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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 24 2012**

OFFICE: NEBRASKA SERVICE CENTER

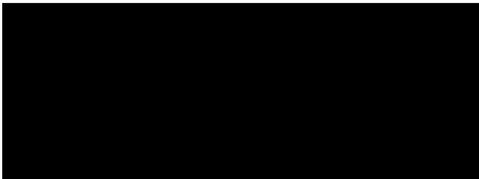
FILE:

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 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 security systems services, which seeks to employ the beneficiary as its Mid-Atlantic – Southeast Regional Sales Manager. 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 that 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 this assertion.

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 issue in this proceeding is whether the petitioner submitted sufficient evidence to establish that the beneficiary was employed by the foreign company in a primarily 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). That being said, however, 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 was employed by the foreign company 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 several non-qualifying job responsibilities. Due to the 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.

The petitioner stated that the last position held by the beneficiary with the foreign company was as U.S. Mid-Atlantic –Southeast Regional Manager. In a letter dated June 17, 2010, the country manager, North America of the foreign company stated that the beneficiary was responsible for “regional annual sales quota of \$2 million, supported existing installations and actively sought new sales channels for \$1 billion entrance control manufacturer.” In response to the director's request for evidence, the petitioner submitted a new job description for the position held by the beneficiary with the foreign employer.

The job description included several non-qualifying duties. For example, the beneficiary spent 15% of his time responsible for “generat[ing] new customers through traditional sales process of cold calling, networking and self-generated referrals as well as company assigned referral.” This duty appears to be a duty performed by a sales representative. The record does not indicate subordinates that will perform the cold calling and networking and that were supervised by the beneficiary. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Furthermore, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The beneficiary also spent 15% of his time “responsible to grow company by generating sales, lead generation, response to RFQ's and the development of proposals/quotes as required.” Again, the petitioner did not indicate that the beneficiary managed these responsibilities rather than actually performing them. 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 job description included additional non-qualifying duties such as the beneficiary would “develop and implement annual, quarterly, monthly and bi-weekly sales plans as approved by supervisor”; “utilize the price matrix and purchasing department to formulate profitable pricing models for each proposal and conduct presentations and proposals to prospective clients”; “recommends product solutions and links to client objectives to total value solution and competitive advantage”; “cultivates and develops strategic relationship with key end customers, and works to ensure customer satisfaction”; “participates in industry, customer, and product trade shows”; and “prepare budgets and approve budget expenditures.” It appears that the beneficiary will be developing and marketing the services of the business, handling all of the sales

operations, and negotiating contracts, rather than directing such activities through subordinate employees. The petitioner did not identify any employees who actually assisted the beneficiary in market research and developing marketing and promotion programs, sales operations, and preparation of financial reports, thus indicating that the beneficiary is the one to carry out these operational functions, which are clearly 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.

In addition, the petitioner submitted an organizational chart for the foreign company which indicated that the sales and marketing manager supervised the beneficiary. The beneficiary is indicated as “sales manager mid atlantic,” and his position was on the same level as three other sales managers.

On July 29, 2010, the director requested additional evidence regarding the beneficiary’s position with the foreign company, including a more detailed job description and an organizational chart that included the names of all departments and teams, and job duties for the beneficiary’s immediate supervisor and subordinate employees. In response, the petitioner provided a job description for the beneficiary’s position, and for the positions of Manager Business Line Site Protection and Branch Manager. The petitioner also provided a new organizational chart that indicated the beneficiary was supervised by the BLM Site Protection and After Sales and Service, and the beneficiary did not supervise any subordinates.

On appeal, the petitioner provides a new organizational chart of the foreign company that indicates that the beneficiary supervised three branch managers. This chart differs from the chart previously submitted which indicated that the beneficiary was on the same level as the other branch managers, and the previous organizational chart did not show that the beneficiary supervised any individuals. In the three organizational charts submitted by the petitioner, the level of supervision is different in each one. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Furthermore, the petitioner submitted on appeal a completely different job description for the beneficiary’s position abroad. In the new description, it clearly states that the beneficiary manages three branch managers; however, the previous job description did not state that the beneficiary managed any individuals. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position’s title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position held by the beneficiary abroad, as described when the petition was filed, merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm’r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm’r 1998).

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. Based on this finding, 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.