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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: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER

Date:

JAN 10 2011

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:

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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a limited liability company organized in the State of Florida. It seeks to employ the beneficiary as its director of operations. 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 the conclusion that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On appeal, counsel disputes the director's conclusion, asserting that the beneficiary has the authority to hire and fire independent contractors who perform services for the petitioner. Counsel also points out that the petitioner is owned by the foreign entity, which effectively controls the petitioner and the beneficiary and that as a result the petitioner and the beneficiary do have an employer-employee relationship contrary to the director's determination. Although counsel indicated in the Form I-290B that he intended to submit a brief and/or additional evidence within 30 days of filing the appeal, there is no evidence that the petitioner has supplemented the record in any way. As such, the record will be considered complete as currently constituted and a decision will be made based on the documentation that has been provided thus far.

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 issue in this proceeding is whether the petitioner submitted sufficient evidence to establish that it would employ the beneficiary in the United States within 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, which includes the following description of the beneficiary's proposed employment with the U.S. petitioner:

As Director of Operations/CEO of [the petitioner], [the beneficiary] plans, develops, and establishes policies and objectives for [the petitioner]. He is responsible for managing and

overseeing the operations and providing the overall direction of business operations. [He] will continue to review activity reports, and financial statements to determine progress and status in obtaining objectives and revise objectives and plans in accordance with current conditions. [The beneficiary] will continue to be responsible for managing the budget, purchasing, hiring, and training of employees and oversee the newly acquired business and its day[-]to[-]day operations to ensure this new phase of expansion of the business is on firm financial footing.

On December 18, 2008, the director issued a request for evidence (RFE) instructing the petitioner to provide, *inter alia*, a more detailed description of the beneficiary's proposed daily functions, the job duties that those functions will entail, and the amount of time allocated to each of the beneficiary's daily tasks. The petitioner was also asked to provide a detailed organizational chart illustrating the beneficiary's proposed position with respect to others within the hierarchy. Additionally, the director asked the petitioner to provide its IRS Form W-2s and/or Form 1099s for 2007 as well as current work schedules for all employees.

In response, the petitioner provided a statement dated March 2, 2009 (marked as Exhibit 3), which incorporated the following percentage breakdown of the beneficiary's time in his proposed managerial position with the U.S. entity:

- Responsible for the means and methods to be used in the business development execution of customer projects. (20% of time)
- Analyze operations to evaluate performance of the company and its staff in meeting objectives, and to determine areas of potential cost reduction, program improvement, or policy change[.] (10% of time)
- Coordinate activities, and resolve problems. (20% of time)
Direction, planning, and policies implementation, objectives, and activities of [the] business in order to ensure continuing operations, to maximize returns on investments, and to increase productivity.
- Establish responsibilities, and coordinate functions among departments and subcontractors. (30% of time)
Implement corrective action plans to solve organizational or departmental problems[.]
- Prepare and present reports concerning activities, expenses, budgets, government statutes and rulings, and other items affecting businesses or program services. Report forecast and financial statements to headquarters. (20% of time)

Additionally, the petitioner stated that the beneficiary oversees the work of seven subcontractors and supervises an administration and marketing adviser, a sales consultant, an accountant/financial advisor, an IT advisor, and an international marketing and trade advisor.

In a decision dated March 23, 2009, the director denied the petition concluding that the petitioner failed to establish that it would employ the beneficiary within a qualifying managerial or executive capacity. In support of this conclusion, the director observed that the petitioner used IRS Form 1099-MISC to compensate

its claimed employees and therefore determined that the beneficiary would not be relieved from having to primarily perform daily operational tasks by a staff of professional, managerial, or supervisory employees.

In examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). Case law supports the pivotal role of a detailed job description, pointing out 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). The AAO will then consider this information in light of the petitioner's organizational hierarchy and staffing structure as a means of gauging the petitioner's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks of the business.

