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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

[redacted]

DATE: JUL 0 2 2012

OFFICE: TEXAS SERVICE CENTER

[redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

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 AAO inappropriately applied the law in reaching its 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 motion 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 any motion to 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 Georgia corporation engaged in wholesale trade, which seeks to employ the beneficiary as its President. 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.

On August 18, 2010, the director denied the petition concluding the following: (1) 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, (2) the petitioner failed to establish that the beneficiary's employment abroad was within a qualifying managerial or executive capacity, and (3) the petitioner failed to establish that it has the ability to pay the beneficiary's proffered wage.

On appeal, counsel for the petitioner contends that the beneficiary is a functional manager as he "performs essential functions and also is responsible for its overall operations." Counsel states that the regulations do not require that a manager supervise professional personnel and thus, the beneficiary is a function manager since he functions at a senior level with respect to the function managed. Counsel also states that the beneficiary's position with the foreign company was in an executive position as he managed and supervised the managers of the Purchasing Department, Marketing and Sales Department and General Affairs Department. This decision will address the beneficiary's foreign and proposed employment to determine whether the petitioner met the applicable eligibility criteria.

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 the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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 that 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. *See* 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is 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, 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. An analysis of the record does not lead to an affirmative conclusion that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

In the July 23, 2009 support letter, the petitioner indicated that the beneficiary's primary job responsibilities as president of the U.S. company are divided into two categories, "the management of the corporate affairs, and personnel control and management," and "the planning and strategizing for establishment of a market share for [the petitioner's] goods and distribution." The petitioner also stated that the beneficiary will "employ 'hands on' managerial approach for the activity of all staff and/or consultants in all aspects of [the petitioner's] operation," which will include "supervising and controlling the work of his subordinates as well as managing the performance of outside consultants, distributors or dealers."

On review, the petitioner provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner stated that the beneficiary will be responsible for "overseeing all aspects of [the petitioner's] operations and maximizing its profitability and growth," "exercise wide latitude in making decisions," and "perform the overall management of [the petitioner.]" 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 petitioner also failed to provide a percentage breakdown of the duties to indicate which duties were managerial or executive in nature. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. The petitioner's descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature. The job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will perform.

The job description also includes several non-qualifying duties such as the beneficiary will "establish operating policies and procedures for marketing [the petitioner's] goods, handling customer service, negotiating with potential and current customers, accounting for business activities, performing systems management, and practicing personnel management for effective operation of [the petitioner]"; "review activity reports regarding consulting companies, distributors or dealers"; "prepare a budget"; "develop financial and marketing plans"; and "evaluate market trends and the circumstances under which [the petitioner's] good are to be marketed." It appears that the beneficiary will be developing and marketing the services of the business and negotiating contracts, rather than directing such activities through subordinate employees. 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 Intn'l.*, 19 I&N Dec. at 604.

An analysis of the nature of the petitioner's business undermines the petitioner's assertion that the beneficiary is employed in a managerial or executive capacity. The Form I-129, submitted on June 28, 2009, stated that the petitioner employs 2 individuals. The petitioner also submitted Form 941, Employer's Federal Tax Return, that indicates the petitioner employed two individuals in 2007, 2008 and the first two quarters of 2009. The petitioner also provided an organizational chart of the petitioner that indicated the beneficiary as president who in turn supervises general management, sales and marketing, and quality control. There are no employees in general management or sales and marketing, and there is one employee in quality control.

On appeal, counsel for the petitioner explained that the quality control employee is assigned to the dealership management. In this role, "he takes in complaints and suggestions from various dealerships and reports directly to the beneficiary from whom he received guidance and direction."

As the petitioner employs the beneficiary and one individual in quality control, the beneficiary may be performing several, if not all, of the finance operations and business development activities, and all of the various operational tasks inherent in operating a business on a daily basis, such as marketing, sales, market research, paying bills, handling customer transactions, and negotiating contracts. Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. 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 Intn'l.*, 19 I&N Dec. at 604.

