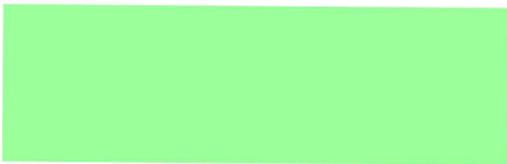


(b)(6)

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

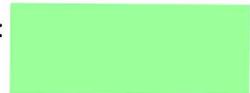


U.S. Citizenship
and Immigration
Services

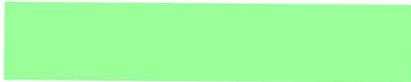


DATE: **AUG 28 2013** OFFICE: TEXAS SERVICE CENTER

FILE:

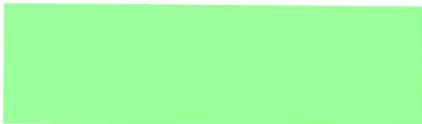


IN RE: Petitioner:
Beneficiary:



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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".
Ron Rosenberg
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 in the United States as its industrial production 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 counsel, on behalf of the petitioner, submitted a statement dated October 10, 2012, which contained relevant information pertaining to the petitioner's eligibility. The petitioner also provided various supporting business and financial documents pertaining to both the beneficiary's proposed employment with the petitioning entity and his prior employment with the petitioner's foreign affiliate.

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 December 6, 2012 informing the petitioner of various evidentiary deficiencies. The RFE addressed numerous issues, including the beneficiary's employment with the U.S. entity and the petitioner's ability to pay the beneficiary's proffered wage. With regard to the beneficiary's proposed employment, the director instructed the petitioner to provide a more detailed job description listing the beneficiary's specific daily job duties and the percentage of time to be allocated to each task. The director also asked for a copy of the petitioner's organizational chart depicting its staffing structure complete with the petitioner's employees, each individual's status as a full- or part-time employee, and each individual's educational credentials and description of job duties. Additionally, with regard to the financial documents, the director asked the petitioner to provide copies of IRS Form W-2 wage and tax statements for each employee covering the relevant time periods as well as evidence of any contract labor the petitioner used during those periods.

The petitioner's response included an hourly breakdown of the beneficiary's work plan and a separate list of the beneficiary's claimed "managerial/executive duties." The petitioner also provided its organizational chart depicting its staffing structure as of February 11, 2013 along with three 2012 IRS Form W-2 statements and one 2012 IRS Form 1099-MISC showing compensation to a non-employee.

After considering the petitioner's response, the director determined that the petitioner failed to establish: (1) that the beneficiary would be employed with the U.S. entity in a qualifying managerial or executive capacity; and (2) that it had the ability to pay the beneficiary's proffered wage at the time the petition was filed. Having reviewed the beneficiary's hourly breakdown, the director provided a list of those job duties that he deemed to be of a non-qualifying nature. The director continued his analysis, finding that the beneficiary oversees two non-professional subordinates. The director further noted that the record contains evidence showing that compensation was paid to only one of the two sales subordinates who were included in the organizational chart. With regard to the petitioner's ability to pay the beneficiary's proffered wage, the director focused on information provided in the petitioner's 2011 tax return and the beneficiary's 2011 IRS Form W-2 statement, which he determined did not show that the beneficiary had been compensated at the proffered wage.

On appeal, counsel provides a brief in which he disputes the director's conclusions.

After reviewing the record in its entirety, the AAO finds that the director erred in placing undue focus on 2011 wage and tax documents. While the petitioner provided these documents in response to the RFE instructions, the petition was filed on November 5, 2012. The petitioner's 2012 wage and tax documents indicates that the petitioner did in fact have the ability to pay the beneficiary's proffered wage on the priority date. Although the beneficiary's 2012 Form W-2 indicates that the beneficiary was compensated \$5,000 below the proffered wage, the regulation at 8 C.F.R. § 204.5(g)(2) only requires the petitioner to establish that it has the ability to pay the proffered wage at the time of filing. The petitioner is not required to actually commence payment of that wage until and unless the petition is approved and the beneficiary's immigration status is changed to that of a permanent resident. When the beneficiary's actual wage is considered together with the petitioner's 2012 net income of \$40,472, it is evident that the petitioner had the ability to pay at the time the petition was filed. Therefore, the second ground that served as a basis for the director's denial is hereby withdrawn and the remainder of this discussion will focus on the beneficiary's employment capacity in his proposed position with the U.S. entity.

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.

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) an organization's staffing structure, job descriptions of the beneficiary's subordinate employees, the nature of the business conducted by the entity in question, and any other facts that may contribute to a comprehensive understanding of the beneficiary's actual role within the petitioning entity.

In the present matter, the director focused on eight tasks (totaling 18 hours of the beneficiary's work week), which he deemed to be non-qualifying. In response to the director's finding, counsel points out that these duties do not account for the majority of the beneficiary's time and further asserts that the duties are either managerial or executive in nature. In support of this assertion, counsel cites to various sections of the statutory definitions for managerial or executive capacity under which he perceives the various duties would fall. However, counsel does not adequately explain why these duties should be deemed as qualifying managerial or executive tasks. Merely stating that certain duties qualify under portions of one statutory definition or another, without further explanation, is not sufficient to support counsel's claim, which in itself does not constitute supporting evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, the petitioner may not claim to employ the beneficiary as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must, at a minimum, establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive capacity or each of the four criteria set forth in the statutory definition for managerial capacity.

Additionally, having conducted its own independent review of the record, the AAO finds that there are other items in the beneficiary's job description, in addition to those listed in the director's decision, which are not readily deemed as qualifying job duties. Specifically, it is unclear what role the beneficiary would play with respect to planning of marketing, communications and sales approach, which would consume two hours of the beneficiary's time. When this information is considered in light of an organizational structure that does not include a specified marketing employee and shows only one documented sales representative, who was employed on a part-time basis at the time of filing, the beneficiary's managerial or executive role with respect to the marketing and sales tasks is unclear and cannot readily be deemed as one within a qualifying capacity. The AAO also finds that reporting to the company's president, a task that points to the beneficiary's subordinate role, also cannot be readily viewed as time spent within a qualifying managerial or executive capacity.

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). Despite the beneficiary's heightened degree of discretionary authority over company employees and his lead role in business matters in general, the petitioner has failed to establish that the primary portion of the beneficiary's time would be allocated to tasks within a qualifying managerial or executive.

Lastly, the petitioner has not provided documentary evidence to resolve the inconsistency between the Part 5, No. 2 of the Form I-140, where the petitioner claimed six employees at the time of filing, and the evidence presented, which shows that wages were paid to only three employees and one contracted sales representative when the petition was filed. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice

unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In summary, the record has not been supplemented with sufficient evidence to establish that the petitioner was ready and able to employ the beneficiary in a qualifying managerial or executive capacity when the petition was filed in November 2012. Therefore, on the basis of this conclusion, the director's decision to deny the petition will be affirmed.

The appeal will be dismissed for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.