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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

[Redacted]

DATE: FEB 09 2012

OFFICE: NEBRASKA 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:

[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. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. 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, Nebraska Service Center. The petitioner subsequently filed a motion to reopen and reconsider, which the director granted thus resulting in a new decision wherein the director affirmed the original denial. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a New York corporation that is doing business as a trader of gemstones. It seeks to hire 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. The director denied the petition based on two independent findings. The director concluded that the petitioner failed to establish: (1) that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and (2) that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

On appeal, counsel disputes the director's most recent decision regarding the petitioner's motion to reopen and reconsider and submits an appellate brief asserting that the director erroneously considered the petitioner's organizational complexity and staffing size in determining the petitioner's eligibility.

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 in this proceeding call for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the beneficiary was employed abroad and whether he 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 support of the Form I-140, the petitioner submitted a letter dated April 28, 2007 in which the beneficiary's responsibilities in his proposed position were said to include the following: hiring and supervising sales and marketing employees, defining goals and developing marketing strategies, maintaining regular contact with existing and potential buyers, participating in gem and jewelry exhibitions, negotiating and finalizing contracts with buyers, studying and analyzing market trends, and coordinating with management in India.

In a separate statement dated April 10, 2007 from a representative of the foreign entity, the beneficiary's employment abroad was described as follows:

[The beneficiary] was solely responsible for hiring, supervising and evaluating sales and marketing related employees, defining [i]nternational marketing/sales goals and developing marketing strategies, implementing them, contacting, negotiating and entering into contract[s] with buyers, studying market trend and evaluating company policies. He was also responsible for co-coordinating with other departments of the company. Thus, he managed the [i]nternational marketing/sales aspects of [REDACTED] and was one of the most instrumental and effective managers in our organization.

On September 9, 2008, the director issued a request for additional evidence (RFE) instructing the petitioner to provide, in part, the following documentation to assist U.S. Citizenship and Immigration Services (USCIS) in determining the beneficiary's employment capacity in his positions with the foreign and U.S. entities: 1) the foreign entity's organizational chart reflecting the staffing that was in place during the time of the beneficiary's employment abroad; 2) a list of the job duties the beneficiary performed during his employment abroad and the percentage of time the beneficiary allocated to each task; 3) the petitioner's organizational chart that reflects the company's staffing at the time the Form I-140 was filed; 4) a detailed description of the beneficiary's proposed day-to-day duties with a percentage of time assigned to each duty; and 5) the petitioner's IRS Form 941 for the second quarter in 2007 as well as a state unemployment supplement identifying the petitioner's employees at the time of filing the Form I-140.

In response, the petitioner provided supplemental job descriptions, organizational charts, and the requested tax and wage documentation.

With regard to the beneficiary's employment abroad, the job description indicated that the beneficiary's time was allocated as follows: (1) 25% to managing and operating the international marketing activities through an assistant manager and sales staff, looking into major orders that the beneficiary obtained and give instructions regarding completion of the deal; (2) 20% to defining the international marketing/sales goal and developing marketing strategy, studying sales figures and determining market demand, studying trade manuals to learn sales of other similar corporations and using this information to develop a sales strategy, coordinating with the sales staff, and putting together a proposal to be reviewed by the company's partners to determine a marketing goal and improve business; (3) 20% to reading manuals and survey reports and attending jewelry and gemstone exhibitions to make business contacts, introduce the company's goods, make future contracts for the sale of goods, and find independent contractors to sell the company's goods abroad; (4) 20% to coordinating with other business managers within the organization to inform them of the orders that have been procured and the types of gemstones that will be required and coming up with a cost to profit ratio before each order is finalized; and (5) 15% to obtaining more independent contractors in different regions throughout the world in order to increase sales.

