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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: JUL 02 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 in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** 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 Florida corporation that seeks to employ the beneficiary as its “president/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 July 14, 2008 in which the beneficiary’s position of general manager was said to involve project management, value-engineering, quantity surveying, path scheduling, and quality control. Additionally, the petitioner indicated that the beneficiary engages in management consulting, which would require the beneficiary to provide management services to clients as well as general management of company administration and promotion of the company in pursuit of potential clients. No further information or supporting evidence was provided.

Upon review of the supporting statement, the director determined that the petition did not warrant approval. The director therefore issued a request for additional evidence (RFE) dated April 30, 2009 informing the petitioner of various evidentiary deficiencies. Two of the issues that the director addressed in the RFE pertained to the beneficiary’s foreign and U.S. employment. Specifically, the director determined that the record lacked evidence showing that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity. The director expressly instructed the petitioner to provide detailed organizational charts for the foreign entity that previously employed the beneficiary and for the U.S. entity where the beneficiary’s proposed employment would take place. The charts were to include the beneficiary’s position, illustrating who supervised whom, and employee names, job titles, and job descriptions.

Although the record shows that the petitioner responded with documents addressing other evidentiary deficiencies that the director pointed to in the RFE (which do not pertain to the grounds for denial), the petitioner did not provide any new information to establish that the beneficiary’s employment with the foreign entity and his proposed employment with the U.S. entity fit the statutory criteria for managerial capacity, pursuant to section 101(a)(44)(A) of the Act, or executive capacity, pursuant to section 101(a)(44)(B) of the Act. Rather, counsel asked the director to review a statement dated June 29, 2006, which the petitioner previously submitted in support of an L-1A nonimmigrant petition and where the petitioner discussed the job duties and responsibilities of the beneficiary’s positions of project manager and management consultant. It is noted that the job duties listed for the position of project manager are identical to those listed in the petitioner’s July 14, 2008 statement (which was submitted in support of the instant Form I-140), which described the beneficiary’s proposed position of general manager. The AAO notes that neither the L-1A supporting statement nor the supporting statement provided with the instant Form I-140 addressed the beneficiary’s prior employment with the foreign entity. The AAO further notes that the petitioner failed to provide the requested organizational charts pertaining to the beneficiary’s foreign and U.S. employers. 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).

Upon review of the limited evidence offered in response to the RFE, the director concluded that the petitioner 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 director therefore issued a decision dated December 7, 2009 denying the petition.

On appeal, counsel asserts that the director's decision was factually and legally incorrect, that the director misinterpreted the evidence, and that the director came to an erroneous adverse conclusion. Counsel asks the AAO to review an affidavit in which the beneficiary offers information addressing the grounds for denial. Counsel also indicates that an appellate brief and/or additional information would be forthcoming within 30 days of the appeal. A review of the record indicates that no further evidence or information has been submitted to date. Therefore, the AAO will make a determination in this matter based on the evidence that is presently on record.

The AAO finds that counsel's arguments are not persuasive and fail to overcome the director's denial. The discussion below will provide an analysis of the relevant documentation and will explain the underlying reasoning for the AAO's decision.

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 to be addressed in this proceeding pertain to the beneficiary's employment capacity in his position with the foreign entity and 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 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 concludes that the affidavit, which the beneficiary offers on appeal in an effort to establish that his positions with the foreign and U.S. employers fit the statutory definitions of managerial or executive capacity, will not be considered in this proceeding. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). As previously noted, 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).

Where, as here, a petitioner was put on notice of a deficiency in the evidence and was given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the supplemental information to be considered, it should have submitted the evidence in response to the director's request for evidence. *Id.* Therefore, to the extent that the beneficiary addresses on appeal issues that should have been addressed previously in response to the RFE, the AAO need not and does not consider the sufficiency of the statements and information provided on appeal.

Accordingly, in reviewing the evidence submitted by the petitioner prior to the appeal, the AAO finds that the record lacks relevant documents and information pertaining to the beneficiary's positions with the foreign and U.S. entities. It is noted that 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 also finds that it is appropriate and often necessary to consider other relevant factors, such as the petitioner's organizational hierarchy, which shows the complexity of a given entity and the beneficiary's placement in relation to other employees, as well as the petitioner's overall staffing, which allows the AAO to gauge the extent to which the petitioner is able to relieve the beneficiary from having to focus the primary portion of his time on the performance of non-qualifying operational tasks.

The petitioner failed to provide a description of the beneficiary's employment with the foreign entity and has provided no evidence of the foreign and U.S. entities' respective organizational hierarchies. Additionally, a review of the five job duties the beneficiary would carry out in his position with the U.S. entity indicates that the beneficiary would primarily perform tasks that are necessary to provide services that are offered by the petitioner to its clientele. 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 performed and would perform are only incidental to the position(s) in question. 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).

The petitioner has failed to establish that the beneficiary's position with the foreign entity and his proposed position with the U.S. entity consisted and would consist primarily of job duties within a qualifying managerial or executive capacity. Therefore, the AAO finds that the petition does not warrant approval and the director's decision will be affirmed.

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.