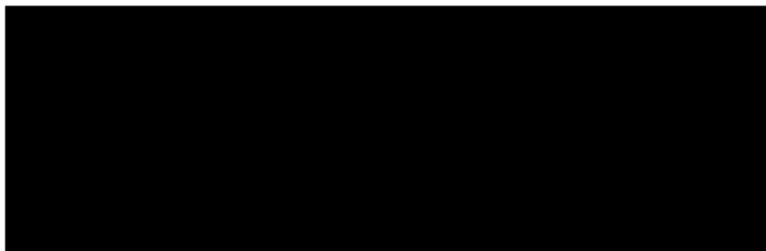


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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



B4

DATE: AUG 15 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:

SELF-REPRESENTED

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 petitioner filed Form I-290B on June 1, 2010. The director wrote a decision dated October 15, 2010 stating that the appeal was untimely filed. The director reviewed the appeal as a motion, and rejected the motion because it failed to meet the requirements of a motion to reopen or a motion to reconsider. As the appeal was in fact timely filed, the AAO will withdraw the director's decision dated October 15, 2010 and enter a decision on the appeal. The appeal will be dismissed.

The petitioner is a Florida company engaged in "import/export." It seeks to employ the beneficiary as its 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.

On April 26, 2010, the director denied the petition concluding that: (1) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity; (2) the petitioner failed to establish that it has the ability to pay the beneficiary's proffered wage; and (3) the petitioner failed to establish that it had been doing business in the United States for one year when the petition was filed.

The petitioner subsequently filed an appeal. On appeal, the petitioner disputes the director's findings and 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 a letter of support dated July 2, 2009, the petitioner explained the duties to be performed by the beneficiary as follows:

As noted above, [the petitioner] initially operated as a laundry service business. However in, in 2007, it decided to “switch gears” and operate international business. It has been [the beneficiary’s] direction and hard work that has allowed the company to make this transition.

Since that time, [the beneficiary] has conducted all necessary research into foreign markets and products, as well as local products, to determine the best approach to developing this business. She has complete discretion to negotiate and execute contracts. [The beneficiary] has located, contacted and negotiated the contracts for our local investors, as well as the numerous contracts for sale of goods. Without [the beneficiary’s] involvement, [the petitioner] would be unable to grow and offer additional employment to United States citizens.

The petitioner submitted an organizational chart of the U.S. company. The chart indicated that the beneficiary will supervise a trade agent in Venezuela, a business specialist, and a webmaster. The organizational chart also indicates that the beneficiary will supervise a “universal account services administrative specialist outsource,” and a lawyer that also appears to be outsourced. In addition, the petitioner provided a brief description of the job duties performed by the beneficiary’s subordinates.

Upon review of the petition and evidence, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity. When 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. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

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. The petitioner provided a very brief description of the duties to be performed by the beneficiary that fails to provide a breakdown of the duties to determine the percentage of time spent on each duty and whether the duty is managerial or executive in nature. Reciting the beneficiary's vague job responsibilities or broadcast 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 her 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 also includes several non-qualifying duties such as "conducted all necessary research into foreign markets and products, as well as local products, to determine the best approach to developing this business"; "complete discretion to negotiate and execute contracts"; and "located, contacted and negotiated the contracts for our local investors, as well as the numerous contracts for sale of goods." It appears that the beneficiary will be responsible for market research, developing and marketing the services of the business, finding new clients and meeting with them, negotiating contracts, and sales operations rather than directing such activities through subordinate employees. 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.

The petitioner's organizational chart indicated that the beneficiary will supervise a vice president, a business specialist, and a web master, and will outsource the account services and legal services. The petitioner submitted Forms W-2 for 2008 that indicated the petitioner employed four individuals. The salaries received by the three employees supervised by the beneficiary indicate that they are part-time employees. The webmaster received \$13,318.55; the vice president received \$12,645.00 and the Business Specialist received \$6,400.00. It does not appear that the beneficiary supervises full-time employees that perform the tasks necessary to provide services so that the beneficiary can primarily perform managerial or executive duties. There is no evidence in the record that the petitioner outsources the account services or the legal services such as contracts, pay statements, or tax documents. It also appears that the beneficiary will be responsible for the financial operations, bookkeeping, and contracts. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The record indicates that at the time of filing the petition, a preponderance of the beneficiary's duties would have been to directly provide the services of the business, regardless of whether such services were qualifying or not. While the AAO acknowledges that no beneficiary is required to allocate 100% of his or her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to 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). The evidence furnished strongly indicates that the beneficiary would not be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Based on the vague job description submitted with the petition, the director reasonably concluded that the petitioner has failed to demonstrate that the beneficiary would be primarily performing managerial or executive duties in his proposed position.

The second issue in this proceeding is whether the petitioner has the ability to pay the beneficiary's proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the *prospective United States employer* has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

(Emphasis added.)

On the Form I-140, the petitioner indicated a salary of \$769.23 per week or approximately \$40,000.00 per year. In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary.

The petitioner submitted Form W-2 for 2008 that indicated the beneficiary received a salary of \$26,775.00 for 2008. On appeal, the petitioner submitted Form W-2 for 2009 that indicated the beneficiary received an annual salary of \$43,204.00. Thus, the beneficiary did receive more than the proposed annual salary of approximately \$40,000.00. Thus, the AAO will withdraw this portion of the director's decision.

Finally, the director denied the petition concluding that the petitioner did not establish that it had been doing business in the United States for one year. The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office." In the present matter, the petitioner submitted Form 1120, U.S. Corporation Income Tax Return, for 2009 that indicated gross receipts on sales of \$326,475.00 for that year and payment of salaries and wages of \$168,959.00. The petitioner had four employees and conducted business for at least one year prior to the filing date of the petition. According to the tax documents and other evidence in the record, it appears that the petitioner was and is doing business in the United States. The AAO will withdraw this portion of the director's decision.

The AAO acknowledges that USCIS has previously approved an L-1A petition and extensions filed by the petitioner on behalf of the beneficiary. Many I-140 immigrant petitions are denied after

USCIS approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22; *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103. Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427. Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; see also 8 C.F.R. § 214.2(l)(14)(i) (requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

Despite the previously approved petitions, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act. Each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Based on the lack of required evidence of eligibility in the current record, the AAO finds that the director was justified in departing from the previous nonimmigrant petition approvals by denying the instant petition.

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.