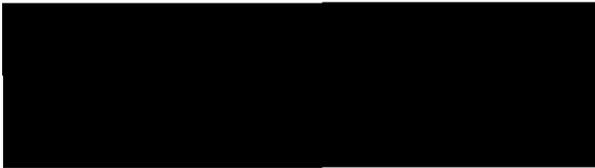


identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

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 03 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:

SELF-REPRESENTED

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

The petitioner is a Michigan company that is engaged in "lottery, liquor, beer and grocery," which seeks to employ the beneficiary as its President/CEO. 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 13, 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, and (2) the petitioner failed to establish that the beneficiary's employment abroad was within a qualifying managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel disputes the director's findings and provides an appellate brief laying out the grounds for challenging the denial. Counsel submits a brief and additional evidence in support of the appeal.

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 October 8, 2009 support letter, the petitioner provided a list of duties to be performed by the beneficiary "in his executive capacity." 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 "overseeing day-to-day business activities of the U.S. entity," "will have the utmost discretionary authority in all decision-making and specialized processes and procedures," and "assure proper application of State of Michigan retail sale regulations." 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 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. at 1108. The petitioner's description of the beneficiary's position does 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 "negotiation of all contracts with prospective clients and suppliers of party/convenience store inventory," negotiating and securing long-term contracts with local and national wine and liquor items suppliers," "establishing of quarterly and annual sales goals for the U.S. entity," "development of customer service standards," "negotiating contracts to expand business location or secure a larger store location," and "establishing marketing and advertising goals to properly introduce and expand the U.S. petitioner's services on the Michigan market." 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. The petitioner did not identify any employees who actually assisted the beneficiary in the marketing and promotion of the business, thus indicating that the beneficiary is the one to carry out these operational functions, which are outside the parameters of what would be deemed as being within a managerial or executive capacity. 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.

The director sent a request for evidence to the petitioner and asked for a much more detailed statement of the duties for the proposed position, and a percentage of time spent on each duty. The petitioner failed to provide a more detailed statement of the proposed duties as requested by the director. 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).

On appeal, the petitioner provided a new job description for the beneficiary’s proposed position. After reviewing the new job description, almost all of the duties are non-qualifying duties such as “ensure that there is adequate supply of materials available”; “order, receive, inspect, and store equipment merchandise, commodities, materials and supplies”; “set up and close cash registers and prepare deposits”; “receive and fill liquor orders for clubs, restaurants, and hotels as required”; “display new items and existing stock”; “assist customers in finding products, making selections and purchasing items and resolve potential confrontational issues when dealing with intoxicated individuals, shoplifters, etc.” All of these duties are not in a managerial or executive capacity but instead resemble the duties that would be performed by cashiers or stockers. 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-140, submitted on December 31, 2009, stated that the petitioner employs three individuals, including the beneficiary. Thus, it appears from the record that the beneficiary may be performing several, if not all, of the finance operations, marketing, and business development activities, and all of the various operational tasks inherent in operating a business on a daily basis, such as paying bills, handling customer transactions, and negotiating contracts. Furthermore, the petitioner corroborates this claim in the duties listed by the petitioner that will be performed by the beneficiary. 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. In addition, the petitioner submitted a “Retailer Contract/Application” that listed the store hours of the petitioner. According to that contract, the petitioner is open seven days a week for a total of 89 hours per week. Moreover, the petitioner presented Forms W-2 for 2009 that indicated four individual were employed by the petitioner in 2009; however, two individuals received a salary of \$7104.00 which indicates part-time employment. The petitioner also provided a list of employees and hours worked for one week in January 2010 that indicated the petitioner employed the beneficiary as general manager/business control, one store manager/order placements and one cashier/lotto sales. However, the petitioner did not explain how one store manager and one cashier can run the business, including running the cashier, customer service, inventory, stocking, and all the day-to-day operations of the store for 89 hours a week. Thus, it appears that the beneficiary will need to perform several duties that do not qualify as executive or managerial in nature.

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 operations 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. As discussed above, the petitioner has not identified sufficient employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. The fact that the beneficiary has a managerial job title and general oversight authority over the business is insufficient to elevate his position to one in a managerial or executive 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. 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 October 8, 2009 letter that the beneficiary has served as President of the foreign affiliate in Canada since 1993. The petitioner stated that the beneficiary "has been and continues to be responsible for establishing Canadian company goals and policies, operational procedures, as well as for approving annual budget and authorization of all expenditures."

This description provides little insight into what the beneficiary primarily did on a day-to-day basis as president of the foreign entity. The petitioner provided a vague description for the duties performed by the beneficiary such as "reviewing of the annual budget and other financial data figures"; "overseeing implementation of company marketing goals"; "reviewing financial goals"; "exercising full discretion attendant with all human resource management, administrative and contract negotiation issues"; and "directing and reviewing day-to-day activities of the business and resolving all employee and customer services issues." The petitioner did not provide a list of employees and their job titles and duties. 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. Accordingly, the evidence of record is insufficient to establish that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity.

On appeal, the petitioner did not discuss this issue at all even though the director denied the petition, in part, because the petitioner failed to establish that the beneficiary was employed by the foreign company in an executive or managerial capacity. 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)).

The record lacks any evidence that the foreign company actually exists and continues to do business. The petitioner did not provide any documentation regarding the foreign company. Again, 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 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.