In the present matter, neither the beneficiary's job description nor the evidence of the petitioner's staffing hierarchy support the petitioner's claim that the beneficiary would be primarily employed within a managerial capacity. First, the AAO finds that the beneficiary's job description is overly vague and does not convey a meaningful understanding of exactly what the beneficiary will be doing on a daily basis and how much of his time would be spent on qualifying tasks versus the non-qualifying ones. For instance, while the petitioner stated that the beneficiary would be responsible for the means and methods used in business development, the petitioner did not specify the beneficiary's role by identifying the actual daily job duties the beneficiary would perform with respect to this general responsibility. Similarly, the petitioner failed to explain what specific job duties the beneficiary would perform in his effort to coordinate activities and solve problems. Merely stating that the beneficiary would direct, plan, and implement policies and objectives does not identify any actual daily tasks. The petitioner was equally vague with regard to the beneficiary's role in supervising employees, stating that the beneficiary would coordinate functions among departments and subcontractors, which would require implementing corrective plans and resolving organizational problems. These general, non-descriptive statements were used to account for 70% of the beneficiary's time, despite the fact that they provide no insight into the beneficiary's role within the organization or the actual tasks he would perform in executing this role.

With regard to the second concern—the petitioner's staffing—the record is lacking in consistent documentation to support the petitioner's claim regarding who the petitioner employed at the time the Form I-140 was filed. Specifically, the petitioner's employee list, which was appended to Exhibit 3 of the RFE response, lists five positions and names the employees occupying those positions. However, at least two of the named individuals—CPA/financial advisor [REDACTED] and international marketing and trade advisor [REDACTED]—were not among individuals to whom the petitioner issued an IRS Form 1099 in 2007. It is therefore unclear who, if anyone, filled the respective positions that were apparently assigned to these individuals at the time the petitioner provided the response to the RFE. Another two employees—sales consultant [REDACTED] and IT advisor [REDACTED]—were compensated at rates that indicate that either these individuals were not working for the petitioner on a full-time basis or they did not work for the petitioner for the full 2007 tax year, which leads to the question of whether they were actually employed by the petitioner at the time the petition was filed. These uncertainties result in doubt as to whether or not the petitioner was adequately staffed to ensure that the beneficiary would be relieved from having to primarily perform operational, non-qualifying tasks. 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).

Additionally, with regard to the petitioner's claim that the beneficiary would oversee the work of subcontractors, it is noted that any time spent supervising, directing, or overseeing the work of the petitioner's contractors cannot be considered as being a qualifying managerial or executive duty. Whether or not these specific tasks would normally be deemed managerial or executive if performed in relation to the internal staff, i.e., *employees*, of the petitioner, they would be deemed in this instance to be tasks necessary to provide a service, albeit a management service, being provided by the petitioner as a general contracting company and, thus, would be non-qualifying. In other words, when the service provided by the petitioner is to act as a general contractor and manage and/or oversee subcontractors, this service and any duties performed by the beneficiary to provide this service would not be deemed to be a qualifying managerial or executive task. Again, 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 id.*

On appeal, counsel asserts that the beneficiary supervises the petitioner's employees and further argues that issuing an IRS Form 1099 rather than an IRS Form W-2 to employees does not change the beneficiary's supervisory role over such employees. Counsel also contends that the beneficiary is an employee of the U.S. entity by virtue of the foreign parent entity's ownership and control over the petitioner.

In light of the AAO's analysis of the beneficiary's job description and the evidence of the petitioner's staffing, the AAO finds that there is no need to address either of the arguments counsel makes on appeal. As previously noted, the petitioner has failed to provide an adequate description of the beneficiary's daily tasks and has provided insufficient evidence to establish whom it employed at the time the Form I-140 was filed and whether the staffing structure that was in place during that relevant time period would have been sufficient to relieve the beneficiary from having to primarily perform non-qualifying tasks. Therefore, on the basis of this analysis, the AAO concludes that the petitioner failed to establish that it would employ the beneficiary within a qualifying managerial or executive capacity and for this reason 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.