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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**

B4

DATE: **AUG 13 2012**

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

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 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 request 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 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. 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 an undated statement from its company's president who provided a brief description of the beneficiary's proposed employment. The petitioner also provided supporting evidence in the form of financial and corporate documents pertaining to the petitioner and its foreign affiliate.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a request for additional evidence (RFE) dated May 21, 2010 informing the petitioner that the record lacked evidence showing that the beneficiary was employed abroad and that he would be employed in the United States in a qualifying managerial or executive capacity. The petitioner was asked to provide detailed job descriptions for the beneficiary's employment with both entities as well as each entity's organizational chart.

The petitioner's response, included a statement from counsel, dated June 14, 2010, in which counsel stated that the beneficiary's foreign and U.S. employment are comprised of five sets of job duties, each comprising 20% of the beneficiary's time in his foreign and proposed positions. While the petitioner provided employee lists for both of the petitioner's employers, the petitioner did not supplement the record with organizational charts illustrating the staffing hierarchy of each entity.

After reviewing the record, the director concluded that the petitioner failed to establish that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity. The director found that the petitioner submitted overly broad job descriptions for each position and also listed some job duties that he deemed to be non-qualifying. The director therefore issued a decision dated November 8, 2010 denying the petition based on the two grounds stated herein.

On appeal, counsel submits a brief in which he disputes the denial, contending that there are subcontractors who carry out daily non-qualifying tasks and project managers and engineers who oversee those who carry out such tasks, thus relieving the beneficiary from having to either perform or supervise those who perform the construction-related tasks that are integral to the petitioner's business. Counsel pointed out that the beneficiary's extensive knowledge and executive decision-making were responsible for bringing the petitioning entity out of debt and developing the business beyond a start-up phase. Additionally, the petitioner provided numerous supporting documents showing each entity's business transactions and finances.

The AAO finds that counsel's assertions are not persuasive in overcoming the director's denial. The discussion below will provide an analysis of the relevant documentation and will explain the underlying reasoning for the AAO's decision.

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 to be addressed in this proceeding call for a discussion of the beneficiary's employment capacity in his respective positions with the foreign and U.S. entities. Specifically, the AAO will review the record in order to determine whether the petitioner submitted sufficient evidence to establish that the beneficiary was employed abroad and 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 examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the beneficiary's job duties. *See* 8 C.F.R. § 204.5(j)(5). Published case law 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). The AAO also finds that it is appropriate to consider other relevant factors, such as an entity's organizational hierarchy, which shows the complexity of a given entity and the beneficiary's placement in relation to other employees, as well as the petitioner's overall staffing, which allows the AAO to gauge who performs the daily operational tasks within a given entity.

Turning first to the beneficiary position with the foreign entity, the AAO concurs, in part, with the director's finding that the job description provided in response to the RFE was overly vague and failed to convey a meaningful understanding of the specific tasks the beneficiary performed on a daily basis. Broadly stating that the beneficiary spent 20% of his time directing and coordinating the company's budget and finances does not establish what actual tasks the beneficiary performed. Directing and coordinating budget and finances is a general category that exists within any organization and can encompass any number of tasks not all of which are deemed as qualifying within a managerial or executive capacity. The petitioner's failure to identify the beneficiary's specific tasks within a broad category precludes the AAO from being able to determine the nature of the tasks the beneficiary actually performed on a daily basis.

The same is true of the category that involved conferring with employees, coordinating activities, and solving problems. The petitioner did not explain which specific employees the beneficiary conferred with or the frequency or content of such communications. In light of the fact that overseeing non-managerial, non-professional, or non-supervisory employees would be deemed as a non-qualifying job duty, it is crucial for the petitioner to further explain which employees the beneficiary conferred with and percentage of time he allocated to this job duty. The petitioner also provided no details as to the types of activities the beneficiary

coordinated or the nature of the problems he had to solve. Without the specific details, the AAO is unable to affirmatively determine that the tasks the beneficiary performed were within a qualifying managerial or executive capacity.

The AAO further notes that tasks such as preparing the company budget and negotiating contracts are not, on their face, tasks of a qualifying nature. This would mean that at least 40% of the beneficiary's time may have been allocated to 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 petitioner must establish that the non-qualifying tasks the beneficiary performed or would perform are only incidental to the position(s) in question. 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).

Given the inadequate job description the petitioner provided to account for 60% of the beneficiary's time, the AAO cannot overlook the possibility that 40% that may have been allocated to the performance of operational and administrative tasks.

Additionally, in reviewing the evidence submitted in response to the RFE, the AAO notes that the petitioner did not provide the requested organizational charts for the beneficiary's foreign or U.S. employers. 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). While the petitioner did provide employee lists for both entities, such documents are not sufficient, as they fail to illustrate each entity's staffing hierarchy and the beneficiary's position in relation to other employees within the company. This additional lack of supporting evidence is another of the deficiencies that preclude the AAO from being able to affirmatively conclude that the beneficiary was employed abroad within a qualifying managerial or executive capacity.

Turning now to the beneficiary's proposed employment with the U.S. entity, the AAO notes that the job description the petitioner provided in response to the RFE was meant to be applied to the beneficiary's foreign and U.S. employment. As such, the same analysis of the various deficiencies in the foreign job description is applicable to the description of the beneficiary's proposed employment. As indicated above, 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. As with the beneficiary's employment with the foreign entity, the petitioner has failed to provide a detailed description of the tasks the beneficiary would perform in his proposed position.

Additionally, the AAO notes that while the petitioner has submitted an organizational chart among the supporting documents that accompanied the appellate brief, the petitioner's current organizational chart does not establish that the petitioner was eligible at the time of filing the petition. A petitioner must establish eligibility at the time of filing. 8 C.F.R. § 103.2(b)(1). A petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, given the fact that the petitioner failed to submit the requested organizational chart in response to the RFE, the AAO will not consider this evidence, which the petitioner submits for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

In summary, the AAO finds that the petitioner provided only general information that fails to convey a detailed account of the beneficiary's job duties both abroad and in his proposed position with the U.S. entity. Therefore, in light of the significant deficiencies that have been discussed in this decision, the AAO finds that the petitioner failed to establish that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity and the petition will be denied based on these adverse findings.

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.