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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:

FEB 09 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 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 matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Hawaiian corporation doing business as a restaurant. It seeks to employ the beneficiary as its president. 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 April 16, 2009, which addressed the beneficiary's role regarding the petitioner's personnel, finance, operations, and marketing. The petitioner also provided a number of supporting documents addressing the regulatory filing requirements described at 8 C.F.R. § 204.5(j)(3)(i).

The director reviewed the petitioner's submissions and determined that the record was not sufficient to warrant approval of the petition. Accordingly, the director issued a request for evidence (RFE) dated October 26, 2009, instructing the petitioner to submit, in part, documentation addressing the beneficiary's proposed position with the U.S. entity as well as the petitioner's organizational hierarchy.

The petitioner provided a response, which included a statement from counsel dated November 15, 2009. The statement included a percentage breakdown of the beneficiary's proposed duties with the U.S. entity. The record was also supplemented with the petitioner's organizational chart as well as payroll and tax documents.

Nevertheless, the director determined that the documentation submitted was not sufficient to establish that the petitioner would employ the beneficiary in the United States in a qualifying managerial or executive capacity and therefore denied the petition in a decision dated February 4, 2010. The director found the petitioning entity to be lacking the organizational complexity that is necessary to warrant the beneficiary's services in a primarily managerial or executive capacity.

On appeal, counsel submits a brief dated February 11, 2010 in which he disputes the basis for denial. Counsel paraphrases the statutory definitions of managerial and executive capacity and asserts that the beneficiary's proposed employment meets both definitions. Counsel focuses on the beneficiary's top placement within the petitioner's organizational hierarchy and her authority to negotiate contracts, make decisions, and to hire, fire, and train personnel. Counsel also states that the beneficiary oversees the work of other supervisory employees and that she manages an essential function, both of which are components of the statutory definition of managerial capacity.

The AAO notes that all of the petitioner's submissions have been reviewed. All relevant documentation that pertains directly to the key issue in this matter will be fully addressed in the discussion below.

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 primary issue to be addressed in this proceeding is the beneficiary's employment capacity in her proposed position with the petitioning U.S. entity. Specifically, the AAO will examine the record to determine 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.

As a preliminary concern, the AAO points out that the statutory definition of "managerial capacity" allows for both "personnel managers" and a "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act. If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Section 101(a)(44)(A)(iii) of the Act.

In the alternate, the term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)).

A beneficiary cannot be both a personnel manager and a function manager, as these terms are mutually exclusive. Counsel's assertion that the beneficiary is both a personnel and a function manager indicates that counsel has failed to draw any distinction between these two different managerial roles.

While the AAO acknowledges the beneficiary's top placement with the petitioner's organization and that the beneficiary has the discretionary authority of someone who is employed in a qualifying managerial or

executive capacity, these two elements must be considered in light of other relevant factors, such as the description of the proposed employment.

When examining the executive or managerial capacity of the beneficiary, the AAO will often look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Published case law supports the significance of a detailed job description, holding that 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). The AAO will then consider the job description in light of the petitioner's organizational hierarchy, the beneficiary's position therein, and the petitioner's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks.

Counsel indicated in his RFE response statement that the beneficiary's managerial job duties include planning and implementing marketing strategies, recruiting and training kitchen and floor staff, and managing the restaurant's daily operations, including shift assignments, supervising kitchen and floor operations, and resolving major customer complaints, which cumulatively comprise 70% of the beneficiary's time in her assignment with the U.S. entity. The AAO finds that these duties fall within the category of tasks that are necessary to provide a service and thus cannot be deemed to be qualifying within a managerial or executive capacity. While the AAO acknowledges that no beneficiary is 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/her proposed position. As stated above, 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. at 604.

Although the AAO does not dispute that the kitchen manager and the floor supervisor are supervisory employees, the record does not establish with sufficient clarity that the beneficiary's role within the petitioning entity is limited to managing only these two positions. Rather, it is reasonable to conclude that supervising kitchen and floor operations will include overseeing the employees who contribute to the successful function of a restaurant, not just the two employees who assume supervisory roles. The format of counsel's time allocations precludes the AAO from being able to determine specifically how much of the beneficiary's time would be allocated to overseeing the supervisory employees and how much would be allocated to supervising the remainder of the restaurant staff. The fact that counsel grouped various tasks together also precludes the AAO from being able to determine how much of the beneficiary's time would be specifically allocated to resolving customer complaints, which is yet another non-qualifying task. To the extent that the petitioner's restaurant staff is primarily comprised of non-managerial and non-professional employees, tasks such as recruiting and training kitchen and floor staff, conducting employee evaluations, and determining employee promotions also cannot be deemed as qualifying tasks.

The record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The fact that an individual manages a small business does not necessarily establish eligibility for classification as a multinational manager or executive. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel, nor has the petitioner demonstrated that it has reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute a significant portion of the duties performed on a day-to-day

basis. In summary, the record does not establish that the primary portion of the beneficiary's time will be allocated to managerial- or executive-level tasks. On the basis of this conclusion, the instant petition may not 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.