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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

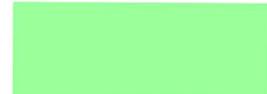


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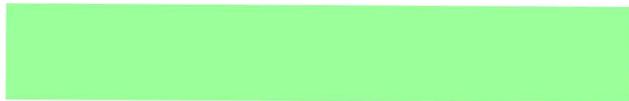
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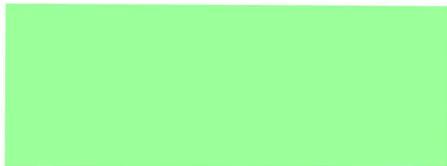
Petitioner:

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
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, revoked the approval of the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner, a California corporation founded in 1998, is in the business of information technology consulting. It is the parent company of the beneficiary's foreign employer, [REDACTED] (the foreign entity), located in [REDACTED] Argentina. The petitioner seeks to employ the beneficiary as its Senior Recruiter.

The director initially approved the petition on June 8, 2012. After issuing a notice of intent to revoke and reviewing the petitioner's rebuttal, the director revoked the approval of the petition on November 6, 2012 concluding that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary was employed abroad in a managerial capacity, specifically, as a functional manager.

I. The Law

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

- (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.

8 C.F.R. § 204.5(j)(3) states:

- (i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:
 - (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a

firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or

- (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).

With respect to managerial capacity, section 101(a)(44) of the Act defines the term as follows:

- (A) 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.

II. Statement of Facts and Procedural History

The sole issue to be addressed is whether the petitioner established that the beneficiary was employed abroad in a qualifying managerial capacity, specifically, as a functional manager.¹

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on January 27, 2012. In a letter accompanying the initial petition, the petitioner asserted that the beneficiary was previously employed abroad by the foreign entity in a functional managerial capacity as a Recruiter, in which capacity she was "responsible for seeking out, pre-screening and completing the recruitment process for candidates."

The director issued a request for evidence (RFE), requesting the petitioner to submit, *inter alia*, a more detailed description regarding the beneficiary's job duties abroad and a detailed organizational chart for the foreign entity showing the beneficiary's position.

In response to the RFE, the petitioner provided a detailed description of the beneficiary's job duties abroad as a Recruiter. In this document, the petitioner described the position's mission as "to generate leads for recruitment services sales and for potential candidates" and to "[generate] demand of recruitment services by calling potential customers, identifying areas of opportunity, giving presentations and assisting a Regional Manager in closing a contingency placement or recruitment process outsourcing deal." The petitioner listed the following main tasks/activities for the position:

1. Seek out potential client companies within target location assigned to the team while maintaining a high call volume of 80+ calls per day, 400 per week with at least 70 documented conversations (40%);
2. Call the companies' executives, starting from CEO and moving down the organizational structure, introduce our recruitment services and assess their recruitment needs by following a pre-qualification script (40%);
3. Prepare and coordinate presentations for potential clients that are concise but complete and targeted to the needs that were previously assessed (10%);
4. Maintain an updated record of all relevant client information including phone or email exchanges, pre-qualification data, etc. in company database (10%).

¹ The petitioner asserts that the beneficiary was employed in a managerial capacity as a functional manager. The petitioner does not claim that the beneficiary was employed in an executive capacity. Therefore, the AAO will only analyze the beneficiary's employment in a managerial capacity as a functional manager.

The petitioner further described the Recruiter as reporting to the Recruiting Supervisor, and having authority over two main types of decisions: determining if a lead is qualified and within the scope of the company's services, and determining if a contact is a suitable candidate. The petitioner described the Recruiter's working conditions as spending six months working "under the direction of a Senior Recruiter who will provide mentoring and closure to their sales efforts," and the Recruiter's potential career path as "Senior Recruiter, Recruiting Supervisor, Regional Manager, Director of Staffing."

The petitioner submitted the foreign entity's organizational chart of the recruitment department, which depicted [REDACTED] Vice President of Human Resources, [REDACTED] at the top. Directly below Mr. [REDACTED] was [REDACTED] Recruiting Manager, ITC USA West. Below Mr. [REDACTED] was [REDACTED] Recruiting Supervisor, ITC Buenos Aires. Below Ms. [REDACTED] was the beneficiary, Recruiter, ITC Buenos Aires. The beneficiary's position is depicted as being in the lowest tier of the department's organizational hierarchy.

