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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

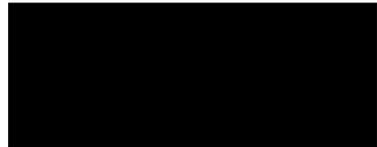


U.S. Citizenship  
and Immigration  
Services



B4

DATE: FEB 22 2012 OFFICE: NEBRASKA SERVICE CENTER

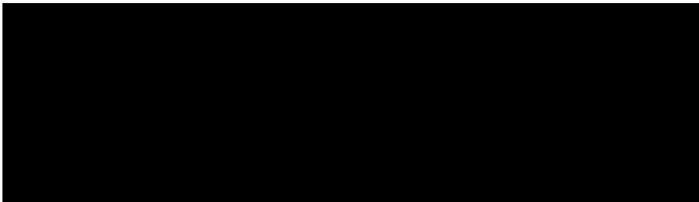


IN RE: Petitioner:  
Beneficiary:



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, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a distributor of commercial plumbing fixtures. It seeks to employ the beneficiary as a Functional Manager/IT Systems. 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 concluding that the petitioner failed 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 current petition has been pending since 2008 and the beneficiary's "job has evolved to include higher and broader managerial duties." Counsel further states that the beneficiary is not performing all of the "IT duties," but rather the "IT duties are performed by six advanced level employees for all the interrelated companies utilizing the Belgium Mainframe system." In addition, counsel states that the beneficiary has been promoted and now "manages 15 U.S. locations" through management of the Purchasing Manager, Product Specialist, and Warehouse Manager. Counsel also submits the beneficiary's job duties and the organizational chart submitted with the request for evidence and a revised organizational chart as of the date the appeal was filed.

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.

As a preliminary matter, counsel contends that the current petition has been pending for years and thus, the beneficiary's job duties have "evolved to a higher and broader level of management." The director did not explain the delay. The director's delay in adjudicating the petition, while regrettable, was not contrary to law. During the delay, the director issued one request for evidence pursuant to 8 C.F.R. § 103.2(b)(8). Furthermore, the AAO must review the beneficiary's job duties as presented when the petition was filed, not at the time of appeal. The petitioner must establish eligibility at the time of filing; 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). On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Thus, the AAO will not use the new job duties provided on appeal to determine the eligibility in this case. Instead, the AAO will review the information submitted pertaining to July 2008 when the I-140 petition was filed.

The issue that will be addressed in this proceeding calls 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 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 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.

In the present matter, an analysis of the record does not lead to affirmative conclusion that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. With regard to the proposed position, the petitioner provided a list of job duties performed by the beneficiary with a percentage breakdown which included broadly stated job responsibilities. Due to the overly general information included in the percentage breakdown, 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.

The petitioner indicated that 40% of the beneficiary's time is spent on the "education of the program to U.S. employees." The duties include "provide on the spot support to questions about and to problems on current IT programming at branch, office and warehouse level"; "prepare and translate procedures on new software programming"; and "organize in-store training sessions." The petitioner's organizational chart indicates that the beneficiary supervised an accounts payable employee, a purchasing manager, a product specialist, a warehouse manager, two receiving/shipping clerks, three order pullers, and two truck drivers. It does not appear that any of the subordinates are trained in information technology in order to perform the day-to-day tasks that will be supervised by the beneficiary.

The same is true for the rest of the beneficiary's duties. The petitioner stated that the beneficiary will spend 5% of his time continuing the "implementation in the U.S. of the IT platform," 10% of his time "mapping the U.S. company's needs for the different components of the platform," 15% of his time responsible for "on-going system diagnosis for required modifications," 10% of his time responsible for the "implementation of multiple components in the U.S. with full support of the Belgian IT Department," 10% of his time "launching different applications with full support of Belgian IT department," and 10% of his time responsible for "improvement reporting of IT department and transactional information reporting." The petitioner submitted job descriptions for the employees supervised by the beneficiary. None of them work in IT operations. It appears that the beneficiary is responsible for personally running all the IT applications rather than supervising employees who are responsible for day-to-day IT tasks. The beneficiary's position description is too general and broad to establish that the preponderance of his duties are managerial or executive in nature. 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 his 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 job description submitted by the petitioner provides little insight into the nature of the tasks the beneficiary will perform. While the petitioner has provided a breakdown of the percentage of time the beneficiary will spend on various responsibilities, the petitioner has not persuasively established that a majority of his time would be devoted to duties that are managerial or executive in nature.

Counsel states that the beneficiary's position may be deemed as that of a function manager which does not focus on the beneficiary's duties as a personnel manager, but this does not account for the non-qualifying tasks the beneficiary would have to perform by overseeing the work of non-supervisory, non-professional, and/or non-managerial employees. 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's assertions are not consistent with the job description and the organizational chart that the petitioner has provided in which considerable focus was placed on the beneficiary's supervision of subordinate employees.

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 the beneficiary is a function manager. The beneficiary's job description does not, however, 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 organizational hierarchy, 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.

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' duties are not related to his information technology responsibilities. The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate his 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 he 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 the 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 would be employed in the United States in a qualifying managerial or executive capacity.

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 met that burden.

**ORDER:** The appeal is dismissed.