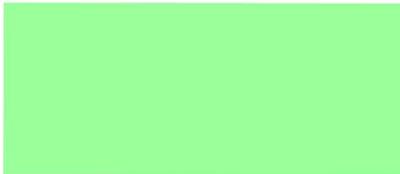


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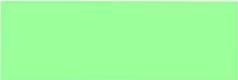


U.S. Citizenship  
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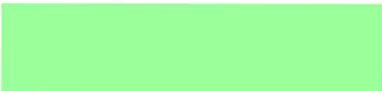


DATE: **DEC 05 2013**

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 (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,

 Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center ("the director"), denied the employment-based immigrant visa petition and affirmed his decision on motion. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Nevada corporation engaged in "industrial tooling" 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.

On June 21, 2013, the director denied the petition concluding that the petitioner failed to establish that the beneficiary's proposed employment would be within a qualifying managerial or executive capacity. The director subsequently granted the petitioner's motion to reopen and affirmed the denial of the petition in a decision dated August 22, 2013.

On appeal, counsel disputes the director's findings and provides an appellate brief laying out the grounds for challenging the denial. On appeal, counsel for the petitioner contends that the beneficiary manages an essential function.

#### I. THE LAW

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.

## II. The Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that it would employ the beneficiary in a qualifying managerial or executive capacity.

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). In addition, 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.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Upon review of the petition and evidence, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity.

In a letter dated September 4, 2012, the petitioner stated that the beneficiary, as General Manager – U.S. Operations - has overall responsibility for the management and daily operations of [the petitioner] as well as the entire U.S. sales system." The letter, due to an apparent missing page, contained no further information regarding the beneficiary's duties.<sup>1</sup> Accordingly, the director issued a request for evidence (RFE) and instructed the petitioner to provide: (1) a detailed description of the beneficiary's day-to-day duties and the percentage of time he allocates to each specific task; (2) a

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<sup>1</sup> The petitioner provided a complete copy of its letter dated September 4, 2012 in support of the motion to reopen. In the letter, the petitioner stated that the beneficiary would perform the following duties: (1) setting strategic and business goals for [the petitioner's] expansion into the U.S. market; (2) develop overall sales strategies for the U.S. market; (3) Create and monitor sales forecasts for all U.S. based sales; (4) recruit, train and manage U.S. sales team members; (5) research and develop new product lines; (6) develop programs and marketing strategies designed to introduce new product lines to the consumer; (7) design processes and procedures for managing warehouse operations and logistics; (8) provide strategic leadership to human resources, information technology, facility maintenance and customer service departments; (9) develop systems and processes to maintain inventory control and overseeing all communications with [the foreign entity]; and (10) research, develop and maintain business relationships with customers and potential customers.

Further, the petitioner stated that the beneficiary has four subordinates including sales representatives and warehouse staff, and manages 12 manufacturing representative companies with 29 individual salespeople.

detailed organizational chart to include the names and detailed job descriptions for the beneficiary's subordinates and immediate supervisor; and (3) information regarding the scope and nature of the petitioner's U.S. operations, supported by documentary evidence.

In response to the RFE, the petitioner stated that the beneficiary holds the position of "US Sales Manager," responsible for "managing and supervising the entire system of sales into the United States." The petitioner did not reference the "General Manager" title indicated on the Form I-140 and in its previous letter. The petitioner stated that the beneficiary would allocate his time as follows: 40% to management of the U.S. sales team, including responsibility for hiring, firing, development and training, setting goals and providing incentives, overseeing completion of tasks, and scheduling resources; 10% to training the U.S. sales team; 25% to managing the U.S. sales operations, including directing the distribution and movement of products to customers, establishing sales territories and quotas, establishing training programs, analyzing sales statistics and monitoring customer preferences; 15% to U.S. marketing, including creating and managing the marketing program, directing prospective customers to appropriate representatives and product line for sales; evaluating new business, and acting as a point of contact for customers to generate leads for the sales teams; and, 10% to U.S. warehouse logistics, including management of daily warehouse and office operations to ensure that orders are filled.

The petitioner stated that the beneficiary will manage an essential function within the business "in as much as the petitioner's principal business is that of a sales and distribution organization and the beneficiary is solely responsible for the sales and distribution functions for the company's U.S. market."

The petitioner submitted a copy of its organizational chart, which depicts the beneficiary as "U.S. Sales Manager" reporting to the company president. The chart indicates that the beneficiary has four direct subordinates including a warehouse manager, two warehouse clerks, and an outside sales employee. The chart also depicts 22 manufacturing sales representatives who also report to the beneficiary. One other employee, a controller, reports to the president. The petitioner provided the requested position descriptions for the beneficiary's subordinates.