On appeal, counsel states that the petitioner hired a CPA who prepares activity reports and financial statements. In addition, counsel states that the petitioner works with several dealerships that are an "integral part of the functions geared toward gaining market share and generating business profits." Counsel states that "most of the ministerial import work is performed by forwarders and customs brokers employed as independent contractors and managed by the beneficiary." Although the petitioner claims that it employs independent contractors and works with dealerships, the petitioner failed to provide any evidence to corroborate this claim such as tax documents, paystubs or contracts. 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)).

Although counsel suggests on appeal 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, counsel cannot merely raise these alternate claims to avoid addressing the non-qualifying tasks the beneficiary would have to perform as a result of not having employees to manage. 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.

Counsel contends that the beneficiary performs 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). 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. As noted above, 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. As noted above, the beneficiary's job description does not establish that the beneficiary is primarily performing in a managerial capacity.

The beneficiary's job duties, as described by the petitioner, are not indicative of an employee who is primarily focused on the broad goals and policies of the organization. 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). The petitioner has not established that the beneficiary is primarily engaged in directing and controlling a subordinate staff comprised of professional, managerial or supervisory employees, nor has it indicated that he is charged with managing an essential function of the petitioning organization. *See* section 101(a)(44)(A) of the Act. Therefore, the AAO is not persuaded that the beneficiary would be employed in a primarily managerial capacity.

The second issue in this matter is whether the beneficiary's employment abroad was within a qualifying managerial or executive capacity. An analysis of the record does not lead to an affirmative conclusion that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

The petitioner claimed in its July 23, 2009 letter that the beneficiary has served continuously for seven years with the foreign company in the position of Marketing and Managing Director. The petitioner stated that the beneficiary "launched aggressive marketing campaigns for international marketing," "planned and devised strategies to implement plans," and "motivated and encouraged his subordinates to forge to fruition of the marketing campaigns."

This description provides little insight into what the beneficiary primarily did on a day-to-day basis as marketing and managing director of the foreign entity. The petitioner did not explain the strategies of development the foreign company had for marketing and sales, or an explanation of how the beneficiary was involved in the marketing campaigns. 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. Again, the actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co.,*

Ltd. v. Sava, 724 F. Supp. at 1108. The evidence of record is insufficient to establish that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity.

The petitioner submitted an organizational chart of the foreign company that indicated the beneficiary was directly supervised by the president and the beneficiary in turn supervised the purchasing department, the marketing and sales department and the general affairs department, which consisted of 15 employees. However, the petitioner did not submit a list of duties performed by the subordinate employees, or evidence that these individuals were employed by the foreign company such as tax documents or paystubs. 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, at 165.

The third issue in this proceeding is whether the petitioner has the ability to pay the beneficiary's proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the *prospective United States employer* has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

(Emphasis added.)

The petitioner indicates on the Form I-140, at Part 6, that it will pay the beneficiary $1,615.38 per week which is approximately $83,999.76 a year. On the Form I-140, the petitioner also indicated that the petitioner's gross annual income is $332,745.00, and the net annual income is $39,815.00, and it currently employs 2 individuals.

In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary.

In the present case, the petitioner provided a Form W-2 for 2008 that stated the beneficiary received a salary of $80,000.00 in 2008. On appeal, the petitioner submits Form 1120, U.S. Corporation Income Tax Return for 2009, and it indicated that the beneficiary received a salary of $84,000.00 in 2009.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984));

see also Chi-Feng Chang v. Thornburgh, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner provided Form 1120, U.S. Corporation Income Tax Return, for 2008 that indicated a gross receipt of sales of $332,745.00, and payment of salaries and wages of $116,000.00, and a net income of $39,815.00. Thus, the petitioner has submitted sufficient evidence that it can pay the proffered wage to the beneficiary and the AAO will withdraw this portion of the director's decision.

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.