The petitioner also submitted the Executive Vice President's position description. In this document, the petitioner described one of the Executive Vice President's primary missions as being "responsible for driving recruitment through state of the art applicant tracking systems, social networking, the use of social media, employee referrals and a highly skilled recruitment team." In particular, one of the position's main tasks/activities is recruitment, which includes the following duties: filling ITC positions; hiring, training and managing recruitment teams globally; interviewing candidates and ensuring suitability/quality of candidates; and participating in defining compensation level. The position's direct reports include the company's *recruiting manager and recruiters*.

The director initially approved the petition on June 11, 2012. On August 27, 2012, the director issued a notice of intent to revoke advising the petitioner that the beneficiary does not appear to have been working in an executive or managerial capacity abroad based upon her job duties, the percentage breakdown of her duties, and her position within the foreign entity's organizational hierarchy.

In response to the notice of intent to revoke, counsel for the petitioner asserted that the beneficiary's position as a Recruiter was that of a functional manager. The petitioner asserted that the position of Recruiter was "essential to the overall business and essential to the HR Department. [The beneficiary] was functioning at a senior level and, as the only person handling that function, she was exercising complete authority over the recruitment operation." Counsel conceded that the beneficiary "did not supervise subordinate employees."

The petitioner submitted a letter from [REDACTED] Executive Vice President, seeking to clarify the nature of the beneficiary's managerial duties abroad. In this letter, Mr. [REDACTED] explained that recruiting is an essential function because the company relies on recruiters "to seek out highly specialized technology experts to fulfill our client's system implementation objectives," and within the IT industry in general, recruitment is an essential function which can dictate the success, failure, and growth of a company. Mr. [REDACTED] further explained that the previous job description submitted for the beneficiary "does not accurately reflect the importance of this position." Mr. [REDACTED] stated:

From 2007-2009, [the beneficiary] was solely responsible for managing the recruitment process of the company for the Eastern Division of the United States. From Buenos Aires, she worked directly with the USA senior executives including the VP of Sales and Managing

Director in order to scope the staffing needs of our Eastern USA implementation projects. She was responsible for the creation and execution of a staffing plan including budgeting and pricing responsibilities. She had decision making authority over the selection process of candidates considered for our company and managed the interviewing process, background verification, and salary offering. She was responsible for managing a hiring budget of over \$4 Million for the years 2007-2009 which in turn led to approximately \$6.5 million in project revenue directly dependent upon her managerial deliverables.

Additional managerial responsibilities included the analysis and selection of vendors for the company. She set up the criteria for evaluating vendors and actively managed the selection and contract negotiation process. These responsibilities carried budgetary responsibilities of \$2.5 Million over this time period. She was on the selection committee for recruitment vendor products such as [REDACTED] which amounted to \$55K for the periods of 2007-2009.

During the period [the beneficiary] was working from our Buenos Aires office, she worked independently with the US-based executives in order to fulfill the company staffing needs. She had minimal supervision of her day-to-day activities and a high degree of autonomy in seeking out innovative methods to meet the objectives of the company. She did not have direct reports but carried management level responsibilities.

The director revoked the approval of the petition, concluding that the petitioner failed to establish that the beneficiary was employed abroad in a primarily managerial or executive capacity. The director concluded that the beneficiary primarily performed non-qualifying administrative, sales, or other operational tasks, and therefore could not qualify as a functional manager or be otherwise employed in a primarily managerial or executive capacity.

The petitioner filed the Form I-290B, Notice of Appeal or Motion. On appeal, counsel for the petitioner asserts:

[The beneficiary's] position as a Recruiter in Buenos Aires from 2007-2009 was that of a functional manager. The fact that she reported up to more senior HR personnel is insignificant in this case because she was managing an "essential function" of the business.

[The beneficiary's] duties and responsibilities during the two-year period in question meet the standard as set out at INA Section 101(a)(44)(A) and 8 C.F.R. 204.5(j)(3), to qualify as a "functional manager."

