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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: **MAY 3 1 2012**

OFFICE: NEBRASKA 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 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 a California corporation that seeks to employ the beneficiary as its vice president and chief executive officer. 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 September 15, 2009, which included a brief description of the beneficiary's proposed employment as well as other relevant information regarding the petitioner's eligibility for the immigration benefit sought. The petitioner also provided supporting evidence, including the petitioner's financial and corporate documents and documents pertaining to the beneficiary's foreign employer.

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 March 15, 2010 informing the petitioner of various evidentiary deficiencies. The RFE included a request for a definitive statement describing the beneficiary's specific job duties and the percentage of time he would allocate to each duty. The petitioner was also asked to discuss the beneficiary's subordinates in terms of their respective job duties and educational levels.

The petitioner provided a response which included a list of responsibilities and the percentage of time the beneficiary would allocate to each job responsibility in his proposed position. The petitioner also listed individual elements that would comprise each general job responsibility. Additionally, the petitioner provided job descriptions for the beneficiary's two subordinates as well as an organizational chart illustrating the foreign entity, its relationship to its three subsidiary entities (including the petitioner) and the various employees and contractors who provide services for the petitioner.

After reviewing the record, the director concluded that the petitioner failed to establish that the petitioner would employ the beneficiary in a qualifying managerial or executive capacity. The director therefore issued a decision dated June 8, 2010 denying the petition. The director observed that while the evidence on record indicates that the petitioning entity has various levels of management, the petitioner is not adequately staffed to relieve the beneficiary from having to primarily perform non-qualifying job duties.

On appeal, counsel submits a brief in which she disputes the basis for denial, contending that the director erred in her interpretation of the supporting evidence, which led to an erroneous conclusion. Counsel contends that the purpose of an organizational chart is to provide an illustration of the chain of command leading up to the head of an organization, not to show whom the department heads supervise. Counsel urges the AAO to place greater emphasis on the petitioner's written statements and points out that the beneficiary's subordinates hold advanced degrees and can therefore be deemed professional employees. Counsel indicates that the director's review only considered whether the subordinates are managerial employees, but failed to consider their professional degrees. Lastly, counsel asserts that the beneficiary's proposed position will be in an executive capacity and notes that the director's discussion focused primarily on the statutory definition of managerial capacity.

The AAO finds that, while counsel makes a number of valid points that help to shed light on certain flaws in the director's analysis, the totality of her assertions are insufficient to overcome the basis for denial—the petitioner's failure to establish that the beneficiary's proposed position would be primarily comprised of tasks within a qualifying managerial or executive capacity.

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.

As indicated above, 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.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as either the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

While the AAO does not dispute the beneficiary's elevated position with the petitioning entity's organizational hierarchy, the record does not indicate that the entity has attained a level of organizational complexity that would require the services of an executive. In reviewing the organizational chart the petitioner originally submitted in support of the petition, it appears that the entire U.S. entity was comprised of three employees—the beneficiary at the top of the hierarchy and two subordinate employees, including a sales manager and a technical manager, to assist with the daily operations. Based on information provided by

the petitioner at Part 5, No. 2 of the Form I-140, the original organizational chart represented an accurate depiction of the petitioning entity.

The petitioner has not persuasively shown that the beneficiary would primarily focus on the broad goals and policies of the organization. It is noted that the beneficiary's actual daily job duties reveal the true nature of the employment in question. *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). While the percentage breakdown that the petitioner provided in response to the RFE shows that the beneficiary will be tasked with some qualifying managerial- or executive-level tasks, a considerable portion of the job duties included in that list, such as meeting with customers and dealers, conducting research, seeking out new target markets and sales opportunities, scheduling events and programs, preparing budget and expense reports, resolving personnel problems and customer complaints, and carrying out various administrative tasks, are outside the realm of a managerial or executive capacity. Based on the format of the petitioner's percentage breakdown, which assigned time allocations to general job responsibilities rather than to individual components that comprise those responsibilities, the AAO is unable to determine specifically how much of the beneficiary's time would be spent performing qualifying versus non-qualifying tasks.¹

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, not integral, 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).

While the petitioner seemingly indicates that a number of services are contracted out and thus are not provided by in-house staff, the petitioner's tax documents do not support the claim that the petitioner paid for labor outside of the three individuals whom it directly employed. 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)). Although staffing size and organizational complexity are only two of the factors that the AAO considers in determining the petitioner's eligibility, the relevance of these factors is not to be discounted as valid indicators of whether the petitioner is able to relieve the beneficiary from having to primarily focus his time on the performance of non-qualifying tasks, even those tasks that could only be performed by a professional-level employee. Merely establishing that the beneficiary performs tasks at a professional level is not sufficient unless those tasks rise to the level of managerial or executive capacity.

Neither the beneficiary's job description nor the petitioner's organizational composition at the time of filing the petition establishes that the primary portion of the beneficiary's time would be dedicated to performing tasks within a qualifying managerial or executive capacity. Accordingly, the instant petition cannot be approved.

¹ Page 2 of the RFE expressly instructs the petitioner to provide an estimate of the percentage of time the beneficiary would dedicate to each specific task.

Additionally, while not previously addressed in the director's decision, the AAO finds that the record fails to establish that the beneficiary's employment abroad was primarily within a qualifying managerial or executive capacity. In reviewing the foreign entity's organizational chart, which the petitioner offered in response to the RFE, it appears that the beneficiary was charged with oversight of a development center and two U.S. employees—the same two employees whom the beneficiary currently supervises in his position with the U.S. entity. The petitioner did not provide an adequate explanation clarifying how the beneficiary was able to oversee the work of individuals who reside in the United States while the beneficiary himself was located overseas. The AAO also finds that the job description addressing the beneficiary's foreign employment was overly broad and contained numerous elements that pertained to his oversight of the U.S. entity. While the AAO recognizes the parent-subsidary relationship between the foreign and U.S. entity, these are nevertheless two separate entities and must be viewed individually rather than as one whole. In order to demonstrate that the beneficiary was employed abroad in a qualifying managerial or executive capacity, further clarification is needed to establish the beneficiary's role and job duties with the foreign entity.

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). Based on the additional ground of ineligibility discussed above, this petition cannot be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for 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 met that burden.

ORDER: The appeal is dismissed.