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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**

[Redacted]

B4

DATE: **JUL 03 2012**

OFFICE: TEXAS SERVICE CENTER

[Redacted]

IN RE: Petitioner:  
Beneficiary:

[Redacted]

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 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. 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 11, 2010, which contained relevant information pertaining to the petitioner's eligibility, including an overview of the petitioner's business, the business of its foreign parent entity, and descriptions of the beneficiary's foreign and proposed employment. The petitioner also provided supporting evidence in the form of financial and corporate documents pertaining to the petitioner and its foreign parent entity.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a notice of intent to deny (NOID) dated April 28, 2010 informing the petitioner of various evidentiary deficiencies. Among the issues addressed was the beneficiary's proposed employment with the U.S. entity. Specifically, the director determined that the record lacked evidence showing that the beneficiary would be employed in the United States in a qualifying capacity. Therefore, the director instructed the petitioner to provide a definitive job description with a list of the beneficiary's proposed job duties and the percentage of time that would be allocated to each item on the list. The director also asked the petitioner to discuss the beneficiary's subordinates, including their respective job titles, job duties, and educational levels.

The petitioner's response included a statement dated May 27, 2010 from the petitioner's attorney who listed the supporting evidence being submitted with the response. In a statement dated May 26, 2010, the petitioner provided a virtually identical job description for the beneficiary as the one that was originally submitted in support of the Form I-140. The petitioner also included job descriptions for its other employees as well as photocopies of the IRS Form W-2s that were issued to the petitioner's employees in 2009.

After reviewing the record, the director concluded that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The director commented on evidence of the petitioner's limited staffing and determined that the petitioner failed to justify allocating 30% of the beneficiary's time to managing such a limited staff. Additionally, the director relied on the common law definition of the term "employee" in concluding that the petitioner and the beneficiary do not have an employer-employee relationship. In light of these adverse findings, the director denied the petition in a decision dated August 17, 2010.

On appeal, counsel submits a brief in which she disputes the grounds for denial and points to supplemental documents submitted in support of the appeal.

The AAO finds that the petitioner has submitted sufficient evidence to overcome the second ground for denial. Nevertheless, with regard to the director's conclusion pertaining to the beneficiary's employment capacity in his proposed position with the U.S. position, the AAO finds that counsel's assertions 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 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.

As a preliminary matter, the AAO notes that counsel's discussion of events that took place or circumstances that changed after the petition was filed are not relevant for the purpose of determining the petitioner's eligibility, which must be established based on the 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). Therefore, while the petitioner's hiring of additional staff or improved financial condition may be relevant for establishing eligibility in future petitions, such information is not relevant in the present matter and need not be considered or addressed.

In examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the beneficiary's proposed 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.

In the present matter, the AAO finds that there are a number of deficiencies. First, despite the fact that the petitioner was issued a NOID in which the director expressly asked for a supplemental job description, the response contained only a job description and percentage breakdown that was virtually identical to the job description initially submitted in support of the Form I-140. Merely resubmitting evidence, which the

director implicitly deemed deficient by asking for further evidence, is not sufficient and is generally unresponsive to the director's request.

Furthermore, in reviewing the beneficiary's job description, the AAO finds that the information provided is overly general and thus fails to convey a meaningful understanding of the specific tasks the beneficiary would perform on a daily basis within the scope of the petitioner's staffing and organizational hierarchy at the time of filing the petition. The petitioner indicated in both job descriptions that the beneficiary would allocate 15% of his time to managing his team and directing and coordinating the employees' activities. The petitioner failed to specify the actual daily tasks the beneficiary would perform in meeting these general job responsibilities. The petitioner was equally vague in stating that another 15% of the beneficiary's time would be allocated to making policies and planning, directing, and coordinating U.S. operations. The goal of any president of an entity is to make policy and direct operations. It stands to reason that the specific tasks of an entity's president would vary, depending on the type of business the entity conducts and the particular organizational hierarchy of the entity in question. The petitioner failed to explain what policies the beneficiary would formulate or what specific actions he would carry out in managing and coordinating operations within the scope of the petitioner's business. 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). Failing to adequately describe the proposed employment precludes the AAO from being able to determine whether the position in question is one that is within a managerial or executive capacity.

While the petitioner claimed that 10% of the beneficiary's time would be allocated to supervising departments linked to marketing, sales, finance, and accounting, this information cannot be verified when reviewing the organizational chart the petitioner provided to illustrate its staffing and hierarchy at the time of filing the petition. The petitioner's organizational chart does not show the existence of marketing, sales, finance, and accounting departments. While the petitioner planned to hire a sales manager some time in 2010, this position was vacant as of February 4, 2010 when the petition was actually filed. It is therefore unclear who, other than the beneficiary himself, was available to carry out the sales manager's tasks at the time of filing the petition. That being said, while the petitioner indicated that 5% of the beneficiary's time would be spent supervising product development, the petitioner has not provided information to clarify who would actually develop the products. Lastly, the AAO notes that developing marketing strategies and addressing customer complaints, all of which are duties assigned to the beneficiary, cannot be deemed as tasks within a qualifying managerial or executive capacity.

Finally, in reviewing the petitioner's staffing, the evidence does not show that the petitioner had the organizational complexity or the necessary staffing to relieve the beneficiary from having to allocate the primary portion of his time to the performance of non-qualifying operational tasks. While 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 the 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).

While the petitioner originally claimed to have employed a total of six staff members at the time of filing the petition, there is no evidence on record to support this claim, as the petition was filed in February 2010 and none of the petitioner's tax records indicate whom the petitioner employed at that time. 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)). Moreover, the petitioner has not explained why it included three waiters in its organizational chart, given that the petitioner identified itself as a food distribution business rather than a restaurant.

In summary, the AAO finds that the record lacks sufficient information and supporting evidence to establish that the petitioner was adequately staffed at the time of filing the petition so that the primary portion of the beneficiary's time would have been allocated to the performance of job duties within a qualifying managerial or executive capacity. Therefore, it cannot be concluded that the beneficiary would be employed in a qualifying managerial or executive capacity, and 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.