The beneficiary's foreign job description was accompanied by the following list of the foreign entity's employees: production manager, purchase manager, accounts officer, two assistant managers, and a general staff of marketing/sales agents. It is noted that while the latter is said to include multiple agents, no employee was specifically identified in this category and the job description for this position(s) referred to a "she" thus indicating that one person carried out the duties assigned to the marketing and sales agents. The organizational chart that was included with the petitioner's RFE response showed the foreign entity's managing partners at the top of the hierarchy, followed by an unspecified number of managers who supervised an accounts officer and the foreign sales, production, and purchase departments. The next tier of

the chart includes assistant managers who supervised general staff including marketing and sales agents. As noted above, the list of employees did not include more than one marketing/sales agent. Additionally, while the chart shows a position titled "managers," which is separate from the foreign sales, production, and purchase departments, the list of employees for whom job descriptions were provided did not include a description for general managers. The only managers listed were those who managed the foreign sales, production, and purchase departments. Based on the information that was provided in the chart, no employees other than those with the managerial position titles actually worked in any of the three departments.

Also provided in response to the RFE was a percentage breakdown describing the beneficiary's proposed job responsibilities with the U.S. entity. As the director provided an accurate summary of the job description, this information need not be restated at this time. The petitioner also provided its own organizational chart to illustrate the staffing structure at the time of filing the petition. The chart depicts the beneficiary at the top of the hierarchy with a general manager as his direct subordinate, and one marketing/sales agent and a secretary at the bottom of the chart as subordinates of the general manager. This staffing configuration is confirmed by the 2007 second quarterly IRS Form 941 and state wage withholding report. Although the AAO acknowledges the petitioner's hiring of an additional marketing/sales agent since the filing of the Form I-140 took place, this information is irrelevant for the purpose of determining eligibility at the time of filing the petition. *See* 8 C.F.R. § 103.2(b)(1).

In a decision dated January 27, 2009, the director denied the petition, concluding that the supplemental job description offered in response to the RFE with regard to the beneficiary's employment abroad was vague and did not adequately inform as to the beneficiary's day-to-day job duties. Thus, based on this deficiency, the director concluded that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. Similarly, the director determined that the information provided with regard to the beneficiary's proposed employment with the U.S. entity did not establish that the beneficiary would primarily perform qualifying tasks within a managerial or executive capacity and instead determined that the preponderance of the beneficiary's job duties would be to directly provide services for the business.

In a follow-up decision dated December 28, 2009, the director concluded that the supplemental information submitted in support of the petitioner's motion to reopen and reconsider was not sufficient to overcome the findings in the original denial.

On appeal from the director's latest decision, counsel asserts that the petitioner is not a large organization and thus cannot afford a market analyst. Counsel states that the petitioner plans to use the beneficiary's marketing knowledge and customer feedback, which he will obtain by attending trade shows, to determine which goods are in demand. Counsel further asserts that the beneficiary will have the assistance of a sales manager and a sales staff to carry out these functions.

Counsel's assertions, however, are not persuasive and fail to overcome the director's conclusions. While it is understandable that the petitioner's needs are affected by the size of its organization, there are no circumstances that would serve to excuse the petitioner from having to meet the statutory criteria that establish eligibility. If the petitioner requires the beneficiary to allocate the primary portion of his time to performing non-qualifying operational tasks, then the petitioner is not eligible to employ a beneficiary in the immigrant classification of multinational manager or executive. While the beneficiary is not required to

allocate 100% of his time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to his 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).

Counsel claims that the beneficiary would be relieved from performing non-qualifying tasks, to some degree, by the manager and a sales staff. However, the record shows that at the time of filing the petitioner's entire sales staff consisted of one agent. As noted above, because the petitioner must establish eligibility at the time of filing, the additional agent that the petitioner hired since the petition's filing cannot be considered for the purposes of determining eligibility. Even if the beneficiary was assisted by the manager and sales agent at the time of filing, the petitioner did not clarify how much of the beneficiary's time was still being allocated to the performance of non-qualifying tasks.

Counsel's claim that the manager would be the liaison between the beneficiary and the petitioner's other employees is not credible given the size of the petitioning organization. It is unrealistic to assert that the beneficiary would oversee only the work of one employee—the manager—in an organization that consisted of four employees, including the beneficiary, at the time of filing the petition. It is therefore unclear what specific role the beneficiary would have in relation to the company's sales agent and the sales function in general, particularly in light of the nature of the petitioner's business, whose primary focus is the wholesale of gemstones.

