

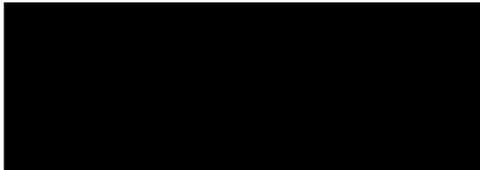
identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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

**PUBLIC COPY**



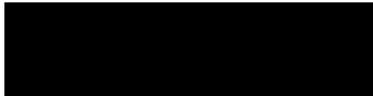
B4

DATE: **MAY 17 2011**

OFFICE: TEXAS SERVICE CENTER

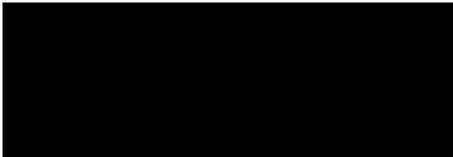
FILE:   


IN RE: Petitioner:  
Beneficiary:



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, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a New York corporation that 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 two independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity; and 2) the petitioner failed to establish that it has the ability to pay the beneficiary's proffered wage.

On appeal, counsel disputes the denial and the underlying reasons therefore. Counsel submits a supplemental brief addressing each of the grounds that served as a basis for denial. After thoroughly reviewing the record, the AAO finds that the director's conclusion regarding the petitioner's ability to pay was issued in error and hereby withdraws this finding as a basis for denial. Therefore, the remainder of this decision will focus primarily on a discussion of the beneficiary's proposed employment with the U.S. petitioner.

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 calls for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine 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, [REDACTED] of the petitioning entity, submitted a letter dated August 20, 2007 in which he discussed the beneficiary's proposed employment with the U.S. entity. [REDACTED] stated that the beneficiary has the required managerial and technical expertise "to set up and run our customer service department to assist with our deliveries." He further stated that the beneficiary would have

the authority to hire and train employees, make personnel decisions, create policies to further company goals, and assess marketing strategies and implement any necessary changes. Also provided in support of the petition was a list of the four employees whom the petitioner employed at the time the Form I-140 was filed. The employees included the company CEO, a designer, a sales person, and an office assistant.

On February 23, 2009, the director issued a request for additional evidence (RFE) instructing the petitioner to provide, in part, a detailed description of the beneficiary's proposed position. The petitioner was asked to list the beneficiary's daily job duties, indicate what percentage of time would be allocated to each duty, disclose the number of subordinates who would report to the beneficiary, and provide each subordinate's job title, job duties, and educational level.

The response included a letter dated March 17, 2009 from [REDACTED] who stated that the beneficiary's proposed position involves directing company employees with regard to design, sales, and daily operations as well as managing the design area and servicing customers. [REDACTED] repeated statements made earlier with regard to the beneficiary's proposed employment and further added that the beneficiary would allocate 80% of his time to visiting customers and making necessary product changes to meet customer needs and 20% to shopping the market and conducting research based on customer needs. [REDACTED] further indicated that the beneficiary would negotiate delivery and pricing with yarn companies and generally added that the beneficiary would work both in an executive and a managerial capacity.

The response also included the petitioner's organizational chart, which depicted [REDACTED] at the top of the petitioner's organizational hierarchy followed by the vice president of sales and the beneficiary as operations director. The chart depicts the design director as the beneficiary's direct subordinate and the employee at the lowest level within the organizational hierarchy.

On May 18, 2009, the director issued a decision denying the petitioner's Form I-140. The director noted that the petitioner provided an overly broad description of the beneficiary's proposed employment and thus failed to convey an understanding of what the beneficiary would actually be doing on a daily basis. The director concluded that the petitioner failed to submit sufficient evidence to establish that the beneficiary would be employed in a qualifying managerial or executive capacity.

On appeal, counsel contends that the director's findings are baseless and asserts that the number of employees the beneficiary would supervise is an issue that is irrelevant to the petitioner's eligibility. Counsel points out that the petitioning entity had been operating for several years prior to the beneficiary's arrival, claiming that this factor is sufficient to establish that the beneficiary would not need to perform the petitioner's administrative tasks. Counsel also emphasizes the beneficiary's discretionary authority with regard to personnel matters and sales policies.

The AAO finds that counsel's arguments are not persuasive in overcoming the denial.

Despite counsel's assertion that the beneficiary would not need to perform the petitioner's administrative functions, the AAO points out that the list of non-qualifying tasks is not merely limited to tasks of an administrative nature. Rather, any task that is necessary to produce a product or to provide services would be deemed as a non-qualifying task. Thus, any 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). While the AAO acknowledges that no beneficiary is required to allocate 100% of his time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to his/her proposed position. In the present matter, despite the overly vague job description provided in response to the RFE, [REDACTED] provided enough information to indicate that the beneficiary would allocate key portions of his time to matters involving customer service, including traveling to see individual customers and performing market research in an effort to address customers' individual concerns. [REDACTED] also indicated that the beneficiary would negotiate pricing and delivery with yarn companies. While these tasks may be essential for the petitioner's operation and overall financial success, they are nevertheless tasks that are necessary to provide services to the petitioner's clientele and thus cannot be deemed as tasks that are within a qualifying managerial or executive capacity.

The AAO does not dispute that the beneficiary may have a certain degree of discretionary authority over matters concerning the sales of the petitioner's products. However, in order to establish that the beneficiary would be employed in a qualifying capacity, the petitioner must provide sufficient evidence to show that the primary portion of the beneficiary's time would be allocated to tasks of a qualifying nature. Here, while only a few tasks were specifically mentioned, the record strongly indicates that the beneficiary would allocate most of his time to tasks of a non-qualifying nature. The fact that the beneficiary may be performing such tasks to best meet the petitioner's operational needs is of little relevance, as the petitioner's needs do not supersede its statutory burden, which requires the petitioner to establish that the beneficiary would allocate the primary portion of his time to performing tasks within a qualifying managerial or executive capacity. Merely claiming that the proposed position meets both statutory definitions is meaningless when the evidence of record does not corroborate the claims being made. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In summary, the AAO finds that the petitioner has not provided sufficient evidence to establish that the beneficiary would be relieved from having to primarily perform the petitioner's daily operational tasks. Rather, the record strongly indicates that the petitioner's organizational needs would require the beneficiary to allocate a prominent portion of his time to sales-related tasks, which are deemed to be outside the realm of what is considered to be within a qualifying managerial or executive capacity regardless of the beneficiary's discretionary authority over the sales function. Therefore, the AAO finds that the petitioner has failed to establish that the beneficiary would be employed in a qualifying capacity and the instant petition cannot be approved.

Additionally, while not previously addressed in the director's decision, the AAO finds that the petitioner has failed to provide sufficient documentation to establish that it meets the initial filing requirement discussed at 8 C.F.R. § 204.5(j)(3)(i)(B), which states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to his entry to the United States as a nonimmigrant to work for the same employer. The job description provided in response to the RFE was overly vague in that it failed to specify the actual job duties associated with managing the company, overseeing orders, and setting production quality. These broad terms simply fail to establish the beneficiary's specific daily tasks and thus preclude the AAO from being able to assess the beneficiary's foreign employment and determine whether the beneficiary was employed in a qualifying managerial or executive capacity.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional ground of ineligibility discussed above, this 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.