

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

(b)(6)



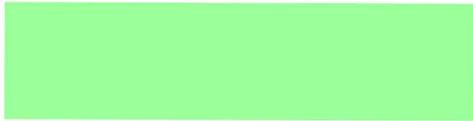
DATE: **APR 08 2013** OFFICE: TEXAS SERVICE CENTER

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 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,

Ron Rosenberg
Acting 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 claims to be a New Jersey corporation that seeks to employ the beneficiary in the United States as its product 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 November 4, 2011, which contained relevant information pertaining to the beneficiary's employment with the petitioning entity. The petitioner also provided a copy of its organizational chart as well as numerous business documents pertaining to the U.S. and foreign entities.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a request for evidence (RFE) dated April 17, 2012 informing the petitioner of various evidentiary deficiencies. The RFE included a request for a more detailed job description pertaining to the beneficiary's proposed employment. The director asked that the new job description be complete with a list of the beneficiary's job duties and the percentage of time the beneficiary would allocate to each of her assigned tasks.

The petitioner's response included a statement dated June 7, 2012 in which the petitioner provided a list of the beneficiary's job duties and responsibilities, choosing to forego assigning a percentage of time to each of the listed items.

In a decision dated July 24, 2012, the director issued a decision denying the petition based on the conclusion that the petitioner failed to establish that the beneficiary would be employed with the U.S. entity in a qualifying managerial or executive capacity. The director determined that the petitioner did not have the organizational complexity to support the beneficiary in a managerial or executive capacity position, which would allow the beneficiary to allocate his time primarily to tasks within a qualifying capacity.

On appeal,¹ counsel submits a brief disputing the director's finding and urging the AAO to consider the petitioner's organizational complexity in light of its reasonable needs, business purpose, and stage of development. Counsel states that the petitioning entity is divided into two separate divisions, each headed by a manager who then reports to the beneficiary.

After reviewing the record and considering the appellate brief, the AAO finds that counsel's assertions are not persuasive in establishing that the petitioner would employ the beneficiary in a qualifying managerial or executive capacity. The AAO will address the relevant evidence in a comprehensive discussion below.

Section 203(b) of the Act states in pertinent part:

¹ Although counsel refers to the petitioner's recent filing as a motion, the record shows that, in fact, the Form I-290B was marked as an appeal, thus indicating that the petitioner was filing an appeal with the AAO rather than a motion, which would be filed with the director. See § 103.5(a)(1)(i).

(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.

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 general, when examining the executive or managerial capacity of the beneficiary, the AAO reviews the totality of the record, starting first with the petitioner's description of the beneficiary's job duties. *See* 8 C.F.R. § 204.5(j)(5). A detailed job description is crucial, as the duties themselves will reveal the true nature of the beneficiary's foreign and proposed 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). The AAO will then consider this information in light of other relevant factors, including (but not limited to) job descriptions of the beneficiary's subordinate employees, the nature of the business conducted by the entities in question, the size of the subordinate staff of the foreign and U.S. entities, and any other facts contributing to a comprehensive understanding of the beneficiary's actual roles in the two respective entities.

In the present matter, the petitioner was expressly informed that the job description that was on record prior to the issuance of an RFE lacked adequate information about the beneficiary's job duties. The expectation, therefore, is that the petitioner's response to the RFE would include an enhanced job description containing more information about the beneficiary's specific job duties and their respective time constraints. The goal in obtaining the supplemental information is to convey a meaningful understanding of the actual tasks the beneficiary would perform on a daily basis and to establish the quantity of time the beneficiary would allocate to the qualifying tasks versus the non-qualifying ones. Instead, the petitioner provided a job description that was similar in content to the description that was originally submitted in support of the petition. Moreover, the petitioner failed to comply with the director's express request for a percentage breakdown specifically indicating how the beneficiary's time would be allocated among her various assigned tasks.

As the beneficiary's proposed employment would involve non-qualifying tasks, such as negotiating business contracts, designing and marketing the petitioner's products, and negotiating healthcare coverage for company employees, it is particularly important for the petitioner to provide a percentage breakdown to indicate what portion of the beneficiary's time would be allocated to the above mentioned non-qualifying tasks. While the AAO acknowledges that no beneficiary is required to allocate 100% of his or her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the position in question. 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).

(b)(6)

Additionally, the AAO finds that other portions of the job description lack sufficient specificity and instead focus on the beneficiary's discretionary authority and her elevated position within the petitioners organizational hierarchy. For instance, the AAO is entirely unclear of the actual tasks associated with implementing goals and objectives, providing direction and leadership, and managing human resources, aside from having the ability to hire and fire personnel. While these broad statements convey a sense of the beneficiary's heightened degree of discretionary authority, they fail to specify the underlying daily tasks that would be involved in meeting her broad job responsibilities.

In summary, the AAO finds that the petitioner failed to provide an adequate description of the proposed employment thus precluding a finding that the beneficiary would be employed in a qualifying managerial or executive capacity where the primary portion of her time would be allocated to qualifying managerial- or executive-level tasks. The instant petition was therefore properly denied and the appeal will be dismissed.

Finally, while not previously addressed in the director's decision, the record indicates that the petition must be denied on the basis of one additional adverse finding. Specifically, the AAO finds that the petitioner failed 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;

* * *

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 the instant matter, the petitioner claims that it and the beneficiary's foreign employer, [REDACTED] are affiliates based on their alleged common ownership "by the same Venezuelan companies." The petitioner indicated that its ownership was divided among three foreign entities, none of which possessed majority ownership of the petitioner's stock. However, according to the foreign entity's

articles of incorporation, clause no. 5, [REDACTED] owns 3,960 shares of the foreign entity's stock, and the 40 remaining authorized shares are split evenly among four different individuals.

In light of these ownership distributions, the AAO cannot find that the foreign and U.S. entities are affiliates that are commonly owned by Venezuelan companies. In fact, the foreign entity is owned exclusively by five individuals, one of whom possesses majority ownership. The two entities are therefore not commonly owned and controlled and thus cannot be said to have a qualifying relationship.

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.