

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

B4

DATE: **OCT 16 2012** OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 in accordance with the instructions on 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, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a New Jersey company engaged in olive oil processing and importing, and it seeks to employ the beneficiary as its Sales Manager/Executive. 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.

On July 8, 2011, the director denied the petition concluding that the petitioner failed to establish that the beneficiary's employment abroad was within a qualifying managerial or executive capacity, and failed to establish the existence of a qualifying relationship between the petitioner and the beneficiary's foreign employer.

On appeal, counsel disputes the director's findings and provides an appellate brief laying out the grounds for challenging the denial. Counsel submits a brief and additional evidence in support of this assertion.

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 the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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 that 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. *See* 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner submitted sufficient evidence to establish that the beneficiary would be employed in a primarily 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, USCIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). Published case law clearly supports the pivotal role of a clearly defined job description, as 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). USCIS reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the petitioner's business, the employment and remuneration of employees, as well as the job descriptions of the beneficiary's subordinates, if any, and any other facts contributing to a complete understanding of a beneficiary's actual role within a given entity.

An analysis of the record does not lead to an affirmative conclusion that the beneficiary was employed by the foreign company in a qualifying managerial or executive capacity. Due to the general information in the job description, the petitioner has failed to provide a comprehensive explanation of how much time the beneficiary spent performing qualifying tasks versus those that would be deemed non-qualifying.

The job description included several non-qualifying duties. For example, the beneficiary will be responsible for "sales relations with major customers"; "must accurately forecast annual, quarterly and monthly revenue streams and develop specific plans to ensure revenue growth in all of the company's product lines"; "provides quarterly results assessments of the sales staff's productivity"; "directs professional account management activities and coordinate proper company resources to ensure efficient and stable product sales"; "directs the actual distribution or movement of the products to the customer and coordinates sales distribution by establishing sales territories, quotas and goals and establishing training programs for sales representatives"; and "analyzes sales statistics gathered by staff to determine sales potential and inventory requirements and monitor the preferences of customers."

It appears that the beneficiary will be developing and marketing the services of the business, handling all of the sales operations, and negotiating contracts, rather than directing such activities through subordinate employees. The petitioner did not identify any employees who actually assisted the beneficiary in sales, financial forecasting, sales results assessments, product distribution, establishing training programs, assessing inventory requirements, or monitoring customer preferences, thus indicating that the beneficiary will carry out these operational functions, which are clearly outside the parameters of what would be deemed as being within a managerial or executive capacity. As discussed below, the record does not indicate subordinates that will perform the activities that are supervised by the beneficiary and it appears that the beneficiary is performing all of the day-to-day duties of the business. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Furthermore, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

In a letter dated December 14, 2010 the petitioner stated that the beneficiary will report to the Export Manager that is located in Turkey and the Vice President for Sales – North America located in the U.S. In response to the request for evidence, the petitioner submitted an organizational chart that indicated a general manager who supervises the vice president of sales who in turn supervises the beneficiary. The chart also shows that the beneficiary supervises two employees in the sales team and one accountant.

The petitioner submitted a copy of the Florida Department of Revenue Employer's Quarterly Report that states the petitioner employed one individual, the beneficiary, in the second and third quarters of 2010. The petitioner submitted Form W-2 for the beneficiary only. Thus, the documentation provided indicates that the only employee of the petitioner is the beneficiary and none of the individuals listed on the organizational chart are in fact, employed by the petitioner. Even though the petitioner claims that the beneficiary directs and manages sales activities, it does not claim to have anyone on its staff to actually perform the sales function. Thus, either the beneficiary himself is performing the sales function or he does not actually manage the sales function as claimed by the petitioner. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If the beneficiary is performing the sales function, the AAO notes that 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. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988).

On appeal, counsel for the petitioner contends that the proffered position is in a managerial capacity and not an executive capacity. Counsel also stated that the beneficiary "manages an essential function within the organization, or a department or subdivision of the organization." The AAO acknowledges counsel's contention that the beneficiary's position is an essential function within the petitioner's organization. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. at 604. The petitioner has not provided evidence that the beneficiary manages an essential function. As noted above, the petitioner provided a brief and vague job description that did not discuss how the beneficiary is managing an essential function. Only on appeal did counsel for the petitioner claim that the beneficiary is

managing an essential function in sales. As noted above, however, the beneficiary's job description does not establish that the beneficiary is performing in a primarily managerial capacity.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

As discussed above, the petitioner has not identified employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate his position to that of a "function manager" as contemplated by the governing statute and regulations. As discussed above, the petitioner has not established that the beneficiary's duties are primarily managerial in nature, and thus he cannot be considered a "function manager."

Other than stating that the proposed position will be responsible for managing an essential function in sales, counsel provides no explanation or evidence in support of his claim that the beneficiary would qualify as a function manager pursuant to section 101(a)(44)(A)(ii) of the Act. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

In summary, the petitioner has failed to provide sufficient evidence to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. Therefore, the instant petition cannot be approved.

The second issue in this proceeding is whether the petitioner provided sufficient evidence to establish that it has a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In a letter dated December 14, 2010, the petitioner stated that “both the foreign and US companies are commonly owned, controlled and managed in effectively the same percentages by the same individuals.” However, the petitioner did not provide all of the relevant evidence since it provided stock certificates for the petitioner and it failed to provide stock certificate number 4. The petitioner submitted stock certificates number 1, 2, 3, 5, and 6.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See* [REDACTED]. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control. The petitioner has failed to establish that it has a qualifying relationship with the beneficiary's foreign employer. For this additional reason, the 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 sustained that burden.

ORDER: The appeal is dismissed.