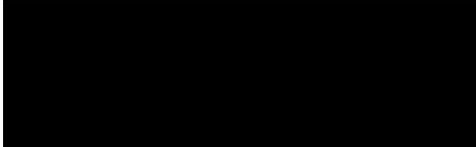


U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave. N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



B4

DATE: **OCT 26 2012** OFFICE: TEXAS SERVICE CENTER



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 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 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 request 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 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 Florida limited liability company 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 April 2, 2010, which contained relevant information pertaining to the beneficiary's proposed employment. Counsel for the petitioner provided a separate statement, dated May 18, 2010, in which he discussed the foreign entity where the beneficiary was previously employed and provided an overview of the petitioner's business and ownership scheme. The petitioner also provided supporting evidence in the form of financial and corporate documents pertaining to the petitioner and the foreign entity.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a request for evidence dated July 7, 2011 informing the petitioner of various evidentiary deficiencies. Among other issues of eligibility, the director addressed the beneficiary's proposed employment, instructing the petitioner to provide a detailed job description delineating the beneficiary's specific job duties and the percentage of time she would allocate to each item on the list. The petitioner was also asked to provide its payroll summary, IRS Form W-2 statements, IRS Form 1099s, and any other evidence of compensation the petitioner paid in 2010.

The petitioner provided a response, which included IRS Form 941 for all four quarters in 2010. The second quarter Form 941 shows that the petitioner had a total of three employees when the Form I-140 was filed. This information is further reiterated in the petitioner's payroll summary, which shows that the petitioner employed a store clerk, one general manager, and one administrative assistant at the time of filing.

With regard to the request for an additional job description, the AAO notes that while the petitioner provided a statement listing the beneficiary's proposed job responsibilities, the new statement was nearly identical to the April 2, 2010 statement, which the petitioner originally submitted in support of the Form I-140. The petitioner did not provide any additional information or add any time constraints to the job description, thus effectively failing to comply with the director's express request. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

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 properly pointed to the petitioner's failure to comply with the RFE, which called for a delineation of the beneficiary's specific job duties and their respective time allocations, and further found that that the petitioner submitted an overly broad job description, which was not sufficient to determine what specific tasks the beneficiary would perform on a daily basis. Noting these significant deficiencies, the director issued a decision dated August 30, 2011 denying the petition.

On appeal, counsel submits a brief in which he disputes the denial, contending that the beneficiary's experience abroad as general manager of the foreign entity is an adequate indicator of her ability to assume a

managerial or executive position with the U.S. entity. Counsel also asserts that despite the petitioner's small staff, the beneficiary would nevertheless be employed in a managerial or executive capacity.

The AAO finds that counsel's assertions are not persuasive and fail to overcome the basis for the director's denial. The discussion below will provide an analysis of the relevant documentation and will explain the underlying reasoning for the AAO's decision.

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 the 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 pointed out in the director's decision, a detailed job description is essential when examining the executive or managerial capacity of a given position. *See* 8 C.F.R. § 204.5(j)(5). Published case law 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). Additionally, the AAO finds that it is appropriate to consider other relevant factors, such as the level of complexity of the petitioner's organizational hierarchy and the petitioner's overall staffing, which allow the AAO to gauge the extent to which the petitioner is able to relieve the beneficiary from having to focus the primary portion of her time on the performance of non-qualifying operational tasks.

The AAO finds that neither the job description provided nor the petitioner's organizational hierarchy establishes that the beneficiary would be employed in a qualifying managerial or executive capacity.

Turning first to the job description provided, the AAO reiterates the petitioner's failure to comply with express RFE instructions, the goal of which was to elicit information that would allow the director to gain a meaningful understanding of the specific tasks that would occupy the primary portion of the beneficiary's

time within the scope of the petitioner's gas station/convenience store operation. The AAO finds that counsel's reliance on the beneficiary's position with the foreign entity as an adequate indicator of the beneficiary's employment capacity in her proposed position with the U.S. entity was misplaced. In his reliance on the beneficiary's employment abroad, counsel failed to consider the significant differences in the nature of the business conducted by the two entities and the different organizational hierarchies involved. These elements can and should be factored into the current analysis, as there is a vast difference between functioning at the top of a 22-person organization with multiple managerial tiers and departments and an organization that operates a three-person gas station/convenience store operation. There is no indication that counsel took these factors into consideration.

Moreover, counsel failed to explain the petitioner's oversight in providing the same deficient job description in its RFE response as it did in the original job description, which the director had already deemed to be deficient as evidenced by his request for a new job description. While the AAO does not dispute the beneficiary's high degree of discretionary authority in making the petitioner's decisions and setting its goals and policies, these general statements do not explain what specific activities the beneficiary would undertake on a daily basis. The mere fact that the beneficiary would be placed at the top of an organizational hierarchy within a small business operation does not establish that the primary portion of her time would be allocated to tasks of a managerial or executive nature.

The AAO also questions the reliability of the beneficiary's list of job responsibilities, which indicates that the beneficiary would oversee activities that deal with the provision of services to company customers, plan the use of materials, determine staffing requirements, and decide on the goods and services to be sold. In light of the nature of the business being conducted by the petitioning entity, it is unclear what "company customers" can exist in the scope of a gas station/convenience store and the petitioner has not explained the need for the beneficiary to plan the use of materials or determine staffing requirements in an operation whose staffing has ranged between 3-5 people over the span of many years, or how much input the beneficiary can expect to have as to the types of goods and services to be sold given that the petitioner is currently operating a specific type of retail business. The petitioner has failed to provide the specific information necessary to support the assertions made in the job description.

Next, looking at the petitioner's organizational hierarchy, which consisted of three employees at the time the petition was filed, it is unclear how the petitioner can expect to relieve the beneficiary from having to allocate her time primarily to either performing the daily operational and administrative tasks of the business or to overseeing the work of non-professional employees. 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)).

In summary, the AAO finds that the petitioner failed to demonstrate 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 to be performed on a day-to-day basis. The AAO further finds that the petitioner has failed to establish that the beneficiary would primarily manage an essential function of the organization or that she would primarily supervise a subordinate staff of professional, managerial, or supervisory personnel who relieve her from performing non-qualifying duties. Based on the evidence furnished, it cannot be found that the beneficiary would be employed in a primarily managerial or executive capacity. Therefore, this petition cannot be approved.

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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.