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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

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DATE: **MAR 14 2012**

OFFICE: TEXAS 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. 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 approved by the Director, Texas Service Center. Upon further review of the record, the director determined that the petitioner was not eligible for the benefit sought and therefore properly served the petitioner with a notice of his intention to revoke the approval of the petition and his reasons therefore. The director ultimately revoked the approval of the petition and 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 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, [REDACTED] president of the petitioning entity, submitted a statement dated January 31, 2008 listing the beneficiary's duties and responsibilities in his proposed position. Supporting evidence also included an organizational chart of the U.S. entity. The chart showed [REDACTED] president at the top-most level of the organizational hierarchy, followed by the beneficiary as manager and three software engineers alongside the beneficiary, also directly subordinate to the company president. The chart shows four senior financial analysts, two financial managers, and three accountants as the beneficiary's direct subordinates.

On March 16, 2009 the director issued a request for evidence indicating that the petition may have been approved in error. The director asked the petitioner to provide a detailed list of the beneficiary's proposed job duties and responsibilities and to indicate what percentage of time the beneficiary would spend performing each of the listed job duties.

The petitioner's response was presented in the form of a statement from [REDACTED] dated April 14, 2009, containing a supplemental description of the beneficiary's proposed employment.

Upon review of the petitioner's submissions, the director determined that the petitioner failed to establish eligibility and that the petition had been approved in error. The director therefore issued a notice of his intent to revoke the petition on January 21, 2010. The director informed the petitioner that the record does not establish that the beneficiary's job duties with the U.S. entity are those of a multinational manager or executive. The petitioner was allowed 30 days in which to respond to the adverse finding.

The petitioner's response included a statement from counsel dated February 19, 2010 and two statements from [REDACTED]—one dated February 15, 2008 and another dated February 16, 2010.¹ Counsel stated that while the beneficiary would assume a senior-level position with the petitioning entity, he would not directly manage subordinate employees. Rather, counsel stated that the beneficiary would identify and cultivate new client relationships, which would include contacting the client and formulating a presentation introducing a detailed financial plan specifically addressing the client's business needs. Counsel further stated that the beneficiary would assemble a team of professional financial and management specialists in the areas of financial consulting and analysis and that the beneficiary would then oversee the team's performance to ensure client satisfaction.

¹ As the Form I-140 was filed on July 10, 2008, it appears that the date on [REDACTED]'s February 2008 statement was erroneous as it predates the filing of the petition. As this typographical error is not germane to the outcome in this proceeding, the AAO finds that no further action needs to be taken with regard to the date of [REDACTED] statement.

In his February 15th statement, [REDACTED] provided an hourly breakdown of the beneficiary's job duties and responsibilities. The list resembled the prior list of duties and responsibilities that was initially submitted in support of the petition in that both lists indicated that the beneficiary would prepare financial reports, oversee the investment of funds and manage risks, interpret data concerning stability and future investment trends, and hire, train and supervise the work of professionals. There is a significant difference between the former and more recent job descriptions offered by [REDACTED] in that the more recent job description indicates that the beneficiary's position would involve a sales element, which was also conveyed in counsel's response statement. This element was not included in [REDACTED]'s original job description.

On March 24, 2010 the director issued a final notice revoking the approval of the petitioner's Form I-140 based on the conclusion 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 found that the job descriptions offered lacked sufficient specificity and contained non-qualifying elements which were not indicative of an individual who would primarily perform qualifying managerial- or executive-level tasks.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

On appeal, counsel again states that the beneficiary will not manage subordinates although he will assume a senior-level position with the U.S. entity. Counsel states that the beneficiary will perform the seven essential functions of the petitioner's consulting operation. Counsel asserts that the petitioning entity is adequately staffed and is therefore capable of relieving the beneficiary from having to primarily perform non-qualifying tasks.

The AAO finds that counsel's assertions are not persuasive and fail to overcome the director's grounds for revocation. 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 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.

When examining the executive or managerial capacity of the beneficiary, the AAO will rely on the petitioner's description of the job duties as a key focal point of its analysis. *See* 8 C.F.R. § 204.5(j)(5). Other relevant factors are considered as well. Such factors include the petitioner's organizational hierarchy, the beneficiary's position therein, and the petitioner's overall ability to relieve the beneficiary from having to primarily perform daily operational tasks.

A review of the various job descriptions provided by the petitioner's counsel shows a contradiction between counsel's claim that the beneficiary would not oversee subordinate employees and the individual components of the job description offered by counsel and [REDACTED] both of whom indicate that there is a significant personnel management component to the proposed employment. *See Matter of Ho*, 19 I&N Dec. at 591-92 (establishing that the petitioner must resolve inconsistencies in the record by providing independent objective evidence).

In the response to the notice of intent, the job description counsel offered of the beneficiary's proposed employment included numerous non-qualifying tasks without any indication that such tasks, cumulatively, would not comprise the primary portion of the beneficiary's proposed position. Specifically, counsel claimed that the beneficiary would be responsible for "cultivating new resources and clients," developing relationships with international companies in an effort to secure international clientele, preparing analyses on promotional spending, overseeing fund investments and managing related risks, attending trade shows and seminars, contacting clients, formulating and making business and training presentations before new and prospective clients, and making arrangements to give client access to pertinent information. Although counsel grouped these, and numerous other job duties, together and assigned a time constraint to the overall group, it is unclear how much time the beneficiary would allocate to the individual non-qualifying tasks that account for a significant portion of the overall job description. The only job duty that was individually assigned its own

time constraint was non-qualifying: the beneficiary would develop and write news stories for advertising purposes for 10% of the time.

Although [REDACTED] February 15th response to the notice of intent assigned hourly time constraints to individual duties and responsibilities, this job description also included a number of non-qualifying job duties, including analyzing data to form the basis of investment decisions, attending trade shows and seminars that relate to international business, prepare financial reports, interpret data concerning stability and future investment trends, and communicate with clients, which cumulatively would consume 14 hours of a 40-hour work week.

Other items included in [REDACTED] job description, such as setting and meeting sales goals, coordinating the work of the sales department, creating schedules and processes, and working on issues that deal with the needs of the development projects and the release of products, also cannot be deemed as qualifying tasks without further clarification explaining how these tasks fit the definition of managerial or executive capacity.

Although [REDACTED] February 16th job description includes many of the same elements that were included in the February 15th letter, a number of additional non-qualifying tasks were also listed, including managing regional training services, developing new services, designing and delivering training consultant orientation programs, performing various administrative duties, negotiating vendor contracts, setting up new employees in payroll, and conducting market research and compiling the data. 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). Here, the evidence submitted does not establish that the beneficiary would refrain from spending the primary portion of his time performing duties that are necessary to provide services to accommodate existing clients and to solicit new prospective clients.

The job descriptions provided indicate that unspecified, though significant, portions of the beneficiary's time would be allocated to the performance of non-qualifying tasks. Moreover, the inconsistency in counsel's own claims and counsel's diverging claim from that of [REDACTED] with regard to the beneficiary's role in personnel management gives rise to doubt as to the assertions that have been made regarding the beneficiary's proposed employment. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*, at 591.

In light of the significant deficiencies described above, the AAO finds that the petitioner has failed to establish that the beneficiary would be employed in a qualifying capacity.

The approval of the petition will remain revoked for the above stated reasons. 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.