

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



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**



B4

DATE: **AUG 10 2012**

OFFICE: NEBRASKA SERVICE CENTER

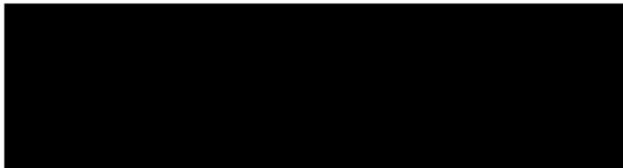


IN RE: Petitioner:
 Beneficiary:



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, 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 company engaged in the wholesale of shoes, which seeks to employ the beneficiary as its Chief Executive Officer. 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.

On November 19, 2010, the director denied the petition concluding the following: (1) the petitioner failed to establish that the beneficiary's proposed employment with the U.S. entity would be within a qualifying managerial or executive capacity; and (2) the petitioner failed to establish that the beneficiary's employment abroad was within a qualifying managerial or executive capacity.

On appeal, counsel disputes the director's findings and provides an appellate brief laying out the grounds for challenging the denial. Counsel submits a brief and additional evidence in support of the appeal.

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 the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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 that 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. *See* 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner submitted sufficient evidence to establish that it would employ the beneficiary 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 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). Published case law clearly supports the pivotal role of a clearly defined job description, as 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); *see also* 8 C.F.R. § 204.5(j)(5). USCIS reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the petitioner's business, the employment and remuneration of employees, as well as the job descriptions of the beneficiary's subordinates, if any, and any other facts contributing to a complete understanding of a beneficiary's actual role within a given entity.

An analysis of the record does not lead to an affirmative conclusion that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

The petitioner did not provide a list of job duties to be performed by the beneficiary in the initial petition and thus, the director requested additional information in support of the petition. In response to the director's request for evidence, the petitioner provided the following description of the duties to be performed by the beneficiary:

[The beneficiary's] daily duties includes align the company, internally and externally, with the company's strategic vision in marketing, finances and accounting and other incidentals in addition to day to day operations. Besides communicating with the foreign entity in China, [the beneficiary] spends most of his time working closely with his Sales Representatives on promotions and orders.

The petitioner also provided an organizational chart that indicated the beneficiary as CEO, who in turn supervises an operator, two outside sales representatives, and an assistant. On appeal, the petitioner explained that it employs only two individuals, including the beneficiary.

On appeal, the petitioner provided additional information about the job duties to be performed by the beneficiary. Upon review of the job description submitted in response to the request for evidence and on appeal, the petitioner provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner stated that the beneficiary will "align the company, internally and externally, with the company's strategic vision in marketing, finances and accounting and other incidentals in addition to day to day operations"; and "develop business plan, reduce cost/overhead, increase customer base and profits, arrange and assign duties to employees and evaluation on sales reports." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any

detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. The petitioner's descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature. The job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will perform.

The job description also includes several non-qualifying duties such as the beneficiary will be responsible for the "quarter reports to Parent company and also give next quarter's estimate sales volume to the parent company"; "introduce new business management system and computer programs to make business operation faster and easier to successfully lower all costs"; "communicate with clients, competitors and the market to understand and get the newest information on Shoes marketing in the United States"; "design promotion on new shoes styles and show them to clients"; "take new order to avoid overloading inventory"; "manage all orders from phone, fax and emails"; and "schedule shipping." It appears that the beneficiary will be developing and marketing the services of the business, handling all of the sales operations, negotiating contracts, and handling the inventory ordering and shipping processes, rather than directing such activities through subordinate employees. The petitioner did not identify any employees who actually assisted the beneficiary in finding engagements, preparing the market research and developing marketing and promotion programs, carrying out the sales operations, and preparing the financial reports, thus indicating that the beneficiary will carry out these operational functions, which are outside the parameters of what would be deemed as being within a managerial or executive capacity. 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 Intn'l.*, 19 I&N Dec. at 604.

An analysis of the nature of the petitioner's business undermines the petitioner's assertion that the beneficiary is employed in a managerial or executive capacity. On appeal, the petitioner states that it employs the beneficiary and one other part-time employee as receptionist and account manager. According to the Form 1120, U.S. Corporation Income Tax Return, for 2009, the second employee only received \$10,490.00 in wages as that employee works only part-time. In addition, the petitioner stated that it employs sales representatives but the petitioner failed to provide any evidence to corroborate this claim. Thus, it appears from the record that the beneficiary, as the only full-time employee, may be primarily engaged in performing the finance operations, marketing, sales, and business development activities, and all of the various operational tasks inherent in operating a business on a daily basis, such as paying bills, handling customer transactions, ordering products and running the shipping services, and negotiating contracts. Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive capacity.

The beneficiary's job duties, as described by the petitioner, are not indicative of an employee who is primarily focused on the broad goals and policies of the organization. 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 petitioner has not established that the beneficiary is primarily engaged in directing and controlling a subordinate staff comprised of professional, managerial or supervisory employees, nor has it indicated that he is charged with managing an essential function of the petitioning organization. *See* section 101(a)(44)(A) of the Act. The AAO is not persuaded that the beneficiary would be employed in a primarily managerial capacity. Therefore, the petition cannot be approved.

The director also concluded that the petitioner failed to provide sufficient evidence to establish that the beneficiary was employed by the foreign company in a primarily managerial or executive capacity.

An analysis of the record does not lead to an affirmative conclusion that the beneficiary was employed abroad in a qualifying managerial or executive capacity. With regard to the foreign position the petitioner provided a list of job duties performed by the beneficiary with a percentage breakdown which included broadly stated job responsibilities. Due to the overly general information included in the percentage breakdown, the AAO is unable to gain a meaningful understanding of how much time the beneficiary spent performing qualifying tasks versus those that would be deemed non-qualifying.

On review, the petitioner provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary did on a day-to-day basis. The petitioner stated that the last position held by the beneficiary with the foreign company was as Vice President of Marketing. In a letter dated August 2, 2010 the president of the foreign company stated that the beneficiary "spends 25 hours on sales and 15 hours on ministry of supply. He supervises sales manager and the supply manager to develop, advertising, marketing, promotion, packing and quality control." The petitioner also provided a document from the foreign company entitled: "The Operation of Marketing and Engineering of [the foreign company]." This document provides a general overview of the marketing and engineering process of the foreign company; however, it is not clear which specific duties were performed by the beneficiary and which subordinates were supervised by the beneficiary. 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)).

The petitioner provided a very brief and vague explanation of the beneficiary's duties with the foreign company. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. The petitioner's descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature. The beneficiary's position description is too general and broad to establish that the preponderance of his duties is managerial or executive in nature. Again, reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the

regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. 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 job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will perform. Furthermore, the petitioner failed to provide an organizational chart of the foreign company indicating the beneficiary's position and his subordinates.

After reviewing the beneficiary's job description with the foreign entity and considering that information in light of the foreign entity's organizational structure as it specifically pertained to the beneficiary's position, the AAO cannot conclude that the primary portion of the beneficiary's time was spent performing tasks within a qualifying managerial or executive capacity. In summary, the petitioner has failed to provide sufficient evidence to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. For this additional reason, the 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.