



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **JAN 09 2013** OFFICE: NEBRASKA SERVICE CENTER

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, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner United States corporation that seeks to employ the beneficiary in the United States as its business support 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.

In support of the Form I-140 the petitioner submitted a statement dated November 24, 2010, which contained relevant information pertaining to the beneficiary's employment abroad and with the petitioning entity. The petitioner also provided a copy of its 2009 annual report.

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 August 10, 2011 informing the petitioner of various evidentiary deficiencies. The RFE included requests for a more detailed job description pertaining to the beneficiary's foreign and proposed employment with a list of the beneficiary's job duties and their time allocations, both entities' organizational charts depicting each company's staffing structure and the beneficiary's placement therein, and job descriptions of the beneficiary's supervisors and subordinates in each entity. The petitioner was expressly asked to assign time allocations to individual job duties rather than groups of tasks.

The petitioner responded with a statement dated October 3, 2011 and provided the requested organizational charts depicting the beneficiary's positions with the foreign and U.S. employers. Although the petitioner attempted to comply with the director's requests for additional information pertaining to the beneficiary's foreign and proposed job duties, the job descriptions that were provided consisted of grouped tasks and job responsibilities, which was the very format that the director had asked the petitioner to avoid and instead to itemize the beneficiary's individual job duties and assign time constraints to each task. The petitioner referred to the beneficiary as the "de fact chief of staff" to the president and CEO of the petitioning organization. The beneficiary would exercise executive-level decision-making on behalf of her direct superior—the president and CEO of the company. The beneficiary's position abroad was described as that of an office manager where her immediate superior was the head of the IT group.

The director assessed the petitioner's job description and while he determined that the petitioner provided additional information pertaining to the beneficiary foreign and proposed employment, he nevertheless concluded that the petitioner failed to establish that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity. The director determined that the petitioner failed to provide sufficient detail to fully describe specific day-to-day tasks and further found that both job descriptions indicate that the beneficiary's positions involve managerial and non-managerial aspects where the beneficiary is shown as managing a function and also performing certain non-qualifying job duties associated with that function.

On appeal, the petitioner asserts that the director failed to adequately address the organizational charts that the petitioner submitted in compliance with the RFE. Counsel asserts that new evidence is being submitted in response to the director's adverse findings.

After reviewing counsel's brief statement and the additional statement dated December 21, 2012, which the petitioner submitted in support of the appeal, the AAO finds that the supporting evidence is unpersuasive and fails to overcome the director's adverse findings. The AAO will provide a full discussion addressing the petitioner's submissions in the decision below.

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.

As previously noted, the two primary issues to be addressed in this decision concern the beneficiary's employment capacity in her former position with the foreign entity and in her proposed position with the U.S. petitioner. Specifically, the AAO will examine the record to determine whether the petitioner submitted sufficient evidence to establish that the beneficiary was employed abroad and whether she would be employed 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.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Published case law supports the pivotal role of a detailed 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). The AAO also finds that it is often necessary to consider other relevant factors, including the petitioner's organizational hierarchy and the beneficiary's position therein.

In the present matter, the record lacks comprehensive job descriptions delineating the beneficiary's day-to-day tasks in her former and proposed positions.

Turning first to the issue of the beneficiary's employment with the foreign entity, the record shows that counsel submitted a job description in his October 3, 2011 statement in which he stated that 50% of the beneficiary's time was allocated to managing the daily operations of the IT, corporate affairs, and risk management groups, central compliance, and four group business support specialists. Counsel stated that such management involved developing and managing office administration procedures, overseeing financial report and cost control, managing annual profit share and remuneration process, recruiting staff, overseeing

staff assignments and relocations, overseeing document management and archiving, and coordinating with the petitioner's foreign affiliate offices. Counsel did not identify the specific actions the beneficiary performed in her role as manager of office administration procedures and the annual profit sharing process, nor did counsel explain what was involved in overseeing financial report and cost control or the document management process. Counsel indicated that the other 50% of the beneficiary's time was allocated to managing a four-person support staff, whose names, position titles, and educational levels were undisclosed, thus precluding the AAO from being able to determine whether the subordinates who were under the beneficiary's control were professional employees. See section 101(a)(44)(A)(ii) of the Act.

Additionally, while the AAO has reviewed the foreign entity's organizational chart, which was provided in response to the RFE, the chart is not persuasive evidence that the beneficiary's employment abroad was within a qualifying managerial or executive capacity. Rather, the chart indicates that the foreign organization is comprised of affiliate offices and various departments all of which are headed by the beneficiary's superior, not by the beneficiary herself. While the chart indicates that the beneficiary had a definite role in assisting her superior, who was the actual head of the organization, there is no evidence—either in the organizational chart or in counsel's job description—that the beneficiary was relieved from having to carry out any necessary non-qualifying tasks that would normally fall to the assistant of the head of an organization or that the non-qualifying tasks associated with assisting the head of an organization did not constitute the primary portion of the beneficiary's job duties in her former position with the foreign entity.

Turning now to the beneficiary's position with the U.S. employer, counsel's job description indicated that the proposed employment would involve participation in the annual profit sharing and remuneration review process for 30% of the time, training the new chief operations officer (COO) by introducing him/her to the petitioner's business operations and key business contacts for 20% of the time, managing an annual North American conference by overseeing the staff responsible for setting up and running the event for 15% of the time, managing and overseeing board members' visits to the petitioning entity in the United States for 10% of the time, and managing the offices of all senior managing directors by selecting their respective premises, suppliers, and contractors, selecting their respective personnel, and training, managing and reviewing each managing director's personnel assistant for the remaining 25% of the time.

The supplemental information provided by counsel did not meet the criteria specified in the RFE, which expressly instructed the petitioner to assign time allocations to individual job duties and not to multiple job duties grouped together. As indicated above in the discussion of the beneficiary's former position with the foreign entity, counsel's broad use of vague terms like "manage" and "oversee" is not sufficient to establish the beneficiary's specific daily tasks. While these broad terms indicate that the beneficiary's proposed position would involve managerial elements, they are not sufficient to establish that the beneficiary would allocate her time primarily to the performance of tasks within a qualifying managerial or executive capacity. For instance, counsel indicated that the beneficiary and her superior would participate in the process for reviewing profit sharing and remuneration. However, counsel did not specify in what capacity the beneficiary would participate or what actual job duties would be involved. He also stated that the beneficiary would be responsible for training the COO, taking necessary steps to ensure that board members' visits are successful, and assuming the role of office manager for senior managing directors. Counsel did not explain how these responsibilities fit the definition of managerial or executive capacity. Regardless of the significance of the job duties to be performed, the petitioner must establish that the nature of those duties is managerial or executive. 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 proposed position. 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). In this matter, the petitioner did not provide sufficient information about the beneficiary's specific tasks.

Despite the petitioner's attempt to overcome the adverse conclusions on appeal, the petitioner's appellate brief was a virtual replica of the response statement provided by counsel in response to the RFE. No new information was provided to clarify the prior job description. Accordingly, the AAO cannot conclude that the beneficiary's former position with the foreign entity or her proposed employment with the U.S. petitioner consisted and would consist of tasks that are primarily within a qualifying managerial or executive capacity. On the basis of these two adverse conclusions the AAO cannot approve the instant petition.

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.