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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
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Services

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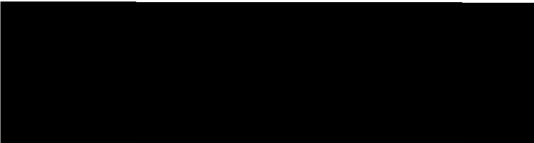
OFFICE: TEXAS SERVICE CENTER

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 Puerto Rican corporation that seeks to employ the beneficiary as its technical operations 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 which was executed on July 20, 2009 by Pedro del Cuadro, the company's president. The petitioner also provided the beneficiary's résumé, which included a description of the beneficiary's foreign and proposed employment.

The director reviewed the petitioner's submissions and determined that the Form I-140 did not warrant approval. The director therefore issued a request for additional evidence (RFE) dated December 22, 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 the amount of time he allocated to each task. The petitioner was also asked to provide the foreign entity's organizational chart that corresponds with the beneficiary's employment abroad.

The petitioner provided a response that contained the requested documentation.

After reviewing the record, the director concluded that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. The director therefore issued a decision dated March 23, 2010 denying the petition.

On appeal, counsel asserts that the beneficiary's position abroad was in the role of a function manager who did not oversee the work of in-house employees, as the foreign entity relied on outside contractors to provide many of the company's services. Counsel stresses the discretionary authority that the beneficiary had in hiring and firing independent contractors, developing the business, designing telecommunications systems, and overseeing the company's operations. Counsel emphasizes the beneficiary's autonomy in executing his duties and asks the AAO to consider the reasonable needs of the foreign entity

The AAO finds that counsel's arguments are not persuasive and fail to overcome the director's denial. It is noted that the petitioner's submissions have been reviewed and those documents that are relevant 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 employment with the foreign entity. Specifically, the AAO will examine the record to determine whether the petitioner submitted sufficient evidence to establish 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.

As a preliminary matter, the AAO notes that counsel's reliance on unpublished AAO decisions is misplaced. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all U.S. Citizenship and Immigration Services (USCIS) employees in the administration of the Act, unpublished decisions are not similarly binding. Moreover, counsel has failed to provide evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions cited in the appellate brief.

Next, while counsel is correct in pointing out that USCIS must take into account the petitioner's reasonable needs when considering staffing size, those needs do not serve to override the petitioner's legal burden of having to establish that the beneficiary's position abroad was one that required the beneficiary to primarily perform duties of a qualifying managerial or executive nature. Thus, if the foreign entity's reasonable needs were such that required the beneficiary to allocate the primary portion of his time to the performance of non-qualifying tasks, the petitioner would not meet the statutory requirements, which require that the employee primarily perform tasks that are in a managerial or an executive capacity. 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 abroad were only incidental to his position with the foreign entity. 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 the present matter, the list of job duties and time allocations that the petitioner provided in response to the RFE indicates that the primary portion of the beneficiary's time was allocated to non-qualifying tasks such as maintaining current and potential client relationships, preparing paperwork, identifying and resolving client concerns, preparing status reports, designing special projects, and providing technical support and training. While the beneficiary's autonomy and discretionary authority are clearly relevant to this discussion of the beneficiary's employment capacity, the matter ultimately cannot be decided without giving due consideration to the tasks the beneficiary performed and the amount of time he allocated to the qualifying tasks versus the non-qualifying ones.

Counsel's use of the term function manager to describe the beneficiary's role is understandable to the extent that the beneficiary was not required to supervise a subordinate staff. However, the petitioner's description of the beneficiary's daily job duties must demonstrate that the beneficiary *manages* the function rather than

performs the duties related to the function. Here, the tasks mentioned above indicate that the beneficiary was indeed responsible for performing a number of non-qualifying functions and it was those functions that consumed the primary portion of the beneficiary's time. While considering any one task, by itself, may not lead to an adverse conclusion, when the non-qualifying tasks are considered cumulatively, the sum total of their time allocations indicates that the beneficiary spent the primary portion of his time performing job duties that were necessary to produce a product or to provide services. Therefore, regardless of the beneficiary's autonomy and discretionary authority in his role with the foreign entity, the AAO cannot conclude that the beneficiary was employed abroad in a qualifying managerial or executive capacity. On the basis of this finding, the petition cannot be approved.

Additionally, while not previously addressed in the director's decision, the AAO concludes that the job description the petitioner provided with regard to the beneficiary's proposed position in the United States does not establish that the beneficiary would be employed in a qualifying managerial or executive capacity. The petitioner provided a job description that cites numerous non-qualifying tasks that are not accompanied by time allocations. The AAO therefore cannot conclude that the beneficiary would allocate his time primarily to the performance of tasks in a managerial or executive capacity.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional ground of ineligibility discussed above, this 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.