

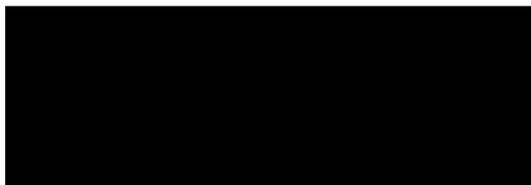
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090



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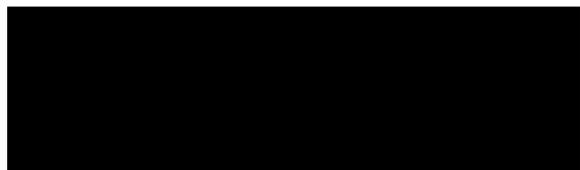
FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER Date:

MAR 24 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:



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, 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 project executive. 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 two independent 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 it would employ the beneficiary in a managerial or executive capacity. Although the director also addressed what he perceived to be discrepancies in the petitioner's ownership, he determined that the totality of the evidence approach did not warrant an adverse conclusion regarding the petitioner's qualifying relationship with its foreign counterpart and thus concluded that sufficient evidence was submitted to satisfy the initial evidence requirement discussed at 8 C.F.R. § 204.5(j)(3)(i)(C).

On appeal, counsel disputes the director's conclusions and submits a brief providing additional information about the beneficiary's foreign and proposed employment.

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 supporting documents, which contained the foreign entity's and the petitioner's organizational charts and a description of the beneficiary's employment with each entity. As the director summarized each entity's organizational chart and restated each of the beneficiary's position descriptions, the AAO need not repeat this information for the record.

On February 13, 2009, the director issued a request for additional evidence (RFE) instructing the petitioner to provide additional information with regard to the beneficiary's foreign and proposed employment. Specifically, the director asked the petitioner to provide more detailed job descriptions, listing the beneficiary's actual daily tasks during his employment abroad and his proposed employment with the U.S. entity and the amount of time that was and would be allocated to each task. The petitioner was also asked to provide a detailed organizational chart for itself and for the beneficiary's foreign employer. The director noted that several individuals were listed without position titles and asked that each chart list the entity's employees by name and position title. The director also requested that brief job descriptions be provided for the beneficiary's immediate supervisor and subordinate employees in each of his positions.

While the petitioner's response included supplemental job descriptions for both of the beneficiary's positions, neither position breakdown included time allocations to indicate what percentage of time was and would be devoted to the beneficiary's individual tasks within each of his respective positions. Instead, the petitioner provided a separate document which allocates a percentage of time to various duties and responsibilities according to the specific day of the week assigned to a duty or responsibility. As the director included the percentage breakdown in the denial, this information does not need to be restated in the current proceeding. It is noted that not all duties and responsibilities that were included in the percentage breakdown chart correspond to the items that were included in the separate job description, which categorizes the beneficiary's duties according to their respective job responsibilities.

The petitioner also provided an additional organizational chart for each entity. The foreign entity's organizational chart identifies only two employees—the beneficiary in the position of director/project executive and the director, whose position is depicted as the beneficiary's superior. The chart also lists ten departments that were subject to the beneficiary's supervision: management, manufacture, operations, export/import, marketing, finance, networking, customer service, bidding, and administration. The same chart shows that the beneficiary's superior was charged with general oversight of the beneficiary in addition to the bidding, advertising, administration, and estimation departments. The beneficiary's subordinates in the foreign position were listed in a separate document and were said to include heads of the management, manufacture, operations, and export/import departments. No further mention was made of the remaining six departments the beneficiary was claimed to have been overseeing.

With regard to the U.S. entity's organizational chart, the beneficiary was similarly shown as supervisor of ten departments, including manufacture, operations, export/import, customer service, research, marketing, estimation and bidding, advertising and networking, finance, and administration. The beneficiary's two superiors were identified as the director and principal director of the company. The petitioner listed eight employees in a separate document, which listed each individual's department and that department's general purpose. One of the eight employees was shown as having been terminated, leaving the company with seven employees, four of whom were employed in non-directorial positions. The document indicated that all employees are encouraged and required to perform multiple tasks so that any individual can perform the tasks of an employee who is absent.

