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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



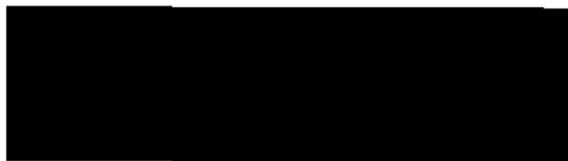
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DATE: **AUG 08 2012**

OFFICE: TEXAS SERVICE CENTER



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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 Texas corporation that seeks to employ the beneficiary as its "president/CEO." 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.

In support of the Form I-140 the petitioner submitted a statement dated December 15, 2009, which contained relevant information pertaining to the petitioner's eligibility, including an overview of the petitioner's business, the business of its foreign parent entity, and descriptions of the beneficiary's foreign and proposed employment. The petitioner also provided supporting evidence in the form of business and tax documents.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a request for evidence (RFE) dated July 13, 2010 informing the petitioner that further evidence was need to show that 1) the beneficiary was employed abroad in a qualifying capacity; 2) the beneficiary would be employed in the United States in a qualifying capacity; and 3) the petitioner has the ability to pay the beneficiary's proffered wage. The petitioner provided a response addressing the director's requests. The response included a statement from counsel dated August 13, 2010. The statement contained supplemental job descriptions pertaining to the beneficiary's foreign and proposed employment as well as payroll and tax documents showing employee wages and salaries.

After reviewing the record, the director concluded that the petitioner failed to establish that the beneficiary was employed abroad or that he would be employed in the United States in a qualifying managerial or executive capacity. The director also determined that the petitioner failed to establish its ability to pay the beneficiary's proffered wage. The director therefore issued a decision dated October 26, 2010 denying the petition.

On appeal, counsel disputes the grounds for denial and submits a brief contending that the petitioner has satisfied the eligibility requirements.

After reviewing the petitioner's submissions, the AAO finds that the petitioner has submitted sufficient evidence to establish its ability to pay the beneficiary's proffered wage, thus overcoming one of the grounds for denial. Notwithstanding this finding, the AAO nevertheless concludes that counsel's assertions with regard to the beneficiary's employment capacity in his foreign and proposed positions are not persuasive and fail to overcome the director's denial. The discussion below will address the relevant documentation and will explain the underlying reasoning for the AAO's conclusion.

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 that will be addressed in this proceeding call for an analysis of the beneficiary's position abroad and his proposed position with the U.S. entity for the purpose of determining whether the petitioner provided sufficient evidence to establish that the beneficiary was and would be employed 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 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). Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient, as the actual duties themselves will 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 finds that it is appropriate to consider other relevant factors, such as an entity's organizational hierarchy, which shows the entity's complexity and the beneficiary's placement in relation to other employees, as well as an entity's overall staffing, which allows the AAO to gauge the extent to which that entity was or is able to relieve the beneficiary from having to focus the primary portion of his time on the performance of non-qualifying operational tasks.

Turning first to the beneficiary's employment abroad, the record contains a deficient job description comprised primarily of general information which, without further detail, indicates that the beneficiary allocated a significant portion of his time to non-qualifying job duties including negotiating client contracts, promoting the company's products and services, recruiting personnel, developing and implementing marketing strategies, partaking in meetings for the purpose of negotiating confidentiality and service agreements, and preparing and completing sales contracts. While counsel states that the beneficiary's position abroad was at the top of the foreign entity's organizational hierarchy and further points out the significant influence the beneficiary had on the foreign entity's business progress, the fact of the matter is that the AAO cannot conclude that the beneficiary was employed abroad in a qualifying managerial or executive capacity without a detailed delineation of the actual job duties the beneficiary performed.

Despite the fact that the director expressly instructed the petitioner of the acceptable format of the job description—to include a list of the beneficiary's job duties accompanied by a percentage breakdown showing how much time was allocated to each item on the list—the petitioner's response, as well as counsel's statement on appeal, contained overly broad statements, which failed to establish that the beneficiary allocated his time primarily to tasks within a qualifying managerial or executive capacity. For instance, counsel's claim that the beneficiary managed "several major organizational components and related functions" including finance, sales, and marketing, tells the AAO little about what specific activities the beneficiary engaged in to manage these components. Merely claiming that the beneficiary "managed" without specifying what actual managerial tasks he performed on a daily basis does not establish the managerial nature of the position. It is the actual tasks performed that define the managerial or executive nature of a given position. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

While counsel asserts that the beneficiary was charged with overseeing the work of professional subordinates, the organizational chart that the petitioner submitted in response to the RFE shows that the beneficiary had one direct subordinate whose managerial title and placement within the foreign entity's organizational hierarchy indicates that this individual was a managerial employee. The petitioner did not provide sufficient information to explain how the foreign entity's organizational hierarchy was conducive to the beneficiary's alleged management and supervision of multiple subordinate employees.

Turning to the issue of the beneficiary's proposed employment with the U.S. petitioner, which operates as a gas station and convenience store, counsel emphasizes the beneficiary's top-most placement within the petitioner's organizational hierarchy and his discretionary authority in setting goals and policies regarding the petitioner's expansion, investment, budgeting, marketing, and personnel, the latter of which would include overseeing professional and managerial subordinate employees. Counsel's statements lack probative value in that they rely primarily on general terminology and paraphrased versions of the statutory definitions to describe the proposed employment. The statement fails to include specific information delineating the beneficiary's actual daily tasks within the scope of the petitioner's convenience store/gas station operation. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103.

The petitioner has failed to adequately describe the job duties the beneficiary performed during his employment abroad and the job duties he would perform in the proposed position. As noted above, a detailed job description is an essential element in determining what portion of the beneficiary's foreign and/or proposed employment was or is comprised of qualifying versus non-qualifying job duties. 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 performed abroad and would perform for the U.S. entity are only incidental to the 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).

The AAO cannot accurately assess how much of the beneficiary's time was and would be attributed to tasks within a qualifying managerial or executive capacity without a detailed description of each position. In light of the fact that the record is missing key information regarding the beneficiary's job duties in his former position with the foreign entity and in his proposed position with the U.S. entity, the AAO cannot affirmatively conclude that the beneficiary was employed abroad and that he would be employed in the United States in a qualifying managerial or executive capacity. Therefore, 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.