The position of "recruiter" at ITC in Buenos Aires from 2007-2009 was essential to the overall business and essential to the HR Department. [The beneficiary] was functioning at a senior level and, as the only person handling that function, she was exercising complete authority over the recruiting operation.

The petitioner has not submitted a brief or additional evidence in support of the appeal.

III. Analysis

Upon review of the record and for the reasons herein, the petitioner has failed to establish that the beneficiary was employed abroad in a managerial capacity.

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. 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'r 1988).

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). 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 operational 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 the beneficiary does not directly supervise subordinates, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's organizational structure, the scope of the beneficiary's authority and its impact on 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 petitioner's description of the beneficiary's duties submitted in response to the RFE reflects that she spent the majority, if not all, of her time performing the non-qualifying, day-to-day duties of the recruitment function rather than managing the function. In particular, the petitioner stated that the beneficiary spent 40% of her time seeking out potential clients via phone calls, and another 40% of her time calling other companies to introduce the foreign entity's recruitment services and assess their recruitment needs by following a pre-qualification script. The beneficiary's remaining time was equally divided between preparing and coordinating presentations for potential clients, and maintaining an updated record of all relevant client information. While such duties are undoubtedly essential to the company's ability to sell its recruitment services to potential clients and reach potential candidates, they are not consistent with the management of the recruitment function. The petitioner has failed to explain which of the above listed duties would constitute managerial duties.

In addition, the record reflects that the beneficiary had no subordinate employees abroad, and was the only person performing direct recruiting functions at the foreign entity. Further, the petitioner's description of the recruiter position included information regarding the position's placement within the recruiting organizational hierarchy, its decision making authority, and its working conditions. According to this information, the recruiter's decision-making authority is limited to determining whether a lead is qualified and determining if a contact is a suitable candidate. The petitioner's description indicated that recruiters are expecting to work under the direction of a senior recruiter who provides mentoring for a period of six months, and the position is described as a role for "current students or recent graduates of a 4-year Bachelor's course." Finally, the job description indicates that the career path for a recruiter may include promotions to the positions of senior recruiter, recruiting supervisor, regional manager and director of staffing. The organizational chart indicated that the beneficiary reported to a recruiting supervisor, and that her supervisor reported to a recruiting manager. The duties of the position, as described in the RFE response, are consistent with a professional position at the lower end of the recruiting organization's hierarchy.

Overall, the petitioner's initial evidence and its response to the RFE provided no support for a finding that the beneficiary performed primarily managerial duties, that she managed any aspect of the recruiting function, or that she was employed at a senior level in the organizational hierarchy as a whole or with respect to the recruiting function. Instead, the petitioner described a position that was primarily responsible for selling the company's recruiting services.

In response to the notice of intent to revoke, the petitioner provided an amended description of the beneficiary's duties abroad that bore no resemblance to the position description provided in response to the RFE. In the amended description, the petitioner asserted that the beneficiary was solely responsible for managing the recruitment process of the company for the Eastern Division of the United States, and worked independently with the U.S.-based executives in order to fulfill the company staffing needs. The petitioner also asserted that the beneficiary had budgetary responsibilities worth over \$10 million, and had managerial responsibilities over the analysis and selection of vendors for the company. The petitioner and counsel provided an inadequate explanation for this complete amendment of the position's duties and level of responsibility. The petitioner stated that the position description submitted in response to the RFE "does not accurately reflect the importance of the position" during the beneficiary's period of employment abroad and offers no further justification for the material changes made. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

The petitioner's claim that the beneficiary was "solely responsible for managing the recruitment process of the company for the Eastern Division of the United States" is not consistent with the evidence in the record. The petitioner's initial description of the Recruiter's job duties did not indicate that the beneficiary had sole responsibility over managing the recruitment process for the Eastern Division of the United States or any other particular geographical area. Instead, the petitioner's initial position description specifically stated that the Recruiter "*assist[s]* a Regional Manager in closing a contingency placement or recruitment process outsourcing deal (emphasis added)." The position description also stated that the position "*contributes* to generating demand of recruitment services" and "*contributes* to the supply of suitable candidates (emphasis added)." The petitioner's use of the words "assists" and "contributes" undermines its claims that the beneficiary was solely responsible for managing the recruitment process.

