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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

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DATE: **SEP 20 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:

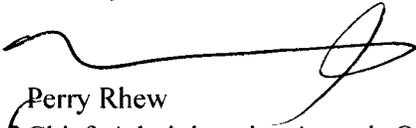


INSTRUCTIONS:

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 Florida corporation that seeks to employ the beneficiary as its vice president of marketing and public relations. 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 finding 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 conclusions and submits a brief in support of his arguments.

### **I. The Law**

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.

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.

## **II. Managerial Capacity**

The primary issue in this proceeding is whether the petitioner established that the beneficiary's proposed employment with the U.S. entity would primarily consist of job duties that are within a qualifying managerial or executive capacity.

In a statement submitted in support of the Form I-140, the petitioner stated that the beneficiary would be employed in a managerial capacity and that her primary focus would be managing the essential marketing function. The petitioner provided the following list of job duties to describe the beneficiary's proposed employment with the U.S. entity:

- **Morning Meeting:** A morning meeting with Bruce Stewart to discuss the previous day's activities, current events in progress, current day activity requirements, budgets and financial status.
- **Media Relations:** A courtesy phone-call to a rotating selection of radio and press media is made on a daily basis to maintain contact with the media, [sic] to ascertain changes in media contacts, to comment on current media articles relating to education and training[,] and to suggest new media articles and angles.
- **Media Networking:** A face-to-face networking meeting is held on a daily basis with a rotating selection of radio and press media to maintain personal contact.
- **Publicity Preparation:** Based upon feedback from meetings and phone-conversations with the media, [the beneficiary] develops news-story angles for discussion at morning meetings [and] prepares media articles, feature items, business briefs on new clients and public interest items for publication.
- **Market Research:** Conducts market research in order to establish possible demographic changes in those attending the courses, surveys to establish student needs and objectives in attending the course, establishes pre-course and post-course perceptions and perception shifts and develops marketing, advertising and publicity vehicles to bring about desired perception and awareness shifts, using a proprietary perception shift achievement methodology . . . .
- **License Liaison:** Weekly phone and email meetings with the licensees in England and Australia on marketing, advertising and public relations activities. These meetings are primarily concerned with sharing information on changing demographics, perceptions, trends and public issues relating to education, training and literacy.
- **Internationalism:** [The beneficiary] has extensive travel experience . . . . She is fluent in English and Afrikaans and has conversational skills in German, Dutch and Flemish.
- **Course Set-up:** Once the training course date, time, format and location are established, [the beneficiary] makes the necessary arrangements with regard to such location bookings and travel arrangements as may be required. In the case of corporate clients, these arrangements are usually handled by the client.

- **Course Materials:** Once the training course has been booked and the course content finalized . . . the preparation, sourcing, design, printing and packing of course materials is conducted by [the beneficiary].
- **Course Instruction:** The presentation of courses is a combination of teaching, coaching and counseling. . . . In large courses, comprising more than 30 managers and executives, [the beneficiary] serves as assistant instructor to Bruce Stewart.
- **Sub-Contractors:** [The petitioner] makes extensive use of sub-contractors for services such as website design [and] hosting, advertising and design, printing, travel, legal and financial. Prospective sub-contractors present their credentials and proposals to Bruce [Stewart] and [to the beneficiary]. Once appointed, they are briefed and their performance is monitored and evaluated monthly by Bruce Stewart or [by the beneficiary].
- **Media Liaison:** [The beneficiary] regularly arranges media-meetings and media-briefings for Bruce Stewart to meet the media.
- **Advertising & Marketing:** After discussion and agreement at the morning meeting, [the beneficiary] oversees the actual implementation of marketing, advertising [and] publicity campaigns.
- **Corporate Citizenship and Networking:** [The beneficiary] has devoted considerable time to supporting community activities in Charlotte. [She] also volunteers her time and expertise to fund-raising . . . .
- **Overall Corporate Management:** As public relations [and] marketing director of the U[.]S[.] local subsidiary, [the beneficiary] has the overall responsibility of presenting the public image of the business to its various target audiences.

The petitioner focused on the beneficiary's sizable contribution of time and effort to the growth and profitability of the petitioning entity as well as her knowledge and experience in the processes and procedures of the petitioning entity's business.

A similar job description was provided with regard to the beneficiary's employment abroad.

