The record was supplemented with the petitioner's third quarterly report for 2008, which includes all four of the employees who were named in the petitioner's employee list.

On May 23, 2009, the director denied the petition, concluding that the petitioner failed to establish that the beneficiary's employment with the U.S. entity would be in a qualifying managerial or executive capacity.

On appeal, counsel challenges the director's reference to the company's size in making the determination regarding the petitioner's eligibility. Counsel urges the AAO to consider other factors, including the petitioner's organizational structure and the beneficiary's position with respect to others in the organization.

While the AAO agrees with counsel's contention that multiple factors must be considered when examining the beneficiary's employment capacity, the beneficiary's position within the petitioner's organizational hierarchy cannot be considered without also giving due consideration to the job duties to be performed. The fact that an individual manages a small business and has overall control of that business in terms of decision-making and personnel does not necessarily establish that the beneficiary would be employed in a managerial or executive capacity as defined in section 101(a)(44) of the Act. As such, the AAO will look first to the petitioner's

description of the job duties when examining the beneficiary's executive or managerial capacity. *See* 8 C.F.R. § 204.5(j)(5). The emphasis that U.S. Citizenship and Immigration Services (USCIS) generally places on a detailed description of the proposed employment is supported by published case law, which has determined that 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).

In the present matter, the director attempted to elicit highly relevant information regarding the beneficiary's daily job duties by instructing the petitioner to list the beneficiary's specific tasks and to indicate the percentage of time the beneficiary would allocate to each task. The information that the petitioner provided did not fit the criteria laid out in the RFE. Despite the director's request for specific job duties, the beneficiary's job description was primarily comprised of general job responsibilities and lacked the requested time allocations. As such, the AAO has no way of knowing whether the actual underlying tasks associated with such general job responsibilities as creating and implementing policies and procedures, implementing routes, supervising managerial employees, and coordinating the preparation and dissemination of materials to guide suppliers are within a qualifying managerial or executive capacity. The petitioner has simply failed to provide enough detailed information regarding the specific tasks to enable the AAO to make an informed determination as to their qualifying or non-qualifying nature.

While the AAO acknowledges that no beneficiary is required to allocate 100% of his time to managerial- or executive-level tasks, the petitioner has the burden of establishing that the non-qualifying tasks the beneficiary would perform are only incidental to his/her proposed position. As most managerial or executive positions, including the beneficiary's proposed position, are not entirely devoid of all operational tasks, it is particularly important that the job description provides a detailed statement disclosing the job duties that would comprise the beneficiary's proposed employment and indicates how much time would be allocated to individual tasks. 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).

Here, [REDACTED] clearly indicated in her initial statement that the beneficiary's key responsibility was to procure business, thus indicating that there is a sales component built into the proposed position and that this component would consume a significant portion of the beneficiary's time. [REDACTED] also indicated that the beneficiary would negotiate with suppliers and communicate directly with certain [REDACTED] customers as well as recruit personnel and negotiate their salaries. It is therefore clear that the beneficiary's proposed employment would require him to perform certain key operational tasks. Regardless of their value to the overall success of the petitioning entity, the fact that the beneficiary would perform these non-qualifying tasks requires that the petitioner specify what portion of the beneficiary's time they would consume. Moreover, in order to meet the statutory criteria, the petitioner must also specify with sufficient clarity which qualifying tasks the beneficiary would perform and establish that those tasks, rather than the non-qualifying operational job duties, would consume the primary portion of the beneficiary's time. This primary objective has not been met in the present matter.

Moreover, when considering the deficient job description in light of the petitioner's relatively limited organizational structure, which at the time of filing was comprised of three subordinates assisting the beneficiary, the AAO must question whether the petitioner was adequately staffed to relieve the beneficiary

from having to allocate the primary portion of his time to the performance of non-qualifying operational tasks. While counsel is correct in noting that the size of an organization should not determine whether the petitioner is eligible for the immigration benefit being sought herein, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *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).

Additionally, while the AAO acknowledges the managerial position titles that have been assigned to the beneficiary's subordinates, the petitioner has not provided an adequate illustration of its organizational hierarchy sufficient to establish that the employees are truly managers other than in their respective position titles.

In summary, a comprehensive review of the record fails to establish that the petitioner was ready and able to employ the beneficiary in a qualifying managerial or executive capacity at the time of filing the petition. While the AAO generally agrees that no one factor should be relied upon to reach an adverse conclusion, the AAO has considered a variety of relevant factors and finds that the petitioner has not provided sufficient evidence to warrant a favorable finding. While the petitioner's organizational complexity may change with time such that it will eventually support an individual who would primarily perform tasks within a managerial or executive capacity, precedent case law mandates that a petitioner must establish eligibility 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). As the record does not establish that the petitioner would be able to employ the beneficiary in a managerial or executive capacity at the time of filing the petition, 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.