

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

[REDACTED]

B4

DATE: DEC 21 2012

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE:           Petitioner:  
                  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:

[REDACTED]

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,

Ron Rosenberg  
Acting 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 Texas corporation that seeks to employ the beneficiary as its customer service and sales director. 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 a statement dated March 12, 2010, which contained relevant information pertaining to the petitioner's eligibility. The petitioner addressed the issue of the beneficiary's proposed employment by providing a list of the beneficiary's job responsibilities and their respective time allocations. The petitioner also provided supporting evidence in the form of tax and business documents pertaining to both entities.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a request for evidence (RFE) dated June 22, 2011 informing the petitioner of various evidentiary deficiencies. Among the issues discussed in the RFE was the beneficiary's proposed employment with the petitioning entity. Specifically, the director instructed the petitioner to describe the petitioner's staffing by disclosing the number of employees and their respective job duties and by providing an organizational chart illustrating the beneficiary's position within the context of the petitioner's staffing hierarchy. The director also asked the petitioner to provide a more detailed description of the beneficiary's proposed position by listing his proposed job duties and the percentage of time the beneficiary would allocate to each item listed.

Additionally, the director addressed the issue of ability to pay the wage offered of \$90,000 per year, instructing the petitioner to provide its 2010 tax return, an audited 2010 financial statement, or a 2010 annual report. The director also indicated that the petitioner should submit evidence in the form of the beneficiary's wage reports, which demonstrate any wages the beneficiary had been paid since the petition was filed.

In response to the RFE, the petitioner provided a letter dated July 16, 2011, containing the same list of job responsibilities that were contained in the petitioner's initial support statement. The letter stressed the beneficiary's job duties as being part of an essential function without which the petitioner would be unable to generate revenue. The letter further referred to the beneficiary as the key point of contact between the petitioner and its clients in terms of interacting with clients and addressing their concerns, as well as representing the petitioner in various negotiations. The letter indicated that the beneficiary would direct and oversee market analysis, statistical interpretation, sales forecasting, and sales data evaluation and he would manage customer service development by delegating tasks to subordinates and meeting with staff and reviewing staff performance.

The petitioner also complied with the request for a copy of its organizational chart, which illustrates a complex organization, complete with a top managerial tier, departments and their respective supervisors, and numerous employees under each department head. Although the chart is titled in the petitioner's name and includes the beneficiary in his proposed position title, it is unclear how this chart is indicative of an entity that named five employees in its 2010 third quarterly employer's report, which reflected the petitioner's staffing at the time of filing. It is noted that the specific instructions in the RFE were for the petitioner to provide separate organizational charts depicting the foreign entity, where the beneficiary was previously employed,

and a chart depicting the U.S. entity, where the beneficiary is seeking employment. The organizational chart the petitioner provided in response to the RFE does not address the director's specific objective, which was to obtain an accurate depiction of the petitioner's staffing at the time of filing.

Additionally, with regard to the ability to pay issue, the petitioner provided its 2010 tax return, an unaudited financial statement, and the beneficiary's IRS Form W-2 for 2010, which showed the beneficiary's wage of \$26,300.

After reviewing the petitioner's response, the director concluded that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity or that it has the ability to pay the beneficiary's proffered wage. The director therefore issued a decision dated August 9, 2011 denying the petition based on the two grounds described herein.

On appeal, [REDACTED], on behalf of the petitioner, submits a brief disputing the director's findings. [REDACTED] contends that the job description previously provided was clear when considered in the context of the petitioner's business. With regard to the issue of ability to pay, [REDACTED] urges the AAO to consider the affiliate relationship between the petitioner and the beneficiary's foreign employer and the "alternative cash flows" that this affiliate relationship makes available to the petitioner in order to ensure that all payroll obligations are being met.

The AAO finds that the petitioner's assertions are unpersuasive and are therefore insufficient to overcome the director's decision. 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 first issue to be addressed in this proceeding calls for an analysis of the beneficiary's employment capacity in his proposed employment with the petitioning entity. Specifically, the AAO will examine the record to determine whether the petitioner submitted sufficient evidence to establish that the beneficiary 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 proposed job duties. *See* 8 C.F.R. § 204.5(j)(5). Published case law supports the pivotal role of a clearly defined job description, deeming the actual duties themselves as the factors that determine 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). Additionally, the AAO finds that it is often appropriate to consider other relevant factors, such as an entity's organizational hierarchy and overall staffing, which allow the AAO to gauge the extent to which that entity was or would be able to relieve the beneficiary from having to focus the primary portion of his time on the performance of non-qualifying operational tasks.

After having reviewed the beneficiary's job description, the AAO finds that the petitioner failed to establish that the beneficiary's time during his proposed employment with the petitioning entity would be primarily allocated to tasks of a qualifying nature.