On August 3, 2010, the director issued a request for additional evidence (RFE) instructing the petitioner to provide further documentation to assist U.S. Citizenship and Immigration Services (USCIS) in determining the nature of the beneficiary's employment capacity in the proposed position with the U.S. entity. Specifically, the petitioner was instructed to provide a list of the beneficiary's job duties and the percentage of time she would allocate to each item listed. The director also asked the petitioner to list the position titles and job duties of any managerial or supervisory employees who report to the beneficiary or in the alternate to specify what essential function the beneficiary managers. With regard to any contractors the petitioner may have used, the director asked for copies of IRS Form 1099s or any other proof of payment to such third parties.

In response, counsel provided an undated statement in which he refers to the director's request to assign time constraints to the beneficiary's proposed job duties as burdensome and further asserts that the petitioner cannot comply with the director's request due to the variety of tasks the beneficiary performs and due to the fact that no two days are alike depending on the needs of the company on any given day. Counsel noted that technological progress allows the beneficiary to perform a variety of administrative tasks with greater ease by using email, cell phone, text messaging and the like to maintain a "virtual office." The petitioner resubmitted the original job description in an effort to comply with the director's request. As for any additional employees, counsel referred to the beneficiary's use of "scouts" who refer potential clients to the beneficiary and then get paid on a commission basis for any referral that results in a business contract. Counsel also stated that the petitioner occasionally uses "casual workers" to carry out various administrative duties. Counsel provided a list of sub-contractors and casual workers, which named a CPA, an attorney, a graphic designer, four marketing scouts, a photographer, a website videographer, and four clerical workers.

The petitioner also provided a chart illustrating its organizational hierarchy, which depicts the company's president, [REDACTED], as head of the organization with the beneficiary in the position directly below him. The beneficiary and [REDACTED] are each shown as overseeing certain sub-contractors. Sub-contractors that are under the beneficiary's supervision include the printing, direct mail, web design, shipping, office cleaning, and travel companies as well as one individual who provides design services. The chart also shows the beneficiary's direct involvement in joint venture alliance with various educational institutions, as well as her continued oversight over employees who work for the petitioner's foreign affiliates in the United Kingdom, Australia, and Canada.

On October 27, 2010, the director issued a decision denying the petition based on the finding that the petitioner failed to establish that the beneficiary's proposed position with the U.S. entity would be within a qualifying managerial or executive capacity. Although the director noted what he determined to be inconsistencies between the information that was initially submitted with regard to the beneficiary's subordinates and information that was later submitted in response to the RFE, the AAO finds that the director's assessment was inaccurate, as some of the information discussed in the director's decision was clearly in regard to the beneficiary's employment abroad, not her proposed employment with the U.S. entity.

Regardless, the director properly pointed out that the petitioner failed to provide the requested percentage breakdown showing how the beneficiary's time would be allocated. It is noted that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The director also noted that the beneficiary would assume a number of daily operational tasks in her position with the U.S. petitioner, thus further indicating that the beneficiary would not primarily perform job duties of a multinational manager or executive.

On appeal, counsel asserts that the Immigration Act of 1990 changes that went into effect on October 1, 1991 included provisions for managers who would not oversee the work of other personnel, but who would instead be charged with the management of a function. On the basis of this statement, counsel asserts that the beneficiary assumes the role of a function manager, managing the marketing and public relations function of the enterprise. Counsel also points out that the beneficiary's top placement with the

petitioner's organizational hierarchy, her discretionary authority, her policy- and goal-setting responsibilities, and her continued interaction with executive-level clients all indicate that the proposed employment is within a managerial capacity.

After conducting a comprehensive review of the record, with emphasis on the petitioner's failure to break down the job description by percentages showing how the beneficiary's time would be allocated, the AAO finds that counsel's assertions are not persuasive in overcoming the director's decision.

When examining the executive or managerial capacity of the beneficiary, the AAO will look 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. In the present matter, while the AAO does not dispute that the beneficiary has a heightened degree of discretionary authority with respect to the function she manages and while she clearly assumes a top-level position within the petitioning organization, these factors do not form a sufficient basis upon which to determine that the beneficiary primarily performs tasks within a qualifying capacity.

First, whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, despite the director's request, the petitioner failed to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is "primarily" performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999); *see also* 8 C.F.R. § 103.2(b)(14).

Second, with regard to the beneficiary's placement within the petitioner's organizational hierarchy, the AAO points out that the petitioner has only two direct employees—the beneficiary and her husband. Despite the fact that the petitioner hires sub-contractors to carry out certain operational tasks, no clarifying information was provided to establish the frequency with which these individuals are hired to carry out their services. Moreover, the AAO cannot overlook the numerous operational tasks that are assigned to the beneficiary herself, despite the petitioner's hiring sub-contractors to perform certain non-qualifying functions.

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. 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 the present matter, the petitioner did not establish that the non-qualifying tasks that are assigned to the beneficiary would only be incidental to

her proposed position. To the contrary, it appears that many of the non-qualifying tasks the beneficiary would perform would consume a considerable portion of the beneficiary's time and would in fact define the proposed position.

Finally, despite counsel's assertions, the petition does not establish that the beneficiary will assume the role of a function manager. The term function manager applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary primarily *manages* the function rather than *performs* the duties related to the function.

Thus, neither responsibility for an essential task within an organization nor the lack of a subordinate staff is a factor that defines a function manager by itself, particularly when the record shows that the individual is actually performing the key duties related to the function he or she claims to manage. Here, the record indicates that the beneficiary is doing just that.

While there is no question that the duties the beneficiary performs are essential to the petitioning entity, the AAO cannot overlook the fact that the majority of the duties are operational tasks that are necessary to provide the services that the petitioner sells to its clients. The AAO finds that the beneficiary's participation in media relations, media networking, publicity preparation, market research, licensee liaison, as well as her contributions to course set-up, materials, and instruction all indicate that the beneficiary spends and will spend the primary portion of her time performing the petitioner's daily operational tasks. Despite the fact that the petitioner failed to assign a time allocation to any of the beneficiary's job duties, the AAO nevertheless finds that the record contains sufficient information to establish that the beneficiary's primary focus would not be placed on qualifying managerial or executive tasks.

To be clear, neither the beneficiary's qualifications nor the significance of her role within the petitioning organization is in question. These are not, however, the sole factors that USCIS considers in determining a beneficiary's eligibility for classification as a multinational manager or executive. While the beneficiary's placement within the petitioner's hierarchy may be at an elevated level and while her level of discretionary authority is indicative of someone who may be employed in a managerial capacity, the actual duties themselves reveal the true nature of the beneficiary's 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).

As discussed, the beneficiary's primary concern in her proposed position is the petitioner's daily operational tasks. Despite the petitioner's use of sub-contractors to perform certain operational tasks, the beneficiary's job description strongly indicates that the sub-contractors did not relieve the beneficiary from having to allocate the primary portion of her time on the performance of non-qualifying tasks. Accordingly, based on the director's findings and the additional findings issued in this decision, the AAO

concludes that the petitioner has failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity and on the basis of this conclusion the instant petition cannot be approved.

Additionally, while not addressed in the director's decision, the AAO finds that the petitioner failed to establish that the beneficiary's employment abroad was within a qualifying managerial or executive capacity. Like the deficiencies noted with regard to the beneficiary's proposed position, the petitioner's description of the beneficiary's employment abroad also incorporates numerous non-qualifying job duties. In fact, the job description for the position abroad is nearly identical to the description for the proposed position. Therefore, on the basis of the analysis provided above, the AAO cannot conclude that the beneficiary was employed abroad in a primarily managerial or executive capacity.

In light of the AAO's additional finding, it is noted that 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.

Lastly, with regard to USCIS's prior approvals of the petitioner's L-1A employment of the same beneficiary, the AAO notes that each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. Thus, if the prior L-1A petition had been approved on the basis of the documents that are currently before the AAO, such approval would have been material and gross error on the part of the director and would therefore be currently subject to revocation. 8 C.F.R. § 214.2(l)(9)(iii)(A)(5).

Furthermore, the approval of a nonimmigrant petition, or even multiple petitions as in the petitioner's case, in no way guarantees that USCIS will approve an immigrant visa petition filed on behalf of the same beneficiary. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). The AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). Therefore, based on the reasons stated above, the prior approvals of the petitioner's nonimmigrant petitions will not guide the outcome in the present matter.

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.