In a decision dated June 21, 2009, the director denied the petition concluding that the petitioner failed to establish that the beneficiary was employed abroad and that he would be employed in the United States in a qualifying managerial or executive capacity as statutorily required. The director found the job descriptions to be vague and lacking sufficient information regarding the beneficiary's specific job duties. The director also noted that the foreign entity's organizational chart, which was originally submitted in support of the petition,

differed significantly from the chart that was submitted in response to the RFE, particularly in terms of the number of employees the foreign entity had during the time of the beneficiary's employment. With regard to the beneficiary's proposed position with the U.S. entity, the director observed that only four Form W-2s were submitted for 2008, thus indicating that the petitioner had only four employees during the year the petition was filed. The director also pointed out that a separate list of employees that pertained to the U.S. entity listed a total of seven employees, including the beneficiary. Lastly, the director noted a discrepancy pertaining to the employment [REDACTED], the beneficiary's spouse. Specifically, while [REDACTED] Form G-325A indicates that she was employed as a partner [REDACTED] from February 2002 through May 2007, the record of proceeding indicates that [REDACTED] was employed by the qualifying foreign entity as the director during the same time period, thus creating a conflict in the type of employment [REDACTED] held prior to the filing of the petition.

On appeal, counsel challenges the director's conclusions, claiming that the beneficiary's time in both positions has been and would be primarily allocated to tasks of a qualifying nature. Counsel elaborates on this assertion by breaking down the statutory definition of executive capacity and pointing to documents in the record that establish how the beneficiary meets each of the four statutory criteria.

After reviewing the evidence of record, particularly the beneficiary's job descriptions and each entity's organizational chart, the AAO concludes that the director's adverse findings were warranted. Although the beneficiary's breakdown of job duties was not accompanied by the requested time allocation, the purpose for which was to determine the percentage of time that was allocated to the beneficiary's duties abroad and his proposed job duties with the U.S. entity, each position breakdown contained sufficient information to enable the AAO determine with a considerable degree of certainty that neither the beneficiary's foreign position nor his proposed position with the U.S. entity required that the primary portion of the beneficiary's time be spent performing tasks in a qualifying managerial or executive capacity.

In examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The significance of a detailed job description is supported by published case law, which holds 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 beneficiary's foreign position was said to involve a variety of non-qualifying tasks, including the following: making arrangements with vendors for supply and delivery of merchandise, training staff in office procedure, marketing the foreign entity's products and seeking out clientele to sell the products, maintaining contact with vendors regarding supplies, and communicating with clients and vendors. As the petitioner did not comply with the RFE, which instructed the petitioner to assign a unit of time to each of the tasks the beneficiary performed abroad, the AAO is unable to determine how much of the beneficiary's time was allocated to qualifying versus non-qualifying tasks. While the AAO acknowledges that no beneficiary is required to allocate 100% of his time to managerial- or executive-level tasks, the burden is on the petitioner to establish that the non-qualifying tasks the beneficiary would perform do not require the majority of the beneficiary's time in his proposed position. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). 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). Without a corresponding time breakdown establishing how much of the beneficiary's time was spent

performing each of the above-mentioned non-qualifying job duties, the AAO is unable to conclude that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

Additionally, although the foreign entity's supplemental organizational chart submitted in response to the RFE identified the beneficiary at the top of the hierarchy, subordinate only to the company's director, the chart appears to be inconsistent with the original chart that was submitted in support of the petition. The more recent chart lists numerous departments under the beneficiary's supervision, including many that were previously listed as being under the supervision of other individuals. Furthermore, while the separate list of subordinates, which the petitioner submitted as a supplement to the organizational chart that was provided in response to the RFE, indicates that [REDACTED] in charge of management, was among the beneficiary's subordinates, the original organizational chart clearly depicts this individual at the same level within the hierarchy as the beneficiary himself. In fact, based on the information provided in the original chart, it appeared that [REDACTED] and the beneficiary both supervised the individuals who were employed in the manufacturing, operations and human resources, and the exports/imports departments. As noted previously in the director's decision, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Counsel's brief does not address the inconsistent information provided in the foreign entity's two distinctly different organizational charts.