First, despite the petitioner's assertion that the job description must be considered in tandem with the nature and scope of the petitioner's line of business, a significant portion of the description offered by the petitioner is overly vague and may be applied to a variety of industries, not just the one in which the petitioner is currently engaged. For instance, it is unclear what the process is for developing logistical goals and strategies to integrate vendors. The petitioner has not clarified the specific tasks the beneficiary would have to perform in order to achieve these broad objectives. The petitioner was similarly vague as to the actual daily tasks that are involved in developing systems for validating and authorizing price quotes to new customers.

Further, in addition to the generalities discussed above, the AAO notes that the petitioner's RFE response statement indicated that there is a strong customer service component in the beneficiary's proposed position. More specifically, [REDACTED], president of the petitioning entity, stated that the beneficiary would meet with the company's clients, negotiate on the petitioner's behalf, and address customers' concerns. It is unclear how these sales- and customer service-related tasks meet the criteria for tasks that are deemed as being within a managerial or executive capacity. The AAO is also unclear as to the extent of the beneficiary's customer service role in managing relationships with the petitioner's corporate clients and suppliers. What specific tasks are required to manage these business relationships and how is the beneficiary relieved from having to personally carry out the operational tasks? Additionally, the petitioner failed to establish that performing follow-up client visits to ensure customer satisfaction, which is another of the beneficiary's proposed job duties, falls within the parameters of what is deemed to be within a qualifying managerial or executive capacity.

Furthermore, while [REDACTED] stressed the importance of the beneficiary's role in the petitioning entity and claimed that the beneficiary's duties constitute an essential function, the beneficiary cannot be deemed a function manager if his managerial role involves both managing the function and performing the underlying job duties related to that function. Although 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 the proposed position. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be 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 beneficiary is not necessarily a function manager by default when the beneficiary does not assume the role of a personnel manager whose primary concern is to manage a subordinate staff of managerial, supervisory, and/or

professional employees. As previously noted, when making the assertion that the beneficiary of an I-140 petition is to assume the role of a function manager, the petition assumes the burden of establishing that the beneficiary's role will be limited to managing the essential function and will not include performing the key tasks associated with that function. While [REDACTED] claimed that the beneficiary would delegate tasks to subordinates and meet with staff and review staff performance, thus indicating that there is a personnel management component to the beneficiary's proposed position, these assertions are not supported by the evidence of record as the organizational chart does not indicate that the beneficiary has any subordinates under his supervision.

In summary, the petitioner has not provided evidence that the beneficiary's role will be limited to merely managing an essential function. As noted above, a review of the petitioner's organizational chart shows that the beneficiary has no subordinate employees. While this factor is not a critical one for someone assuming the role of managing an essential function, the organizational chart does not demonstrate that employees within the petitioner's own organizational hierarchy would be available to carry out the non-qualifying tasks associated with the beneficiary's essential function. 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)).

Despite the petitioner's attempt to present the petitioner and its affiliate as part of one entity, the AAO's review of the beneficiary's proposed employment is limited to the U.S. employer's organizational hierarchy, not the combined hierarchies of the petitioner and its foreign affiliate. While the foreign entity may want to achieve its business goals by operating through the U.S. petitioner, this business objective does not relieve the petitioner from having to meet statutory and regulatory requirements. The AAO cannot consider the foreign affiliate's organizational hierarchy when assessing the petitioner's eligibility. Despite the common ownership between these two entities, the AAO is required to view the petitioner as a separate entity, which is subject to applicable statutory and regulatory requirements. Here, neither the beneficiary's job description nor the petitioner's organizational chart constitutes sufficient supporting evidence upon which the AAO can base the favorable affirmative conclusion that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. On the basis of this initial adverse conclusion, the AAO finds that the instant petition cannot be approved.

The AAO will now turn to the second ground for denial—the finding that the petitioner failed to meet the regulatory requirements discussed at 8 C.F.R. § 204.5(g)(2), which states, in pertinent part:

*Ability of prospective employer to pay wage.* 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.

The record shows that the director considered the beneficiary's 2010 wages and has properly analyzed the petitioner's 2010 tax return, concluding that the documentary evidence does not establish the petitioner's ability to pay the beneficiary's proffered wage.

In the supporting statement submitted on appeal, [REDACTED] urges the AAO to consider the “alternative cash flows” that are made available to the petitioner by virtue of its affiliate relationship with the beneficiary’s foreign employer. The above regulation is specific as to the types of documents the petitioner can submit in order to establish its ability to pay at the time of filing. The availability of cash flow from the foreign affiliate is not among those factors that can be considered in determining the petitioner’s ability to pay the wage offered. As such, even if the petitioner were to demonstrate the foreign entity’s ability to pay the beneficiary’s proffered wage, this evidence would be irrelevant for purposes of meeting the criteria specified at 8 C.F.R. § 204.5(g)(2), which requires the petitioner to establish its own ability to pay. The record in the present matter does not establish that the petitioner meets this eligibility provision. On the basis of this second adverse finding, the AAO finds that the petition does not warrant approval and must be denied.

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.