Moreover, the petitioner's initial position description indicated that the Recruiter reported to a Recruiting Supervisor, and worked under the direction of a Senior Recruiter. The foreign entity's organizational chart depicted the beneficiary's position as Recruiter at the bottom of the hierarchy, directly supervised by a Recruiting Supervisor, then a Recruiting Manager, and ultimately, the Vice President of Human Resources. In fact, the petitioner's position description for the vice president position stated that this position was in fact directly responsible for the recruitment process, including managing the "recruitment team" of which the beneficiary was a part. Based upon all of the above factors, the record supports the conclusion that the beneficiary was not solely responsible for managing any aspect of the recruitment process, contrary to the petitioner's claims.

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). Furthermore, when responding to the director's notice of intent to revoke, the petitioner cannot materially change the beneficiary's stated job responsibilities or her level of authority within the organizational hierarchy. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). The petitioner offered no supporting evidence in response to the notice of intent to revoke to substantiate the material changes made to the position's duties and level of authority. The petitioner's unsupported claim that the information initially provided in support of the petition was simply inaccurate is not persuasive. 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 AAO observes that the beneficiary does state in her resume that she "[r]eceived two promotions within 18 months and became the sole recruiter for the East Coast territory." The position that the beneficiary held after receiving two promotions within the organization was that of a recruiter based in New York, her initial position in the United States. In fact, the organizational chart submitted at the time of filing indicated that the beneficiary reported indirectly to a U.S. recruitment manager for the *West* region during her employment abroad.

Even assuming *arguendo* that the beneficiary was solely responsible for managing the recruitment process of the company for the Eastern Division of the United States as claimed, the petitioner failed to establish what proportion of the beneficiary's duties were spent on this particular duty, as opposed to her other duties.² Whether the beneficiary can be considered a managerial employee turns on whether the petitioner has sustained its burden of proving that her duties were "primarily" managerial in nature. See section 101(a)(44)(A) of the Act. Since the petitioner failed to document what proportion of the beneficiary's total duties were spent on this particular function, the petitioner failed to establish that the beneficiary was primarily

² The petitioner's initial position description for the Recruiter position accounted for 100% of the beneficiary's time. Again, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591-92.

performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). Furthermore, if the beneficiary was also the sole employee who provided direct recruitment services for the Eastern Division of the United States, then she cannot be considered a function manager, notwithstanding any claims that she concurrently managed this particular function. Again, 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. Section 101(a)(44)(A) of the Act.

The petitioner's assertion that the beneficiary had managerial responsibilities over the analysis and selection of vendors for the company will not be considered, as these responsibilities were not listed in the petitioner's initial position description for the beneficiary. As stated above, when responding to the director's notice of intent to revoke, the petitioner cannot materially change the beneficiary's stated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 249.

Finally, the AAO acknowledges the petitioner's assertions that the beneficiary worked independently with the US-based executives, had budgetary responsibilities worth over \$10 million, and had "a high degree of autonomy." As stated above, the detailed position description submitted in response to the RFE indicated that the beneficiary had limited decision-making authority, worked under the direction of a mentor, and had no budgetary responsibilities. However, even if supported by the evidence of record, these aspects of the beneficiary's employment do not, and cannot, overcome the petitioner's failure to establish that the beneficiary *primarily* performed managerial duties abroad, as opposed to *primarily* performing non-qualifying duties abroad. Again, the AAO emphasizes that whether the beneficiary can be considered a managerial employee, including a function manager, turns on whether the petitioner has sustained its burden of proving that the beneficiary's duties were "primarily" managerial in nature. *See* section 101(a)(44)(A) of the Act. Here, the petitioner has not established this fundamental element of eligibility.

Based on the above, the petitioner failed to establish that the beneficiary was employed abroad in a primarily managerial capacity and the approval of the petition was properly revoked. For this reason, the appeal will be dismissed.

IV. Conclusion

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.