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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
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Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

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DATE: **MAR 14 2012**

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

The petitioner is a New York 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 July 29, 2009, invoices showing the foreign entity's sales transactions during various time periods, an unsigned copy of the petitioner's 2008 federal tax return, and a copy of the petitioner's stock certificate.

The director reviewed the petitioner's submissions and determined that additional documentation was required. The director therefore issued a request for evidence (RFE) dated October 21, 2009 in which the director listed various documentary deficiencies. The RFE included a request for evidence pertaining to the petitioner's ownership and financial status as well as evidence of the petitioner's staffing, work performed by the petitioner's employees, a list of the beneficiary's proposed job duties, and the percentage of time the beneficiary would allocate to each of his proposed job duties. The director instructed the petitioner to provide evidence showing that the beneficiary either manages or directs the management of a function within the petitioning entity and to establish that the beneficiary does not directly perform the function that he manages.

The petitioner provided a response statement dated October 27, 2009, which included a list of the beneficiary's proposed responsibilities and the percentage of time that would be allocated to each responsibility. The statement was written by the petitioner's vice president, who claimed to be the beneficiary's direct subordinate. The vice president indicated that the petitioner has 15 sales representatives throughout the United States and provided the representatives' contact information. The petitioner also provided various corporate and financial documents that addressed other portions of the RFE.

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 or that the petitioner had the ability to pay the beneficiary's proffered wage at the time of filing. 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. The director therefore issued a decision dated February 12, 2010 denying the petition based on these three findings.

On appeal, counsel submits a brief addressing the grounds for denial. Counsel states that the beneficiary does not engage in sales activity or oversee the sales representatives. He claims that the beneficiary is a function manager and that the number of employees the petitioner has should not be a determining factor. He further asserts that the director erroneously disregarded the petitioner's early stage of development and cites numerous unpublished AAO decisions in support of his assertions.<sup>1</sup> Additionally, counsel contends that the petitioner's stockholders support the petitioner through loans and payment of the beneficiary's salary.

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<sup>1</sup> While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

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 documents that pertain 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 first 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.

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 will also consider the petitioner's organizational hierarchy in an effort to gauge whether the petitioner was adequately staffed and had the necessary human resources to ensure that the beneficiary would be relieved from having to primarily perform the daily operational tasks.

The petitioner indicated in Part 5, Item 2 of the Form I-140 that it was staffed with two employees and five sales personnel at the time of filing. While the petitioner submitted a list of 15 sales representatives in response to the RFE, thus indicating that it had acquired additional representatives since the petition was filed, the AAO notes that a petitioner must establish eligibility 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). The AAO notes counsel's focus on language in an unpublished AAO decision where it was claimed that the beneficiary would primarily perform tasks of a qualifying nature after the petitioning entity advanced beyond the start-up phase of development. As noted above, the petitioner must establish that the facts and circumstances that existed at the time of filing were such that the petitioner had the ability to employ the beneficiary in a qualifying managerial or executive capacity. If the petitioner is unable to employ the beneficiary in a qualifying capacity at the time of filing, then U.S. Citizenship and Immigration Services (USCIS) may not approve the petition.

The beneficiary's job description is a key factor in establishing whether the beneficiary would be employed in a qualifying capacity. Published case law supports the prominent role of a detailed job description, holding that 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 job description provided is overly vague and focuses on broad job responsibilities that can be applied to any individual with a top placement in any organization. While the petitioner indicated that the beneficiary would direct and manage daily activities, establish and develop goals and policies, and manage and direct marketing and advertising, all of which signify that the beneficiary has a heightened degree of discretionary authority over the petitioner's business operation, none of these statements help to determine what specific tasks the beneficiary performs on a daily basis. Despite the fact that the petitioner's RFE response supplemented these broad statements with a percentage breakdown, the time distribution fails to provide any insight into the beneficiary's actual daily job duties. Without specific information about the beneficiary's daily tasks, the AAO cannot determine whether the beneficiary would spend the primary portion of his time performing tasks that are necessary to produce a product or to provide services.

Simply listing some of the non-qualifying tasks that the beneficiary does not perform is not sufficient, as there may be numerous others that the beneficiary does perform. The petitioner was given the opportunity to provide a list of the beneficiary's specific daily tasks in response to the RFE. Instead, the petitioner restated the original job description and simply added a percentage breakdown to an otherwise deficient list of broad job responsibilities.

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 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).

Due to the petitioner's failure to supplement the record with a detailed description of the beneficiary's proposed employment and given the petitioner's relatively small organizational hierarchy at the time of filing, the AAO finds that the record lacks sufficient supporting evidence to establish that the petitioner was ready and able to employ the beneficiary in a primarily managerial or executive capacity when the Form I-140 was filed. Based on this initial determination, the AAO finds that the petitioner has failed to establish eligibility and the petition must therefore be denied.

Next, the AAO will address the second basis for denial—the conclusion that the petitioner failed to establish that it had the ability to pay the beneficiary's proffered wage at the time of filing.

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).

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. While the record indicates that the petitioner did employ the beneficiary at the time of filing, no evidence was provided to establish how the beneficiary was remunerated. Therefore, the record lacks *prima facie* proof to meet the provisions of 8 C.F.R. § 204.5(g)(2).

Although the AAO may examine the prospective employer's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses, as an alternate means of determining the petitioner's ability to pay, the record in the present matter does not contain the U.S. employer's 2009 tax return, which would determine how much net income the U.S. entity had at the time the Form I-140 was filed.<sup>2</sup>

Additionally, counsel asserts that the director placed undue emphasis on the petitioner's net profits as provided in the petitioner's 2008 tax return, citing the precedent holding in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), in support of his assertion. More specifically, counsel asserts that in *Matter of Sonegawa* the Regional Commissioner approved a visa petition, despite the petitioner's net income loss, emphasizing the reasonable expectation for the petitioner's future increase in profit. Despite the petitioner's obviously inadequate net income in *Matter of Sonegawa*, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As indicated in *Matter of Sonegawa*, USCIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, or any other evidence that USCIS deems to be relevant to the petitioner's ability to pay the proffered wage.

In the instant matter, counsel implies that the AAO should consider the petitioner's relatively early stage of development and asks the AAO to apply the reasoning employed by the Regional Commissioner in *Matter of Sonegawa*. *Id.* Many of the relevant facts in *Matter of Sonegawa*, however, are significantly different from those in the instant matter. The petitioner in *Matter of Sonegawa* had been doing business for eleven years and also had a business reputation, clientele, and a history of paying wages, all of which could be used to estimate future earnings and the ability to pay the proffered wage. *See* 12 I&N Dec. 612. It is noted that none of these

factors are true of the U.S. employer in the present matter. Moreover, the claim that the petitioner's stockholders are willing to loan the petitioner money and pay the beneficiary's salary is irrelevant, in light of the regulatory burden that requires the prospective U.S. employer to establish its own ability to pay the beneficiary's proffered wage, notwithstanding the ability of the petitioner's stockholders to meet that burden. *See* 8 C.F.R. § 204.5(g)(2). That being said, the record shows that the beneficiary owns 190 out of 200 shares of the petitioner's stock and is therefore the majority shareholder. As such, the very claim that the beneficiary's salary would be paid by the petitioner's stockholders indicates that the beneficiary would in essence be paying himself.

The record lacks evidence to show that the petitioner had the ability to pay the beneficiary's proffered wage as required by regulation. On the basis of this second finding of ineligibility, the instant petition cannot be approved.

In light of the above deficiencies, the AAO finds that there is no need to address the employer-employee issue, which the director cited as another basis for the 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.