In reviewing the description of the beneficiary's proposed employment as provided in response to the RFE, the AAO finds that the petitioner failed to convey a meaningful understanding of the specific job duties the beneficiary would perform on a daily basis. For instance, the petitioner indicated that the beneficiary is responsible for leading the petitioner "on the path to profitability" by establishing policies and setting long- and short-term goals. However, no information was provided as to what specific policies and goals the beneficiary has made or what specific daily job duties exemplify the beneficiary's policy- and goal-setting agenda. The record is also unclear as to the specific daily job duties that are associated with setting the petitioner's sales targets or approving the company budget. The petitioner also claimed that the beneficiary would "create strategic business units" in order to introduce new product lines. However, no clarification was provided to explain specifically what is meant by "strategic business units" and how exactly this "unit" would impact the introduction of new products. Again, the petitioner's repeated references to a sales staff and associates are unclear, as there were no associates listed in the organizational chart at the time of filing and the sales staff consisted of only one individual.

The AAO further notes that while it is foreseeable that the beneficiary would educate new employees on company policies and procedures, it is unreasonable for the petitioner to claim that the beneficiary was allocating 10% of his time to this task given the size of the organization and the irregular hiring patterns at the time of filing the petition. Moreover, the petitioner has not established how this job duty fits the definition of managerial or executive capacity.

In summary, after examining the beneficiary's job description and considering that information in light of the petitioner's organizational composition at the time of filing the petition, the AAO finds that the record lacks evidence to establish that the petitioning entity was capable of employing the beneficiary in a qualifying

managerial or executive capacity at the time of filing. While it is foreseeable that the petitioning organization may eventually progress to a stage of development wherein the beneficiary would be employed in a qualifying capacity, the petitioner had not reached such a stage at the time of filing. Despite the beneficiary's position at the top of the petitioner's organizational hierarchy and the built-in discretionary authority that may be inherent to such a role, the petitioner has not established that the primary portion of the beneficiary's time, at the time of filing the petition, would have been primarily allocated to tasks within a qualifying managerial or executive capacity. Therefore, the AAO finds that director properly denied the petition.

With regard to the beneficiary's position abroad, counsel introduced affidavits from the purchase manager, an assistant manager, and a partner of the foreign entity. The purchase manager, [REDACTED] stated that during his employment abroad, the beneficiary was responsible for the export of the company's goods and was assisted by an assistant export manager and a marketing/sales agent. [REDACTED] claimed that the beneficiary communicated with him regarding the amount of goods to be exported based on the number of orders received in order to avoid a surplus of goods, which would lead to financial loss. [REDACTED] claimed that the beneficiary had the authority to hire, fire, and train employees.

The foreign entity's assistant manager, [REDACTED], also stated that the beneficiary was fully in charge of all export activities and that in this capacity, the beneficiary worked with the purchase and production managers in order to obtain price quotes based on the amount of goods that needed to be exported for specific orders. [REDACTED] also confirmed the beneficiary's authority to hire, fire, and train employees.

Lastly, [REDACTED] a partner of the foreign entity, stated that the beneficiary was fully responsible for the international marketing/sales activities and had managerial subordinates working under him. [REDACTED] compiled a list of export projects that the beneficiary was responsible for and provided the dollar amount that the beneficiary's business dealings brought to the foreign entity.

Although the AAO acknowledges all the claims made by the above three affiants, we find that the statements from the beneficiary's foreign co-workers add little to an understanding of the beneficiary's employment capacity and thus are not sufficient to overcome the director's original findings, which focused primarily on the deficient job description and the lack of specific information detailing the beneficiary's actual day-to-day job duties. 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 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990).

While the petitioner has established that the beneficiary was charged with responsibility for a function that was essential to the foreign entity, i.e., international exporting, the evidence of record is not sufficiently clear as to whether the beneficiary was actually primarily performing the duties related to the function. Despite the statements made by the beneficiary's co-workers to establish that the beneficiary was assisted by other employees within the organization, the foreign entity's organizational chart is unclear in that no specific position titles or employee names were included, thus making it unclear which employees were specifically assigned to tasks that dealt with the international export function.

Accordingly, in light of the insufficient information provided with regard to the beneficiary's employment abroad and his daily job duties, the AAO finds that the petitioner failed to establish that the beneficiary was

employed abroad in a qualifying managerial or executive capacity. On the basis of this additional conclusion the instant petition may not be approved.

The petition will be denied 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.