Similarly, the supplemental description of the beneficiary's proposed job duties, which was provided in response to the RFE, also indicates that a significant portion of the beneficiary's proposed job description consists of non-qualifying tasks, including conducting inventory, listing inventory items electronically, communicating with suppliers, couriers, and shipping companies, training staff on office procedure, marketing and soliciting clients to purchase the petitioner's products, communicating with old and new customers, researching new products, and contacting supply vendors. Although the petitioner supplemented the position description with a chart showing an approximate time distribution during the beneficiary's six-day work week, not all of the items listed in the chart corresponded with the job duties that were listed in the breakdown of job duties. For instance, the chart indicated that the beneficiary would allocate 12% or one hour of his time each day to office procedure. However, none of the information provided in the breakdown of job duties expressly identified any of the tasks as falling into the heading of "office procedure." Instead, the petitioner submitted yet another separate document, which indicates that office procedure includes checking the prior day's work, following up on production schedules, assigning tasks to meet schedules, multitasking, providing "RFI" responses, and other miscellaneous activities such as staff evaluation, bills and invoicing, correspondence, inventory, and scheduling. Again, none of the specific tasks identified in the general category of office procedure was assigned a specific time allocation.

The petitioner also did not explain which job duties fall into the category of "miscellaneous dispatch," which would consume another 12% of the beneficiary's time. The chart also indicates that a significant portion of the beneficiary's time, or 40%, would be allocated to a combination of marketing, sales, bidding, and consultant and client networking. However, without further explanation clarifying how these job duties fit the definition of managerial or executive capacity, it appears that three hours of the beneficiary's time would be allocated to non-qualifying operational tasks. Lastly, the AAO notes that there is an inherent flaw in the chart's time distribution in that the chart accounts for only five hours, or 64%, of the beneficiary's time from Monday through Friday. It is therefore unclear which tasks would consume the remaining 36% of the beneficiary's time.

Additionally, the organizational chart submitted in response to the RFE is equally as confusing as the chart that was submitted to describe the foreign entity's organizational hierarchy. The U.S. chart similarly identifies the beneficiary at a top level within the organization and lists the same ten departments under his general supervision. However, as with the foreign entity's chart, the U.S. chart is also unaccompanied by names of subordinates who perform the work within these departments and the separate document that lists all of the petitioner's employees shows that such employees were divided among the administrative, manufacture, export/import, sales, and operation departments. No information was provided to explain who would be performing the work of the customer service, research, marketing, estimation and bidding, advertising and networking, and the finance departments.

In summary, the record shows that neither entity's organizational chart nor the description of the beneficiary's duties within each entity establishes that the beneficiary was employed abroad or that he would be employed in the United States in a qualifying managerial or executive capacity. While no clear determination can be made to establish precisely what portion of the beneficiary's time in his position abroad and in his proposed position was and would be allocated to the performance of non-qualifying operational tasks, the burden is on the petitioner to establish that the primary portion of his time has been and would be spent performing duties within a qualifying managerial or executive capacity.

Here, the contradictory organizational charts and inconclusive job descriptions, which failed to specifically assign time allotments to individual job duties, preclude the AAO from being able to affirmatively conclude that the beneficiary was employed abroad and would be employed by the U.S. entity in a qualifying managerial or executive capacity. While the AAO does not dispute the beneficiary's ability to exercise his discretionary authority over the goals, policies, and business decisions within each entity, this is only a single element of several that contribute to an overall determination of the beneficiary's eligibility.

When 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). The AAO will then consider this information in light of the petitioner's organizational hierarchy, the beneficiary's position therein, and the petitioner's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks. Based on the analysis provided in this decision, the AAO cannot conclude that the beneficiary's position within either entity is one in which the beneficiary primarily performed and would perform tasks within a qualifying capacity. Therefore, on the basis of these two separate conclusions 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.