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Administrative Appeals Office (AAO)  
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U.S. Citizenship  
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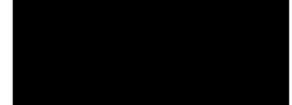
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By

DATE: **MAY 29 2012**

OFFICE: NEBRASKA 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 an Ohio entity that seeks to employ the beneficiary as its general 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 October 27, 2009, which included relevant information regarding the petitioner's eligibility for the immigration benefit sought as well as a brief description of the beneficiary's proposed employment. The petitioner also provided supporting evidence, including the petitioner's financial and corporate documents as well as documents pertaining to the petitioner's foreign parent entity.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a notice of intent to deny (NOID) dated February 25, 2010 informing the petitioner of an evidentiary deficiency. The petitioner subsequently responded, providing an additional statement of explanation as well as supplemental supporting evidence.

Notwithstanding the petitioner's response addressing the deficiency that was previously described in the NOID, the director determined that the evidence on record did not establish that the petitioner would employ the beneficiary in a qualifying managerial or executive capacity. The director therefore issued a decision dated June 10, 2010 denying the petition. The director found that the petitioner submitted an overly broad job description and questioned whether the petitioning entity's limited staffing was sufficient to allow the beneficiary to focus the primary portion of her time on the performance of tasks within a qualifying managerial or executive capacity.

On appeal, counsel challenges the propriety of the denial given that the sole basis for the adverse decision had not been previously addressed in the director's February 25, 2010 NOID. The director also provides additional information about the beneficiary's proposed position in an effort to overcome the basis for denial.

The AAO finds that counsel's assertions are not persuasive in overcoming the ground for denial. 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 her 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.

As a preliminary matter, the AAO notes that the director is not required, either by statute or regulation, to issue a NOID or request for evidence prior denying an immigrant petition. The regulation at 8 C.F.R. § 103.2(b)(8) expressly states that the decision to issue a NOID or an RFE or to deny a petition without issuing either one lies with the director. Therefore, the AAO cannot invalidate an otherwise sound decision simply based on the fact that the director did not incorporate the basis for denial into the NOID. Whether or not the director's decision is legally sound will be determined by reviewing the facts of the matter and applying those facts to relevant statutory and regulatory provisions.

In examining the executive or managerial capacity of the beneficiary, the AAO will first review the record in search of an adequate description of the beneficiary's proposed job duties. *See* 8 C.F.R. § 204.5(j)(5). Published case law clearly supports the pivotal role of a detailed job description, determining 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); *see also* 8 C.F.R. § 204.5(j)(5). The AAO will also consider other relevant factors, such as the complexity of 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 the daily operational tasks.

As properly pointed out in the director's decision, the job description that the petitioner offered in the present matter was overly vague and failed to convey a meaningful understanding of the specific tasks the beneficiary would perform on a daily basis. While the petitioner indicated that the beneficiary would assume a top position within the organizational hierarchy and that she would oversee the work of subordinate employees, these two factors alone are not sufficient to establish the beneficiary's specific daily tasks. Although the petitioner clearly indicated that it had experienced some employee turnovers since the Form I-140 was filed, the record provides no specific information discussing the time between firing employees and hiring new ones. The petitioner also failed to explain how such employee turnovers affected the beneficiary's position.

On appeal, counsel asserts that the beneficiary was overseeing the work of two professional sales engineers. In the originally submitted organizational chart, it was the sales manager, not the beneficiary herself, who was the direct supervisor of the sales engineers. The beneficiary was depicted at the top of the organizational hierarchy with the sales manager, one manager assistant, one marketing representative, and an accountant as her direct subordinates. While counsel's appellate brief refers to multiple marketing

representatives, who are charged with making sales calls and identifying potential customers, the organizational chart that was submitted in support of the petition identified only one marketing representative. The petitioner's December 2009 payroll named a total of nine employees, a number that is consistent with the claim made in the Form I-140. The petition was filed in January 2010. Since the petitioner must establish eligibility based on the facts that were in existence at the time the petition was filed, the probative value of the 2009 payroll document is significantly diminished as it speaks to facts and circumstances that may no longer have existed at the time of filing the petition, particularly in light of the employee turnover that has been discussed on appeal.

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Therefore, the AAO will generally consider a petitioner's staffing size as a highly relevant factor that allows for a clearer understanding of who within the petitioning entity is performing the daily non-qualifying tasks and to what extent the petitioner is able to support the beneficiary in a position where the primary portion of the tasks to be performed would be within a managerial or executive capacity.

The record lacks sufficient documentation to establish whether, at the time the Form I-140 was filed, the petitioner was adequately staffed to allow the beneficiary to focus her time primarily to the performance of qualifying tasks in a managerial or executive capacity. Whether a petitioner is adequately staffed is a factor that must be considered in the scope of the beneficiary's proposed set of tasks. Thus, the petitioner's failure to provide a detailed job description delineating the proposed job duties precludes the AAO from being able to conclude that the prospective employment would be within a qualifying managerial or executive capacity. While counsel asserts that the beneficiary would not make marketing or sales related calls or handle daily administrative tasks, the petitioner has failed to explain precisely what tasks the beneficiary would actually be carrying out. The petitioner has not demonstrated that it has reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies would constitute significant components of the duties performed by the beneficiary on a day-to-day basis.

In light of the significant deficiencies that have been discussed in this decision, the AAO is unable to affirmatively conclude that the beneficiary would be employed in a qualifying managerial or executive capacity. Therefore, the AAO finds that the 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.