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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 10 2012** OFFICE: TEXAS 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 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, 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 revision department 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.

In support of the Form I-140, the petitioner provided a statement dated July 17, 2009 as well as a number of supporting documents addressing the regulatory filing requirements included in 8 C.F.R. §§ 204.5(j)(3)(i) and (5). The director determined that the record lacked sufficient evidence establishing that the petitioner meets all relevant statutory and regulatory criteria and subsequently issued a request for evidence (RFE) dated September 25, 2009. Among the issues addressed in the RFE was the beneficiary's qualifying managerial or executive capacity in his employment with the foreign and U.S. entities. The petitioner duly responded to the director's request, providing a statement dated October 26, 2009, which included position descriptions of the beneficiary's foreign and proposed employment. The response also included both entities' organizational charts and evidence of wages paid to staff employed by the U.S. entity.

After reviewing the record, the director determined that the petitioner failed to meet two eligibility requirements. Accordingly, the director issued a decision dated January 11, 2010 in which he focused on two grounds of ineligibility. Specifically, the director concluded that: (1) the petitioner failed to establish that the beneficiary was employed abroad in a managerial or executive capacity; and (2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On appeal, counsel disputes the director's decision asserting that the beneficiary's subordinates in his position abroad with the foreign entity and in his proposed position with the U.S. entity, respectively, have relieved and would relieve the beneficiary from having to allocate his time primarily to the performance of non-qualifying tasks. Counsel questions the director's consideration of the beneficiary's salary relative to his subordinates as a factor in denying the petition. Additionally, [REDACTED] on behalf of the petitioner, submits a statement dated February 8, 2010 in which she provides additional, more detailed information about the job duties the beneficiary performed during his employment with the foreign entity and those he would perform for the U.S. entity under an approved petition.

The AAO notes that all of the petitioner's submissions have been reviewed. All relevant documentation that pertains to the key issues 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 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.

As a preliminary matter, the AAO finds that the director unnecessarily considered the beneficiary's earnings relative to his subordinates within the U.S. organization. Accordingly, the AAO will disregard the director's finding as it pertains to the beneficiary's salary. The remaining portions of the director's analysis and the conclusions reached as a result thereof will not be withdrawn.

In examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The AAO will then consider this information in light of an entity's organizational hierarchy, the beneficiary's position therein, and that entity's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks.

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.

On the other hand, 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)).

In the present matter, the information provided strongly indicates that the beneficiary's foreign and proposed positions are those of a personnel rather than a function manager. As such, the managerial, supervisory, or professional positions of the beneficiary's employees must be explored as this issue is critical in determining whether the beneficiary's employment meets the statutory criteria.

In the petitioner's October 26, 2009 statement which the petitioner submitted in response to the director's RFE, the petitioner indicated that 65% of the beneficiary's time abroad was allocated to coordinating and directing, which primarily included directing and supervising eight subordinate employees, including an import/export manager, import/export account executives, revisers, and dispatchers. Despite the managerial or executive position titles of some of these subordinate positions, the information on record indicates that the beneficiary managed a number of non-managerial, non-supervisory, and non-professional employees. For instance, while the foreign entity's organizational chart indicates that the import/export account executives are subordinate to an import/export manager, the petitioner's October 26, 2009 support statement (at page five) indicates that these account executives report directly to the beneficiary. As such, despite the managerial position title of the import/export manager, it does not appear that this individual managed or supervised anyone. It is therefore necessary, in order to establish eligibility, for the petitioner to establish that the beneficiary's subordinates were professional employees.

In evaluating whether the beneficiary managed professional employees, the AAO must evaluate which of the subordinate positions required a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least a baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1998); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). In the present matter, the petitioner's RFE response statement did not include any information about the educational requirements of the positions that were subordinate to the beneficiary, nor was any information provided to establish what actual educational levels these individuals had attained. Although the petitioner provides additional information about the roles the beneficiary's subordinates played in the course of the foreign entity's business and further explains how some of the foreign entity's non-qualifying tasks were carried out, the statement on appeal also fails to establish that the beneficiary's subordinates abroad could be deemed professional employees.