With regard to the proposed position, the petitioner provided a list of job duties accompanied by a percentage breakdown. Due to the overly general information, the AAO is unable to gain a meaningful understanding of how much time the beneficiary will spend performing qualifying tasks versus those that would be deemed non-qualifying. For instance, in describing the beneficiary's proposed employment, the petitioner indicated that the beneficiary will spend 40 percent of his time "responsible for management of US sales team." The duties include, in part: "responsible for employee performance management; recruitment and dismissal of employees and representatives"; "mentor, motivate and guide employees and representatives to ensure alignment with strategic company vision"; "schedule resources based on business demands"; "set goals and provide incentive for employees and representatives to achieve those goals"; "oversee completion of tasks and assigned duties"; and, "enforce rules and policies." However, it is unclear which specific tasks actually fall within these broad categories. Merely using the term "manage" to describe the beneficiary's role does not establish that the tasks the beneficiary will perform will be of a qualifying nature. The

beneficiary's position description is too general and broad to establish that the preponderance of his duties is managerial or executive in nature. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will 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).

The petitioner also stated that the beneficiary will spend 10 percent of his time in the training of the U.S. sales team. Thus, the job description indicated that the beneficiary will spend at least 50 percent and up to 75 percent of his time in the management and training of the sales team in the United States. However, according to the organizational chart, the beneficiary only supervises one employee in the sales team as the other employees work within the warehouse operations. It is not clear how the beneficiary will spend the majority of his time managing and training one employee. 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 addition, the job description stated that the beneficiary will manage the "representatives." The organizational chart also indicated that the beneficiary will manage 10 manufacturing representatives. The petitioner clarified that the manufacturing representatives are not employees; however, the petitioner has indicated that the representatives play a large role in the sales operations for the company. The petitioner has not clearly explained or documented the role of the manufacturing representatives. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The petitioner also stated that the beneficiary will "direct the actual distribution and movement of products to customers"; "coordinate sales distribution by establishing sales territories, quotas, and goals"; "analyze sales statistics to determine sales potential and inventory requirements"; and, "monitor customer preferences." However, it is not clear who performs the market research and sales research. Similarly, the petitioner stated that the beneficiary will spend 15 percent of his time responsible for U.S. marketing such as "create and manage the marketing program consisting of multiple forms of advertising such as website/internet, marketing literature/brochures, and word of mouth thereby increasing company presence including lead generation for sales representatives"; "direct prospective customers to appropriate representative and product line for sales"; "evaluate how new business is coming in and making plans for its increase"; and, "act as main point-of-contact for customers to determine their product requirements thereby generating leads for the sales team." However, the petitioner's organizational chart did not identify any employees who actually assist in performing marketing tasks, thus indicating that the beneficiary himself may be the one to carry out these operational functions. 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Finally, the petitioner has provided no explanation for the change in the beneficiary's job title from "General Manager" to "US Sales Manager." The initial position description appeared to grant the beneficiary broader authority over the U.S. operations and included some responsibilities that were not mentioned in the subsequent breakdown of the proffered position, including potentially non-qualifying duties such as "research and develop new product lines." 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).

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary, for example, to perform the duties of the sales representative and warehouse employees. Further, although the petitioner identified one employee as the "warehouse manager," both organizational charts indicate that the warehouse clerks report to the beneficiary and do not show the warehouse manager as a subordinate supervisory employee.

Finally, the AAO acknowledges counsel's contention on appeal that the beneficiary manages an essential function of the company. 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. § 204.5(j)(5). 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.

In this matter, 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. Further, the more detailed position description provided in response to the RFE indicated that the beneficiary would be primarily engaged in the first-line supervision of non-professional employees. Only on motion did counsel for the petitioner claim that the beneficiary manages an essential function by managing a "major component of the organization – both in terms of its sales functions as well as its logistical support for the entire company." Further, the petitioner submitted an opinion letter from Dr. [REDACTED] Director of Graduate Studies at the [REDACTED] Dr. [REDACTED] found that "in [the] position as General Manager for [the petitioner], [the beneficiary] will be responsible for managing logistics of the company's business operations, as well as the essential functions [of business development, administration, and sales strategy], which demonstrates his key role as a function manager."

A review of Dr. [REDACTED] letter reveals that he based his evaluation entirely on the position description for "General Manager" that was provided in the petitioner's letter dated September 4, 2012. Dr. [REDACTED] did not review the more detailed description for the position of "US Sales Manager" which was provided in response to the RFE and undermines the petitioner's initial claim that the beneficiary is responsible for the company's overall operations. Rather, as discussed, the beneficiary, as US Sales Manager, would allocate over half of his time to managing and training a US sales team comprised of one employee and performing marketing duties, rather than managing an essential function or functions.

As such, Dr. [REDACTED] letter does not support the petitioner's claim that the beneficiary would be employed as a function manager, as his review was based on incomplete evidence and a limited job description that was too vague to establish the beneficiary's eligibility under the statute and regulations. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Since the opinion offered here was not based on the beneficiary's complete position description, it has been given limited weight.

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 operations 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.

The fact that the beneficiary has been given a managerial job title and general oversight authority over U.S. sales 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, but rather, the petitioner indicated that over half of his time would be spent on the supervision and training of sales staff.

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 and based on this finding, the instant petition cannot be approved.

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.