



U.S. Citizenship  
and Immigration  
Services

B4

DATE: DEC 20 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,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The director of the Nebraska Service Center revoked the previously approved preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the petition will be revoked.

The petitioner is a Texas corporation that is engaged in the wholesale of gold and diamond jewelry. The petitioner seeks to employ the beneficiary as its Sales and Marketing 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 September 14, 2009, the director revoked the petition concluding that the petitioner did not submit sufficient evidence in rebuttal to the United States Citizenship and Immigration Services' ("USCIS") Notice of Intent to Revoke ("NOIR") and has not overcome the grounds for revocation. The AAO reviewed the record in its entirety before issuing its decision.

On December 5, 2006, the petitioner filed the Form I-140 to classify the beneficiary as an employment-based immigrant. The director approved the petition. On August 4, 2008, the director notified the petitioner of his intent to revoke approval of the immigrant petition. In the notice of intent to revoke, the director stated the following:

Included with the initial petition was a letter stating the beneficiary would be crucial to managing the western region operations in Henderson, Nevada. Submitted documentation shows that there is no business operation in Henderson. It has also come to the attention of USCIS that the beneficiary is not currently employed and has not been working for at least three years. Therefore, the petitioner has not shown that the beneficiary is presently employed in a full-time managerial or executive capacity.

On September 24, 2009, the director revoked the Immigrant Petition for Alien Worker since the petitioner did not provide evidence to overcome the grounds of revocation listed in the notice of intent to revoke. In the decision, the director noted that in the beneficiary's interview, he stated that he had not worked for at least three years. The director stated that "the alien did not enter the United States to continue to be employed as a manager or executive for the same employer, subsidiary, or affiliate and was not doing so when the petitioner was filed on December 5, 2006." The director also stated that the "record also showed that there was no business operation in Henderson, NV, where the alien was intended to work." The director further stated that the "record is insufficient to demonstrate that the beneficiary will be primarily employed in a managerial or executive capacity as contemplated by regulations."

On October 16, 2009, counsel for the petitioner filed Form I-1290B to appeal the director's decision. Upon review, the information submitted by the petitioner is not sufficient to overcome the director's concerns and the petition will be revoked.

On appeal, counsel for the petitioner stated that the "beneficiary after entering the United States, continued to work for the affiliated foreign employer, [the foreign employer] until the filing of the I-140 petition was filed on December 5, 2006 because he did not have work authorization to allow

him to work in the United States.” Although counsel states that the beneficiary has been employed by the foreign company since 2001 to the present, the petitioner lacks any evidence to corroborate this claim such as paystubs, a letter from the foreign company confirming employment, or copies of the beneficiary’s bank statements or tax returns. Without documentary evidence, it is impossible to determine if the beneficiary has been and continues to be employed by the foreign company. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel also argues that the three years prior to the beneficiary’s December 2003 nonimmigrant entry must be the point of reference for the purpose of determining the relevant three-year time period during which the beneficiary’s minimum one year of foreign employment must have occurred. Counsel contends that the beneficiary qualifies because he was employed as a Sales and Marketing Manager by the foreign affiliate from 2001 until the I-140 petition was filed on December 6, 2006.

Contrary to the assertions of counsel, the beneficiary’s February 6, 2005 B-2 entry into the United States, which was not for the purpose of being employed as a manager or executive at the petitioning entity, cannot be the basis for determining the relevant three-year time period during which the beneficiary’s employment abroad would be considered.

The key question is whether the beneficiary’s employment in the United States was in lawful status *for or in order to render services to* the petitioning organization. The AAO concludes that the beneficiary’s period of stay in the United States was not spent *for or for the purpose of rendering services to* the petitioning organization. To the contrary, the beneficiary’s period of stay in the United States was spent as a B-2 visitor and an E-2 derivative spouse and his choice to seek employment with his previous employer was merely incidental to his stay in the United States as a family member of an E-2 nonimmigrant visa holder.

The beneficiary’s stay in the United States was not for the purpose of being employed by the same employer or a subsidiary or an affiliate thereof. Rather, the beneficiary remained in the United States in two different visa classifications, as a B-2 visitor and E-2 dependent of the primary visa applicant. Therefore, the relevant three-year time period during which the beneficiary’s one year of qualifying foreign employment should have taken place is from February 6, 2002 until February 6, 2005. The record does not provide sufficient evidence that the beneficiary was employed abroad during that time.

On appeal, counsel states that the beneficiary “came to the United States on a B-2 visitor visa on or about February 6, 2005.” On the Form G-325A, however, the beneficiary stated that he has been living in the United States since April 2004. 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).

The second issue that the director noted in the denial decision is that the record showed that there was no business operation in Henderson, Nevada, where the alien intended to work. On appeal, counsel claims that the petitioner "has substantial business contacts in the area." Counsel further states that "petitioner demonstrated that the Beneficiary's location will be in Houston, Texas, however, he will travel frequently to Henderson, Nevada because a large number of trade shows take place in that area." The AAO agrees that the petitioner is not required to show an office location in Nevada since business development and growth can originate from the Houston, Texas office. The AAO will withdraw this portion of the director's decision.

Finally, the director revoked the petition since the petitioner failed to present sufficient evidence that the beneficiary would be employed in a managerial or executive capacity.

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.

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 the nature of the petitioner's business, the employment and remuneration of employees, 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.

The job description includes non-qualifying duties such as the beneficiary will “research and present reports showing potential customers the cost benefit of entering into agreements to purchase or lease company products or services”; “lead negotiations, coordinate complex decision-making processes, and overcome objections to capture new business opportunities”; “develop marketing related events, seminars, mailings, and call campaigns to increase brand awareness and presence in the local market”; and “represent the company at trade and industry functions and develop strong relationships with customers, technical, and service personnel.” Developing marketing strategy and negotiating deals are both operational duties that cannot be classified as managerial or executive tasks. An employee who "primarily" performs the tasks necessary to produce a product or provide a service 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). In the present matter, the petitioner has failed to establish that the beneficiary would be employed abroad in a qualifying capacity.

Counsel’s statements on appeal do not overcome the director’s concerns. Counsel did not provide sufficient evidence to overcome the findings of the director. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The petition will be revoked 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. The petition is revoked.