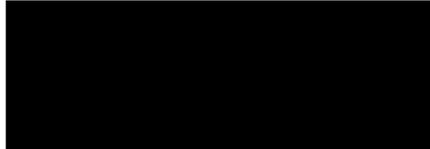


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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



B4

DATE: JUL 02 2012

OFFICE: NEBRASKA SERVICE CENTER

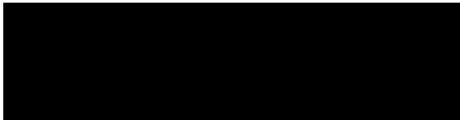


IN RE: Petitioner:
Beneficiary:



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

The petitioner is a California corporation that seeks to employ the beneficiary as its president and head of operations. 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 supporting statement containing relevant information regarding the petitioner's eligibility, including overviews of the petitioner's and the foreign parent entity's respective businesses and descriptions of the beneficiary's foreign and proposed employment. The petitioner also provided supporting evidence in the form of payroll reports, bank statements, and a business lease.

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 January 8, 2009 informing the petitioner of various evidentiary deficiencies, including insufficient evidence establishing that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The director therefore instructed the petitioner to provide a list of the beneficiary's proposed job duties and to assign a time constraint to each item on the list indicating what percentage of time the beneficiary would allocate to each of his proposed job duties. The director also instructed the petitioner to provide a detailed organizational chart depicting the beneficiary's proposed position as well as the names of all the departments and teams that are part of the organizational hierarchy. The petitioner was asked to include names, educational levels, and detailed job descriptions for the employees who are the beneficiary's direct subordinates as well as those to whom the beneficiary may be subordinate.

The petitioner responded to the RFE by providing the requested documents. The beneficiary's job description was supplemented with the requested time constraints and the petitioner's organizational chart depicting an entity with employees in the United States and India. The chart shows that five employees are located in the United States with a more extensive staffing structure in India.

After reviewing the record, the director concluded that the petitioner failed to establish that the petitioner would employ the beneficiary in a qualifying managerial or executive capacity. The director issued a decision dated March 23, 2009 denying the petition.

On appeal, counsel objects to the director's reliance on the beneficiary's salary as an indicator of his employment capacity and disagrees with the director's interpretation of the organizational charts previously submitted. Counsel asserts that the beneficiary assumed the role of both a manager and an executive in the petitioner's early stages of development. Counsel states that the bulk of the petitioner's operations are in India and urges the AAO to consider the petitioner's reasonable needs in light of its overall stage of development. He asserts that the beneficiary's subordinate employees are degreed professionals.

Although the AAO acknowledges that the director erroneously considered the beneficiary's proffered wage and did not discuss the petitioner's organizational hierarchy with sufficient clarity, the director adequately conveyed key points that led to the adverse decision, i.e., that the petitioner provided a deficient job description for the proposed position and that the petitioner's organizational hierarchy did not attain a level of complexity wherein the petitioner would have the ability to relieve the beneficiary from having to allocate the

primary portion of his time to the performance of non-qualifying tasks. The AAO finds that counsel's arguments are not persuasive and fail to establish that a favorable decision was warranted based on the facts and circumstances that existed at the time the Form I-140 was filed. 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 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). 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).

The petitioner provided a deficient job description, which is comprised in large part of vague statements that fail to clarify the beneficiary's specific daily tasks within the scope of the petitioner's business organization. For example, the petitioner indicated that 20% of the beneficiary's time would be spent developing and growing the U.S. business; 15% would be spent developing and implementing a strategic plan aimed at company growth and increased profitability; 10% would be spent setting goals and objectives; and 10% would be spent engaging in strategic planning, management, and technology development. Merely relying on broad terminology and the beneficiary's elevated role within the petitioning entity is not sufficient to convey a meaningful understanding of what specific tasks the beneficiary would perform on a daily basis in order to meet the general responsibilities of the proposed position.

The AAO 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. 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 at 42; *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)).

A considerable portion of the beneficiary's time would be allocated to overseeing the work of employees and performing non-qualifying operational tasks, including developing client relationships, negotiating contracts, recruiting staff for the U.S. office, and understanding client requirements and finding solutions. With regard to the personnel management portion of the beneficiary's proposed position, the AAO finds that the petitioner failed to provide sufficient evidence to establish that the managerial personnel the beneficiary would purportedly oversee are actual employees of the petitioning entity. To clarify, the petitioner's organizational chart shows that the petitioner's U.S. staff is comprised of a chairman, the beneficiary in the position of president and CEO, an executive vice president, a director of corporate education, and an executive assistant. The chart indicates that the remainder (and primary portion) of the support staff is located in India. The chart shows that the support staff is comprised of business developers, project managers, account executives, and the software development employees who actually carry out the operational tasks to meet the requirements of client contracts. The record contains no evidence, other than the petitioner's own representations, to corroborate the existence of the staff that the petitioner purportedly employs overseas. 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)).

While the AAO takes note of counsel's references to the petitioner's reasonable needs and early stages of development, merely showing that a limited support staff meets the petitioner's reasonable needs is not sufficient, unless the petitioner can establish that the documented support staff the petitioner had in place at the time the petition was filed would be sufficient to relieve the beneficiary from having to allocate the primary portion of his time to the performance of non-qualifying tasks. The petitioner's reasonable needs do not serve to override the petitioner's legal burden of having to establish that the beneficiary would primarily perform duties of a qualifying managerial or executive nature. Therefore, any petitioner whose reasonable needs are met by having the beneficiary allocate his time primarily to the performance of non-qualifying tasks cannot be deemed to employ the beneficiary in a qualifying managerial or executive capacity.

In summary, the petitioner has failed to clarify the beneficiary's actual daily job duties and it has failed to provide adequate documentation to establish that its organizational hierarchy at the time of filing the petition was sufficient to relieve the beneficiary from having to allocate his time primarily to the performance of non-qualifying tasks. In light of these deficiencies, the AAO finds that the petition cannot be approved.

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.