

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY



B4

DATE: **MAR 02 2012** OFFICE: NEBRASKA SERVICE CENTER FILE:

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. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. 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 multinational corporation that seeks to employ the beneficiary as its senior development manager. 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 June 19, 2009, which included relevant information regarding the petitioner's eligibility for the immigration benefit sought as well as descriptions of the beneficiary's foreign and proposed employment. The petitioner also provided the financial and corporate documents establishing the existence of a qualifying relationship and its ability to pay.

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 December 16, 2009 informing the petitioner of various evidentiary deficiencies. The director instructed the petitioner to provide a list of the beneficiary's job duties with the foreign entity and to assign a time allocation to each job duty on the list. The petitioner was also asked to provide the former employer's organizational chart that corresponds with the beneficiary's employment abroad, naming all departments and teams as well as the names and job descriptions of the beneficiary's immediate supervisor and subordinate employees.

The petitioner's response included a January 22, 2010 statement from counsel, which contained the requested information concerning the beneficiary's foreign job duties. The petitioner also included a copy of the requested organizational chart.

The director reviewed the submitted documents and concluded that the beneficiary was not employed abroad in a qualifying managerial or executive capacity. The director determined that the primary portion of the beneficiary's job duties in his position with the foreign entity consisted of non-qualifying operational tasks. The director therefore issued a decision dated February 18, 2010 denying the petition.

On appeal, counsel submits a brief disputing the director's denial. Counsel contends that the director placed undue emphasis on the beneficiary's position within the foreign entity's organizational hierarchy and his lack of subordinate employees. Counsel further asserts that the beneficiary assumed the role of a function manager, which did not require traditional supervisory job duties.

The AAO finds that counsel's arguments are not persuasive and fail to overcome the director's denial. The petitioner's submissions have been reviewed and all relevant documentation that pertains directly to the key issue in this matter will be fully addressed in the discussion below.

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 prior position with the foreign entity. Specifically, the AAO will examine the record to determine whether the evidence shows that the beneficiary was employed abroad 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 description of the job duties of the position in question. *See* 8 C.F.R. § 204.5(j)(5). A detailed job description often carries essential information about the beneficiary's job duties and the amount of time the beneficiary allocates to the job duties that are qualifying versus those that are not.

While the AAO acknowledges that 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 performed or 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).

Counsel states that the beneficiary was a function rather than a personnel manager during his employment with the foreign entity. 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. § 204.5(j)(5). In addition, 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.

In consideration of the claim that the beneficiary's position abroad was that of a function manager, the fact that the beneficiary did not have subordinate employees is reasonable, as counsel suggests. The description of the beneficiary's job duties during his employment abroad, however, does not establish that the beneficiary's role was limited to merely managing an essential function. The job description divided the beneficiary's work cycle into four phases—the design phase, the software engineering phase, the quality assurance/documentation/education/clean-up phase, and the post-release phase. On appeal, counsel specifies the proportion of the full cycle that was allocated to each phase. She indicates that the first phase lasted 3-4

months, the second phase lasted 6-8 months, and the third and fourth phases each lasted 2-3 months so that the duration of one full four-phase cycle could range from 13 months as the shortest cycle to 18 months as the longest cycle.

In the first phase, the record shows that during a typical work week the beneficiary spent 32-35 hours conducting research and writing designs and another 4-10 hours on miscellaneous tasks, such as researching software bugs, providing customer support, and carrying out sales and engineering tasks. Based on these time allocations, the AAO finds that the primary portion of the beneficiary's work week during the design phase of a cycle was spent performing tasks necessary to produce a product or to provide service. During the software engineering phase, which is the longest of the four phases, the beneficiary spent 30 hours conducting research, reworking design plans, and writing second-phase designs; he spent another 4-10 hours on the same miscellaneous tasks that he performed during the first phase. Similar to the first phase assessment, an examination of the typical work week during the second phase of a cycle also shows that the primary portion of the beneficiary's time was allocated to tasks necessary to produce a product or to provide services.

Although the AAO finds that the beneficiary allocated less of his time to the non-qualifying tasks during the third and fourth phases than during the first two phases, the record nevertheless shows that of the 35-48 weekly hours during the third phase, the beneficiary may have allocated up to 25 hours of his time to non-qualifying tasks such as product testing and tasks that are grouped together as miscellaneous. Similarly, during the fourth phase of the cycle, the beneficiary may have allocated up to 28 hours of a possible 37 hour work week to such non-qualifying tasks as preparing marketing requirements and carrying out research, customer support, sales, and engineering duties.

In summary, the job description that was provided in response to the RFE indicates that the beneficiary allocated the primary portion of his time to the performance of tasks that are indicative of providing services that are directly associated with generating the foreign entity's revenue. As previously stated, 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. at 604. Therefore, despite the fact that the beneficiary performed job duties that were themselves essential and while a certain function management component was directly built into the beneficiary's position with the foreign entity, the record indicates that the primary portion of the beneficiary's time was allocated to carrying out the tasks of a function rather than managing that function. Accordingly, the AAO finds that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. On the basis of this finding, the instant 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.