The job description offered in the RFE response also indicates that the beneficiary allocated another 20% of his time to consulting and training, which included communicating with clients and advising them on the documentary requirements of importing into and exporting out of Mexico. As a result of this advisory role, the beneficiary was expected to keep abreast of laws and regulations dealing with customs, tariffs, and duties and educate subordinate personnel to ensure that they are aware of all relevant changes in the law. Although this aspect of the beneficiary's position abroad was undoubtedly crucial to the operation of the foreign entity's business, the AAO cannot conclude that consulting and training could be deemed a task within a managerial or executive capacity.

While the AAO is mindful of the fact that the beneficiary meets certain key elements of the statutory definition for managerial capacity, in order to be deemed a multinational manager or executive, the petitioner must establish that the beneficiary meets all four elements of the statutory definition of either managerial or

executive capacity. Simply focusing on the managerial aspect of the beneficiary's position is not sufficient. According to the statutory requirements, the AAO must consider the managerial, supervisory, or professional nature of the employees the beneficiary was overseeing. In this instance, a major portion of the beneficiary's employment with the foreign entity required supervision of non-managerial, non-supervisory, and non-professional personnel. As such, the AAO cannot conclude that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

With regard to the beneficiary's employment with the U.S. entity, the petitioner indicated in the October 26, 2009 statement that by virtue of managing the revision and traffic departments, the beneficiary would be managing an essential function. The petitioner stated that the revision and traffic departments, together, are responsible for revising merchandise and preparing documents for the importation of goods into Mexico. Although the petitioner further stated that 65% of the beneficiary's time would be specifically allocated to managing the essential function, the job description expressly stated that the beneficiary would supervise the work of four traffic executives within the traffic department as well as one classifier and one revision executive within the revision department. It appears, therefore, that a key feature of the beneficiary's proposed employment, like his employment abroad, is the supervision of others and in light of this information, the AAO finds that the beneficiary would fill the role of a personnel manager rather than that of a function manager, despite the petitioner's claim.

Accordingly, as noted in the discussion of the beneficiary's employment abroad, the AAO must assess the positions of the beneficiary's subordinates in order to determine whether they are managerial, supervisory, or professional employees. A review of the petitioner's organizational chart indicates that the traffic executives, of which there are four, are neither managerial nor supervisory positions, as they have no subordinate employees of their own. The AAO further finds that the traffic executives are non-professional, despite what their position titles may indicate, as their positions require no degree, but rather only field experience with traffic and/or customs. The petitioner similarly indicated that while both the classifier and the revision executive require field experience, neither requires a professional degree. The record therefore lacks sufficient evidence to establish that any of the beneficiary's subordinates within the U.S. position can be deemed as professional employees. The beneficiary's allocation of a primary portion of his time to overseeing these non-professional employees precludes the AAO from finding that the beneficiary's proposed position with the U.S. entity would be within a qualifying managerial or executive capacity.

The AAO further notes that the time the beneficiary would spend consulting with clients and training subordinate personnel on documentary requirements also cannot be deemed as time spent within a qualifying managerial or executive capacity.

On appeal, [REDACTED] on behalf of the petitioner, asserts that the beneficiary is a key resource due to his knowledge of Mexican customs laws and regulations as well as his familiarity with the norms and standards of the petitioner and its affiliates. However, such knowledge alone is not sufficient to establish that the beneficiary's employment meets the four statutory requirements that define managerial capacity. Furthermore, [REDACTED] emphasis on the "large percentage" of time the beneficiary has spent consulting clients on the various aspects of importing and exporting only goes further to establish that the beneficiary is not employed within a qualifying managerial capacity, as consulting with clients is not a managerial or executive task.

In summary, the AAO finds that the petitioner has failed to establish that the beneficiary was employed abroad or that he would be employed in the United States in a qualifying managerial or executive capacity. The record indicates that key aspects of the beneficiary's work included and would include consulting each entity's clientele on documentary requirements and overseeing the work of non-managerial, non-supervisory, and non-professional personnel. In light of this information, the AAO cannot conclude that the primary portion of the beneficiary's time has been and would be spent performing tasks within a qualifying capacity. On the basis of these findings, this 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.