



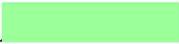
**U.S. Citizenship  
and Immigration  
Services**

(b)(6)

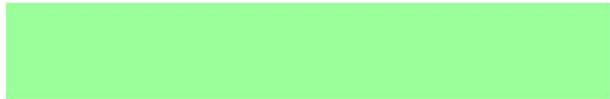


DATE: **JAN 11 2013**

OFFICE: TEXAS SERVICE CENTER

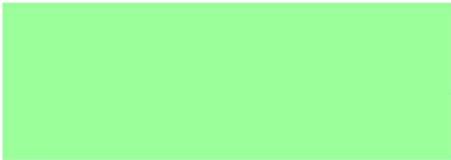
FILE:   


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 Texas corporation that seeks to employ the beneficiary in the United States as its president. 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 an undated statement (at exhibit 3) which contained relevant information pertaining to the beneficiary's proposed employment with the petitioning entity. The petitioner also provided various documents pertaining to the petitioner's business activities, finances, and corporate set-up.

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 June 21, 2011 informing the petitioner of various evidentiary deficiencies. Among the issues addressed in the RFE was the beneficiary's proposed employment with the U.S. entity. Specifically, the director instructed the petitioner to provide a more detailed job description pertaining to the beneficiary's U.S. employment by listing each of the proposed job duties and indicating the percentage of time the beneficiary would allocate to each of the items listed. The petitioner was also asked to provide job titles, list job duties, and disclose the educational levels of all employees the beneficiary would supervise in his proposed position.

The director's response to this portion of the RFE was contained within Exhibit Q, which named the beneficiary's subordinates, briefly described their respective job duties, and included one diploma and one college transcript for two of the beneficiary's employees, and Exhibit R, which included the beneficiary's job description addressing the proposed U.S. employment. The petitioner listed and assigned time constraints to each of six broad categories and listed job duties under each category.

After considering the petitioner's response, the director determined 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 provided a deficient job description which failed to provide insight into the beneficiary's actual daily tasks. The director also observed that the position titles of the beneficiary's subordinates indicate that managerial employees are disproportionately overrepresented in the petitioner's organizational hierarchy. Despite the information provided, the director determined that the petitioner lacks the organizational complexity to employ the beneficiary in a primarily managerial or executive capacity. In light of these adverse findings, the director issued a decision dated August 8, 2011 denying the petition.

On appeal, counsel provides a brief disputing the director's decision. Counsel asserts that the petitioner provided an adequate job description, which establishes that the beneficiary's duties fit under the statutory definition of both managerial and executive capacity and points out that the beneficiary has complete discretion over four managerial employees. Counsel contends that the director erroneously based the adverse conclusion on the petitioner's failure to submit a delineation of the beneficiary's daily tasks and further states that the size of the petitioning business should not be a sole determining factor of the beneficiary's employment capacity.

The petitioner's submissions, both on and prior to the appeal, have been considered. The AAO finds that counsel's assertions are not persuasive and thus fail to overcome the director's decision. The AAO will address the relevant supporting evidence and counsel's appellate brief in the discussion 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.

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.

The primary issue in this proceeding concerns the beneficiary's proposed employment with the petitioning entity. Specifically, the AAO will review the record to determine whether the petitioner submitted sufficient probative evidence to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

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). The AAO also finds it appropriate to consider other relevant factors, including the petitioner's organizational hierarchy, the beneficiary's position therein, and the petitioner's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks.

The petitioner failed to adhere to the specific instructions of the RFE, which instructed the petitioner to list the beneficiary's job duties and to indicate what percentage of time the beneficiary would spend performing each task. Instead, the petitioner provided a list of six broad categories and assigned a percentage of time to each category rather than to the individual job duties that comprise each category. While counsel is correct in pointing out that the director did not expressly ask the petitioner to list the beneficiary's "daily" job duties, the RFE instructions clearly asked for a list of "all duties" of the proposed position. The instructions were also clear in asking the petitioner to assign a percentage of time to "each duty," thus indicating that broadly assigning time constraints to general categories, rather than to specific job duties, would not constitute compliance with the RFE instructions.

