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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**

**PUBLIC COPY**



B4

DATE: **MAR 19 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)

IN 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.<sup>1</sup> The appeal will be dismissed.

The petitioner is a New York limited liability company that seeks to employ the beneficiary as its IT project 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 company president submitted a statement on the petitioner's behalf. The initial supporting evidence also included the petitioner's 2007 tax return, the petitioner's payroll documents, a bank statement, the petitioner's 2007 balance sheet, and a copy of an office lease dated October 24, 2008.

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 September 9, 2009 instructing the petitioner to address various evidentiary deficiencies concerning the beneficiary's employment capacity in his proposed and foreign positions, the petitioner's qualifying relationship with the beneficiary's foreign employer, and the petitioner's business activity prior to the filing of the petition.

The petitioner provided a response addressing the issues highlighted in the RFE. The response included a statement dated October 9, 2009 from the petitioner's prior counsel as well as supporting documents from the beneficiary's foreign and prospective U.S. employers.

After reviewing the record, the director concluded that the petitioner failed to establish eligibility and therefore issued a decision dated February 5, 2010 denying the petition based on the determination that the petitioner failed to provide evidence of the following: (1) the existence of a qualifying relationship between the beneficiary's foreign and prospective U.S. employers; (2) the beneficiary's qualifying employment with the U.S. petitioner in a managerial or executive capacity; and (3) the petitioner's ongoing business activity for at least one year prior to the filing of the instant petition.

On appeal, the petitioner's current counsel submits a brief along with supporting documentation in an effort to overcome the three grounds cited for denial.

After fully reviewing the petitioner's submissions, the AAO finds that the petitioner has overcome two of the three grounds of ineligibility. Namely, the AAO finds that sufficient evidence has been provided to establish that: (1) the petitioner has a qualifying relationship with the beneficiary's foreign employer; and (2) the petitioner had been actively engaged in doing business for at least one year prior to filing the instant petition. Notwithstanding the petitioner's ability to meet these regulatory requirements, the AAO nevertheless finds that the record lacks sufficient evidence to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity and for this reason the director's decision to deny the petition will not be withdrawn.

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<sup>1</sup> The record shows that the petitioner filed two separate Form I-290Bs, Notice of Appeal or Motion. The instant appeal was timely filed and will be fully addressed in this discussion. The subsequent Form I-290B (with receipt number [REDACTED]) shows a receipt date of March 16, 2010 and has been rejected based on its untimely filing.

As indicated above, the petitioner's submissions have been reviewed. 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 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 other relevant factors, such as the company's organizational hierarchy, the beneficiary's position therein, and the petitioner's overall ability to relieve the beneficiary from having to primarily perform non-qualifying tasks.

In the present matter, the record does not establish that the petitioning U.S. entity would employ the beneficiary in a qualifying managerial or executive capacity. Although counsel for the petitioner provided a lengthy list of the duties and responsibilities the beneficiary would be assigned to carry out, a number of the items listed require further clarification to establish the beneficiary's precise role with respect to the duty or responsibility. For instance, counsel stated that the beneficiary would manage on-site and off-site development teams without specifying what actual daily tasks the beneficiary would perform in the course of that activity. Counsel also failed to explain how the beneficiary would facilitate problem solving to create a healthy group dynamic, how frequently the beneficiary would be directly involved in assisting with issue resolution, and what specific tasks would be involved in coordinating team logistics and ensuring timely and accurate delivery of the work product. While these responsibilities indicate that the proposed position has an oversight or supervisory component, which bestows upon the beneficiary a certain degree of discretionary authority with respect to each project he would manage, more information is required to determine the specific tasks the beneficiary would perform and the nature of such tasks. Published case law has established 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).

Additionally, based on a review of the petitioner's organizational chart, the AAO finds that the record lacks sufficient evidence establishing that the petitioner has the human resources to support the beneficiary in a qualifying managerial or executive capacity. While the chart shows that the foreign entity, where the beneficiary was previously employed, has an extensive organizational hierarchy equipped with teams to actually carry out the web designing, business analysis, quality assurance, and development tasks, the same is not true of the U.S. entity, which is depicted as being fully staffed with several management teams but otherwise lacks the actual employees who would perform the necessary operational tasks that are required for the completion of each client project. Merely claiming that the petitioner will rely on the employees of the foreign entity to carry out necessary operational tasks is not sufficient for a number of reasons.

First and foremost, while the AAO acknowledges the shared ownership and control of the beneficiary's foreign employer and the U.S. petitioner, this qualifying relationship does not alter the fact that the U.S. petitioner is a separate entity independent of its foreign counterpart. As such, the foreign entity's employees, much like finances, cannot be commingled with those of the petitioner at the petitioner's behest. Regardless of the economic reasons which may make it financially prudent to rely on the foreign entity's employees to satisfy its own staffing requirements, particularly for an entity in its initial phase of development, the petitioner must establish that it has, within its own organizational structure, the capacity to relieve the beneficiary from having to primarily perform tasks of a non-qualifying nature. This is not to say that the petitioner must have an in-house staff to carry out its daily operational tasks. Nor is the petitioner prohibited from contracting the foreign entity's employees to perform certain operational or administrative tasks. However, if the petitioner wishes to hire contractual labor to carry out tasks that are required for its successful daily operation, the record must be supplemented with documentary evidence to establish the existence of such human resources. 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 claim that the beneficiary supervises the work of employees who are located off-site makes it imperative that the petitioner establish precisely how the beneficiary can effectively oversee and manage the work of individuals who are situated far from the work location of the beneficiary himself. This is particularly significant in the present matter, where counsel's job description strongly indicates that the beneficiary would assume a considerable role in resolving problems, fostering a healthy work environment, and coordinating the work of various teams. It is unclear how the beneficiary would be able to fulfill these responsibilities and still remain in the United States while the teams he would supervise would continue to work abroad. While the job description that was submitted in response to the RFE indicated that the beneficiary would oversee staff on-site as well as off-site, the record does not contain evidence to support this assertion. Based on the payroll reports that were submitted in response to the RFE, it appears that the petitioner had a total of seven in-house employees at the time of filing and no evidence was submitted to show whom, other than the seven in-house employees, the petitioner may have hired to perform its daily operational tasks. As stated above, the petitioner must corroborate its claims by submitting supporting documentary evidence. *Id.* As the record does not contain such corroborating evidence, it is not clear how the petitioner would have been able to relieve the beneficiary from having to allocate the primary portion of his time to the performance of non-qualifying 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 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).

In light of the deficiencies described above, the AAO is unable to conclude that the petitioner was ready and able to employ the beneficiary in a qualifying managerial or executive capacity at the time the petition was filed. On the basis of this conclusion 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.