

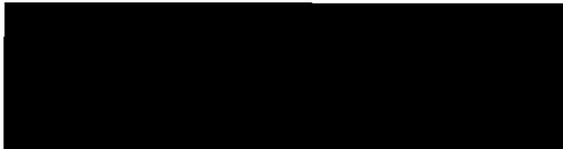
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



B4

DATE: JUL 26 2012 OFFICE: NEBRASKA SERVICE CENTER

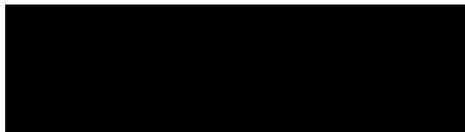


IN RE: Petitioner:
Beneficiary:



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. 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 October 6, 2009, which included relevant information pertaining to the beneficiary's employment abroad as well as his proposed employment with the U.S. entity. The petitioner also provided supporting evidence in the form of corporate, business, and tax documents.

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 March 12, 2010 informing the petitioner of various evidentiary deficiencies. The director instructed the petitioner to supplement the record with additional job descriptions and documents pertaining to the beneficiary's foreign and proposed employment in order to determine whether the beneficiary was employed abroad and whether he would be employed in the United States in a qualifying managerial or executive capacity.

The petitioner provided a response, which included supplemental job descriptions, organizational charts, and tax documents addressing the director's concerns.

After reviewing the record, the director concluded that the evidence and information provided failed to establish that the beneficiary's proposed employment with the U.S. entity meets the statutory definitions of managerial or executive capacity. The director therefore issued a decision dated October 20, 2010 denying the petition.

On appeal, counsel asserts that the beneficiary is working in an executive capacity. Counsel stresses the beneficiary's discretionary authority and attributes the petitioning entity's growth and development to the beneficiary's guidance and business acumen.

The AAO finds that the petitioner'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 primary issue in this proceeding calls for an analysis of the beneficiary's 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 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.

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 to consider other relevant factors, such as the type of business the petitioner operates, the petitioner's organizational hierarchy, which shows the complexity of a given entity and the beneficiary's placement in relation to other employees, and 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.

Turning first to the percentage breakdown used to describe the beneficiary's proposed employment, the AAO finds that a number of the items listed are indicative of non-qualifying operational tasks, including traveling abroad for sourcing and purchases, analyzing market trends to determine a market strategy, interacting with sales representatives, visiting customers, attending trade shows, and engaging in administrative tasks that involve addressing payments and receivables as well as taxation, banking, and legal matters.

The AAO has reviewed the beneficiary's job description in light of the petitioner's organizational hierarchy, which shows that at the time of filing, the petitioner was comprised of five in-house employees—the beneficiary as the company's president, a general manager/product development, one office operations and sales manager, one warehouse manager, and one warehouse worker—and contract-based sales representatives and a bookkeeping firm.

On appeal, counsel asserts that the beneficiary himself is not involved in actually selling the petitioner's products and points to the sales representatives whom the petitioner employs to carry out this essential non-qualifying task. Counsel also provides examples of key business decisions the beneficiary has made and explains how these decisions help to shape the petitioner's organizational policies and enable the petitioner to reach various business objectives. However, notwithstanding the beneficiary's pivotal role and his senior position within the petitioner's organizational hierarchy, the AAO finds that neither the beneficiary's job description nor the petitioner's staffing establishes that the petitioner has progressed to a stage in its development where it is capable of relieving the beneficiary from having to allocate the primary portion of his time to performing operational and administrative tasks.

While the AAO acknowledges that no beneficiary is required to allocate 100% of his or her 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 position 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). That being said, it cannot be concluded that any one task that the beneficiary would perform can serve as an adequate basis for this adverse finding. However, when considered cumulatively, the percentage breakdown offered in response to the RFE is sufficient to show that the total amount of time the beneficiary would allocate to the non-qualifying tasks is greater than the time that would be spent performing tasks within a qualifying managerial or executive capacity. Therefore, notwithstanding the beneficiary's discretionary authority and his top placement within the petitioner's organizational hierarchy, the AAO finds that the petitioner has failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. On the basis of this conclusion, 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.