

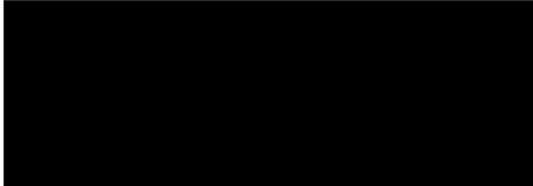
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



B4.

DATE: **FEB 15 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 Massachusetts corporation that seeks to employ the beneficiary as its general 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.

The director denied the petition based on the following grounds of ineligibility: (1) failure to establish that the beneficiary's employment abroad was within a qualifying managerial or executive capacity; and (2) failure to establish that the beneficiary's proposed employment with the U.S. entity would be within a qualifying managerial or executive capacity.

On appeal, counsel for the petitioner contends that the beneficiary is a function manager in both her position abroad and with the petitioner. Counsel states that the petitioner is a full service travel agency business and "makes 50% of its revenues from creating tour and travel packages for clients and groups," which the beneficiary is in charge of as a general manager and thus, manages an essential function of the organization. On appeal, the petitioner submits an affidavit from the vice president that states the beneficiary is in charge of an important aspect of the business operations in managing the tour packages.

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 issues that will be addressed in this proceeding call for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the petitioner submitted sufficient evidence to establish that the beneficiary was employed abroad and 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, 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). USCIS reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the petitioner's business, the employment and remuneration of employees, as well as 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 definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary primarily performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

An analysis of the record does not lead to the conclusion that the beneficiary was employed abroad or would be employed in the United States in a qualifying managerial or executive capacity. With regard to the foreign position held by the beneficiary, the petitioner failed to provide any evidence of the duties performed by the beneficiary. The record lacks any corroborating evidence such as a job description with a percentage breakdown for each duty, an organizational chart for the foreign company, a description of job duties performed by all other employees of the foreign company, to name a few examples of evidence to be submitted. The director requested this type of evidence in the request for evidence but the petitioner failed to submit any documentation regarding the beneficiary's position with the foreign entity. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). 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)).

The only information submitted regarding the beneficiary's position abroad is the beneficiary's resume. In her resume, she lists her position with the foreign company as General Manager, and states: "My main duty is to lead the customer services operations, to make sales, to negotiate with travel services suppliers and airlines, to have control of the cash entry and bank deposits, training and supervision of employees, and to inform and reports to the President and Administrator the transaction and operations of the business." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of her daily routine. The actual duties themselves will 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 petitioner failed to describe the beneficiary's position

or the actual duties to be performed, such that they could be classified as managerial or executive in nature.

When 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. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

In response to the director's request for evidence, the petitioner described the beneficiary's duties in the United States in a letter dated August 20, 2009, as follows:

She has the responsibility to lead the operations of the business, related a [*sic*] sales, employees and agreements with travel services suppliers. Her main duty is to lead the customer services operations, to make sales, to negotiate with travel services suppliers and airlines, to have control of the cash entry and bank deposits, training and supervision of employees, and to inform and report to the president and administrator the transactions and operations of the business.

The petitioner submitted an organizational chart of the U.S. company which shows the President supervising the Vice President who in turn supervises the General Manager (the beneficiary's position), who in turn supervises two Sales – Travel Agents, and one bookkeeper. The petitioner also provided a brief job description for each position. In addition, the petitioner submitted several copies of invoices and booking that were made by the beneficiary or in the name of the beneficiary.

On appeal, counsel for the petitioner claims that the beneficiary is a function manager as she manages the essential function of preparing tours and travel packages.

The petitioner provided a list of job duties that was not accompanied by a percentage breakdown. Due to the overly general and vague list of job duties, the AAO is unable to gain a meaningful understanding of how much time the beneficiary spent performing qualifying tasks versus those that would be deemed non-qualifying.

In describing the beneficiary's position in the United States, the petitioner stated that the beneficiary has "responsibility to lead the operations of the business, related [to] sales, employees and agreements with travel services suppliers." It is unclear what specific tasks actually fall within this broad category. Merely using the term "lead the operations" to describe the beneficiary's function does not establish that the supervisory tasks the beneficiary will perform are of a qualifying nature, particularly when it appears that the beneficiary will perform several non-qualifying duties such as making sales and negotiating with travel services suppliers and airlines. The petitioner provided invoices and emails of travel packages that were prepared by the beneficiary. It appears that the beneficiary's duties are more closely aligned with a travel agent. Without further information, it appears that the beneficiary will be providing the services of the business rather than directing such activities through subordinate employees. 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).

The petitioner failed to submit the percentage of time the beneficiary will spend on each duty, as requested by the director. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). On appeal, counsel for the petitioner asserts that the beneficiary primarily performs executive and managerial duties. The petitioner did not, however, submit any documentation to confirm this assertion. 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 states that the beneficiary's position is an essential function within the petitioner's organization. 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. § 214.2(l)(3)(ii). 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 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. at 604.) The petitioner has not provided evidence that the beneficiary manages an essential function. The petitioner provided a brief and vague job description that did not discuss how the beneficiary is managing an essential function. Only on appeal did counsel for the petitioner claim that travel services makes up 50% of the sales and as the manager of the travel tours and packages, the beneficiary is managing an essential function. However, the beneficiary's job description does not establish that the beneficiary is primarily performing in a managerial capacity.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

As discussed above, the petitioner has not identified employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business since the subordinates are also engaged in sales of travel packages and the bookkeeper is in charge of financial operations. The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate her position to that of a "function manager" as contemplated by the governing statute and regulations. As discussed above, the petitioner has not established that the beneficiary's duties are primarily managerial in nature, and thus she cannot be considered a "function manager."

Other than stating that the proposed position will be responsible for managing an unidentified essential function, counsel provides no explanation or evidence in support of his claim that the beneficiary would qualify as a function manager pursuant to section 101(a)(44)(A)(ii) of the Act. 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).

In summary, the petitioner has failed to provide sufficient evidence to establish that the beneficiary was employed abroad and that she would be employed in the United States in a qualifying managerial or executive capacity. Based on these two findings, the instant petition cannot be approved.

Beyond the decision of the director, the petitioner did not submit sufficient evidence to establish that it has a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

As general evidence of a petitioner's claimed qualifying relationship, the articles of incorporation alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The stock certificates, corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra*. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

The director specifically requested documentary evidence to establish the ownership and control of the foreign entity and the U.S. entity such as stock certificates and copies of annual reports which indicate affiliates and/or subsidiaries and the percent of ownership held by the parent company. In the petitioner's response, the petitioner failed to submit the requested documentation to establish ownership or control by the foreign entity. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The petitioner submitted a "Certificate of Merchant Registry Society of Commerce," that states the foreign company was registered on November 20, 2003 until November 20, 2009. This document is confusing because it names six individuals as shareholders but also states that the owner is [REDACTED]. The petitioner also submitted a document entitled, "Annual Report for Domestic and Foreign Corporations," from the Commonwealth of Massachusetts for the U.S. company that lists the registered agent as [REDACTED]. The document also stated that the U.S. company has 2,000 shares of common stock but it does not list who is the owner of these shares. The registered agent is not necessarily the owner of the company. The petitioner failed to provide any supporting documentation to corroborate the claim that [REDACTED] owns the foreign company and the U.S. company. 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).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

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.