Given that each category is comprised of both qualifying and non-qualifying tasks, failing to assign time constraints to the individual tasks precludes the AAO from being able to gauge how much of the beneficiary's time would be spent carrying out qualifying tasks versus those that are not 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 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). With this in mind it is also important to factor in the petitioner's staffing to determine whether the petitioner would be capable of relieving the beneficiary from having to primarily focus on the performance of non-qualifying tasks. It is noted that merely providing an adequately defined job description (even one that primarily includes tasks within a qualifying capacity) is not sufficient without further evidence showing that the petitioner has the underlying support staff to actually carry out the necessary operational and administrative tasks that are required for the business to function without relying on the beneficiary's direct involvement with the non-qualifying tasks.

The Form I-140 indicates that the petitioner had six employees at the time of filing the petition. The petitioner's fourth quarterly tax return for 2010, however, shows that the petitioner was staffed with no more than four employees when the petition was filed. Given that a number of the beneficiary's job duties involve overseeing the performance of daily tasks, it is reasonable to expect that the petitioner would be actually staffed with employees who would perform the underlying tasks whose execution the beneficiary would supervise. It also stands to reason that if the petitioner did not employ the necessary support staff at the time the petition was filed, the job description that so heavily relies on the employment of a support staff would be considered unreliable. As the petitioner's initially submitted organizational chart identified a total of six employees (not including the beneficiary himself) to include an accounting manager, a sales manager and one outside sales person, a logistics manager, and a warehouse manager with an assistant, vacancy of any one of these positions at the time of filing would leave the AAO to question whether the beneficiary himself would be expected to perform the job duties assigned to the vacant position.

Based on the information provided in the petitioner's quarterly tax return for the time period during which the Form I-140 was filed, the petitioner did not employ all the individuals whose names and positions are depicted in the organizational chart. 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). The petitioner has not provided any evidence resolving this significant inconsistency. Thus, in addition to questioning the reliability of the petitioner's organizational chart, the AAO is also led to question how many of the beneficiary's duties depicted as oversight duties would realistically require the beneficiary to actually perform the underlying tasks. For instance, in the category "General Duties," the beneficiary is assigned with approving a marketing plan, directing advertising campaigns, overseeing the search for new manufacturers and brands, and controlling and authorizing modification or creation of software modules. These job duties indicate that someone other than the beneficiary would actually perform the duties that the beneficiary would oversee. It is unclear whether the petitioner employed the requisite support personnel to relieve the beneficiary from having to perform the non-qualifying marketing- and technology-related tasks that would purportedly be performed by the beneficiary's subordinates. Since the petitioner's organizational chart does not include any marketing or IT personnel, the AAO further questions the petitioner's capability to relieve the beneficiary from having to engage in directly performing the non-qualifying tasks associated with the marketing and IT functions. Thus, counsel's assertion that the size of the petitioning entity should not factor into a determination of the beneficiary's

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employment capacity is not persuasive or probative, as the AAO cannot determine whether the beneficiary would be employed in a qualifying managerial or executive capacity without a valid explanation of how the petitioner plans to relieve the beneficiary from having to spend his time primarily on the performance of non-qualifying operational tasks.

Additionally, the AAO is unable to determine whether certain other job duties assigned to the beneficiary are of a qualifying nature. Specifically, it is unclear how supporting the sales department, attending client negotiations, seeking out new business, attending trade fairs and conferences, directing relationships with customs agencies, attending meetings with suppliers, coordinating timing of imports and exports, creating an investment plan, and helping the warehouse manager to address mishaps are qualifying tasks. Without further clarification of the beneficiary's specific role with respect to these job duties, it is unclear how the job duties are indicative of an individual who is primarily employed in a managerial or executive capacity.

In summary, the record lacks sufficient information about the specific tasks the beneficiary would perform or evidence demonstrating that the petitioner employed an adequate support staff at the time of filing the petition to relieve the beneficiary from having to allocate his time primarily to the performance of non-qualifying tasks. Accordingly, in light of the deficiencies discussed herein, the AAO cannot affirmatively conclude that the beneficiary would be employed in a qualifying managerial or executive capacity. On the basis of this determination, the instant 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.