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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 21 2012**

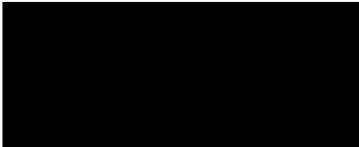
OFFICE: NEBRASKA SERVICE CENTER

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 that seeks to employ the beneficiary as its executive director/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.

In support of the Form I-140 the petitioner submitted a statement dated January 6, 2009, which included information regarding the petitioner's eligibility for the immigration benefit sought as well as a brief description of the beneficiary's proposed employment. The petitioner also provided supporting evidence, including the petitioner's financial and corporate documents and documents pertaining to the petitioner's U.S. subsidiary. Although the petitioner indicated that the beneficiary was employed abroad by an affiliate entity, the statement contained no information about the beneficiary's foreign employment.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a request for additional evidence (RFE) dated July 28, 2009 instructing the petitioner to supplement the record with documentation regarding the beneficiary's foreign employment as well as his proposed employment with the U.S. entity. Specifically, the director asked the petitioner to provide a definitive statement describing the beneficiary's specific job duties with each entity and to assign a time allocation to each of the listed job duties. The petitioner was also asked to discuss the beneficiary's subordinates in terms of their respective job titles, job duties, and qualifications.

In response, the petitioner provided a statement from counsel dated September 3, 2009. Counsel stated that the beneficiary would allocate 70% of his time working for the petitioning entity and 30% of his time working for the petitioner's U.S. subsidiary. Counsel provided a list comprising the beneficiary's proposed job duties and responsibilities with the petitioning entity and assigned a percentage of time to each item. Additionally, the petitioner provided its updated organizational chart and its quarterly wage contribution report for the first quarter of 2009 during which the Form I-140 was filed. With regard to the foreign entity, while the petitioner provided relevant organizational charts depicting the foreign entity's staffing hierarchy and described the positions of employees listed in those charts, a job description for the beneficiary was not provided. It is noted that 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).

After reviewing the record, the director concluded that the petitioner failed to establish that the foreign entity employed and that the petitioner would employ the beneficiary in a qualifying managerial or executive capacity. The director therefore issued a decision dated January 28, 2010 denying the petition. The director found that the petitioning entity had not reached a level of organizational complexity that would require the services of two managerial or executive employees.

On appeal, the petitioner submits a statement dated February 23, 2010, which was later followed by an appellate brief disputing the denial of the petition. As counsel did not address the beneficiary's employment abroad in either of his submissions, the AAO finds that the petitioner has effectively conceded the director's adverse conclusion with regard to the beneficiary's employment with the foreign entity and the petition will be denied on the basis of this initial conclusion. The discussion below will therefore focus on the beneficiary's proposed employment.

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 his 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.

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 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. The purpose of a detailed job description is to enable U.S. Citizenship and Immigration Services (USCIS) to gain a meaningful understanding of the types of tasks that will consume the beneficiary's time. 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).

In the present matter, the job description offered in response to the director's RFE lacks sufficient information about the beneficiary's specific job duties. For instance, the petitioner indicated that 15% of the beneficiary's time would be allocated to focusing on the petitioner's finances, including budgeting for expenditures and operating costs, defining strategic and operational plans, allocating resources, and preparing budget proposals to be reviewed and approved by the board of directors. This information is vague as it fails to cite specific tasks that the beneficiary would undertake on a daily basis in his effort to meet these overall broad job responsibilities. Similarly, the AAO is unable to ascertain what specific tasks the beneficiary would perform in his efforts to "ensure ongoing quality care by developing and implementing patient care policies." The petitioner did not define what is meant by "quality care," nor state what specific patient care policies have been implemented already such that the AAO would gain an understanding of the beneficiary's specific role. The petitioner also failed to cite specific tasks in the beneficiary's role of overseeing, directing, and leading daily activities that pertain to the goods and services offered by the petitioner. It can be argued that the role of leader of daily activities is one that is assumed by any individual who is placed at the top of an organizational

hierarchy. As such, the petitioner must specify what actual tasks the beneficiary would perform; merely reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient.

The AAO further notes that the claim that the beneficiary's budget proposals would be subject to review by the board of directors lacks credibility, as the record shows that the beneficiary is the board member with controlling interest in the petitioning entity. Moreover, the very act of preparing budget proposals is indicative of an operational task, which would be deemed non-qualifying. The AAO also finds that meeting with vendors, contractors, and customers and negotiating orders and agreements fall within the category of non-qualifying operational tasks.

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. 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). Here, not only does the job description list certain non-qualifying tasks, but a considerable portion of the beneficiary's job description is comprised of general information, which fails to delineate specific job duties and thus precludes the AAO from being able to determine how much of the beneficiary's time would be spent performing qualifying tasks versus those that are non-qualifying.

Additionally, while Part 5, Item 2 of the Form I-140 indicates that the petitioner was claiming a total of eleven employees at the time of filing, the petitioner's 2009 first quarterly wage report, which accounts for reported employees at the time of filing, shows that the petitioner's staff was comprised of only seven employees. See RFE response, Exhibit 58. 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). The petitioner has not provided any documentation to support the claim of having eleven employees at the time of filing the petition.

A review of the quarterly wages paid at the time of filing indicates that the petitioner's sales manager, its intake coordinator, and its computer information specialist were not paid wages commensurate with full-time employment. While the petitioner's organizational chart lists a sales staff, one on-call information technology employee, several delivery employees, and two financial staff members, there is no evidence to establish that any of these individuals were employed by the petitioning entity at the time the Form I-140 was filed. 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)). It is further noted that any employees the petitioner may have hired after the Form I-140 was filed would not be considered for the purpose of determining the petitioner's eligibility, which must be established on the basis of facts and circumstances that existed at the time of filing. 8 C.F.R. § 103.2(b)(1). A petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

In summary, neither the beneficiary's job description nor the petitioner's organizational composition supports the claim that the petitioner was ready and able to employ the beneficiary in a qualifying managerial or executive capacity at the time the petition was filed. As previously noted, the job description offered in the present matter is overly vague, as it fails to provide needed information about the beneficiary's specific daily tasks, and the petitioner's organizational hierarchy contained far fewer employees than those claimed initially in the Form I-140 and in the organizational chart that was submitted in response to the director's RFE. In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)).

Despite counsel's attempt to distinguish between the facts in *Family, Inc.* from those in the present case, the distinctions made by counsel are not sufficient to establish that the petition warrants approval. *Id.* The fact that the petitioner failed to provide supporting evidence to establish that it had eleven employees at the time of filing as claimed in the Form I-140 warrants further information explaining how the petitioner planned to relieve the beneficiary from having to primarily perform non-qualifying operational tasks given the organizational composition that was in place at the time of filing. Such an explanation necessarily requires a detailed description of the tasks the beneficiary would perform and an explanation establishing that the petitioner's staffing at the time of filing the petition was sufficient to allow the beneficiary to allocate the primary portion of his time to the performance of managerial- or executive-level tasks. This crucial information is not present in the record.

In light of the deficiencies as described above, the AAO finds that the petitioner has failed to establish that the beneficiary was either employed abroad or that he would be employed by the U.S. entity in a qualifying managerial or executive capacity. Based on these adverse findings, this petition cannot 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.