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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

DATE: **JUN 13 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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

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 is a Washington limited liability company that seeks to employ the beneficiary in the United States as its general manager. The petitioner seeks 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 beneficiary, on behalf of the petitioner, submitted a statement dated September 9, 2010, which contained information pertaining to the beneficiary's employment with the foreign and U.S. entities. The petitioner also included a number of financial and business documents pertaining to its own business and to the beneficiary's employer abroad.

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 January 18, 2011 informing the petitioner of various evidentiary deficiencies. The RFE addressed a number of issues, including the beneficiary's employment capacity in his proposed position with the U.S. entity and the prior position held during the beneficiary's employment abroad. The petitioner was instructed to provide organizational charts and job descriptions for the beneficiary's positions with the foreign and U.S. employers. Additionally, the director asked the petitioner to answer a series of questions in an attempt to determine whether the beneficiary's ownership interest in the petitioning entity would preclude the beneficiary from being a true "employee."

In response, the petitioner provided a statement from counsel dated April 11, 2011. Counsel listed the supporting exhibits that were being submitted along with his statement and further asserted that the beneficiary's ownership of the petitioning entity does not preclude the beneficiary from qualifying as an "employee" of that entity. The exhibits submitted to address the director's questions pertaining to the beneficiary's foreign and proposed employment included a description of the beneficiary's employment abroad contained within a statement dated April 1, 2011, organizational charts depicting the foreign and U.S. entities, and job descriptions pertaining to the beneficiary's proposed position with the U.S. entity and the beneficiary's subordinates in his position with that entity.

After considering the petitioner's response, the director determined that the petitioner failed to establish that the beneficiary was employed abroad or would be employed with the U.S. entity in a qualifying managerial or executive capacity. Additionally, in reliance on evidence pertaining to the beneficiary's ownership of the U.S. entity, the director determined that the beneficiary would not be an employee of the petitioning entity. In light of these adverse findings, the director issued a decision dated August 20, 2011 denying the petition.

On appeal, counsel provides an appellate brief in which he focuses primarily on the director's determination that the beneficiary would not be an employee of the petitioning entity due to his ownership of that entity. While counsel also challenges the director's adverse finding with regard to the beneficiary's employment capacity in his proposed position with the U.S. entity, he neither addresses nor even disputes the issue of the beneficiary's employment capacity in his position with the foreign entity.

In light of the petitioner's failure to address or dispute the director's finding regarding the beneficiary's employment capacity in his prior position with the foreign entity, the AAO finds that the petitioner has effectively conceded to the adverse finding. The AAO will therefore dismiss this appeal based on the

petitioner's failure to overcome the director's adverse finding pertaining to the beneficiary foreign employment and this issue need not be further addressed in this decision.

With regard to the director's adverse finding stemming from the beneficiary's ownership of the petitioning entity, the AAO finds that the director's reliance on the issue of the beneficiary's ownership as an eligibility factor appears to be an attempt to address the marginality of the petitioning business or the use of the corporate form as a shell for immigration purposes. While not irrelevant, the issue of whether the beneficiary's ownership interest precludes the beneficiary from qualifying as the petitioner's employee is not the optimal means of addressing these concerns. Instead, the director's attention to the fundamental eligibility requirements should remain the primary focus. Marginality and the validity of the job offer are best addressed by the regulation that requires the petitioner to establish its ability to pay. *See* 8 C.F.R. § 204.5(g)(2); *see also Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm'r 1977) (noting that the fundamental focus of ability to pay is whether the employer is making a "realistic" or credible job offer).

Upon review, the beneficiary's status as an employee of the U.S. entity is not the essential issue for consideration when evaluating the petitioner's eligibility. Therefore, the director's finding as it relates to the beneficiary's status as an employee need not and will not be addressed in this proceeding. In light of the above, the remaining focus of this decision will be the beneficiary's employment capacity in his proposed position with the U.S. entity.

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

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

When examining the executive or managerial capacity of the beneficiary, the AAO reviews the totality of the record, starting with the petitioner's description of the beneficiary's job duties. *See* 8 C.F.R. § 204.5(j)(5). A detailed job description is crucial, as the duties themselves will reveal the true nature of the beneficiary's foreign and proposed employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The AAO will consider this information in light of other relevant factors, including (but not limited to) job descriptions of the beneficiary's subordinate employees, the nature of the business conducted, the size of the subordinate staff available to perform the entity's operational tasks, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role within a given organization.

Looking to the beneficiary's job description as provided in the RFE response, the AAO finds that the information does not establish that the beneficiary would allocate his time primarily to the performance of job duties in a qualifying managerial or executive capacity despite what the beneficiary's position title may indicate. First, the AAO observes that two items on the list—conducting morning meetings and partaking in conference calls with branch managers—provide hourly and percentage-based time allocations that are not consistent with one another. More specifically, the petitioner indicated that the beneficiary would spend one hour conducting morning meetings, which the petitioner determined as being equal to 5% of the beneficiary's time. The petitioner also stated that the beneficiary would spend 1.5 hours, or 10% of the beneficiary's time, on conference calls with branch managers. Assuming that the beneficiary's work week would consist of a total of 40 hours, one hour would constitute 2.5% and 1.5 hours would constitute 3.75% of the beneficiary's time.

The miscalculations noted above make it possible that the remainder of the petitioner's percentage breakdown was equally miscalculated, thus leaving the AAO without a reliable means of determining how the beneficiary would allocate his time between the qualifying and non-qualifying tasks. Even if the AAO were to rely on the percentage breakdowns the petitioner provided, that information indicates that a considerable portion of the beneficiary's time would be allocated to operational tasks that are not within a qualifying managerial or executive capacity. The petitioner indicated that the beneficiary would engage in various types of employee training, allocating 10% of his time to training branch managers on the interview and hiring process and another 15% of his time to hiring and training new sales representatives. The latter assertion contradicts the petitioner's claim that training branch managers would include educating them on the process of training new representatives. It is unclear why both the branch managers and the beneficiary are engaged in the same task. Regardless, the fact that the petitioner indicates that the beneficiary would assume an active role in the training of employees, a task that is operational rather than of a qualifying nature, indicates that approximately 25% of the beneficiary's time would be allocated to these non-qualifying tasks.

The petitioner further indicated that the beneficiary would allocate 5% of his time to interviewing sales representatives, 10% engaging in conferences with "sales coordinators/secretaries about the processing, banking, lead generation and customer services," 5% conducting surveys and studies to determine new business locations, and another 5% attending various conventions throughout the year, all of which would also fall within the category of non-qualifying tasks.

While no single component of those listed above can serve as an adequate basis for an adverse finding, when considered cumulatively, the total remaining time the beneficiary would allocate to qualifying tasks does not exceed the time that would be spent performing tasks that are not within a qualifying managerial or executive capacity. While 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 reviewing the organizational chart that the petitioner was instructed to provide in the RFE, the AAO observes that the beneficiary's position is not included in the chart. Furthermore, while the petitioner's Form I-140 indicates that the petitioner employed 15 in-house and 15 contracted workers at the time of filing the

petition, the organizational chart depicts a total of only 15 employees and thus does not provide an accurate overview of the staffing structure that is claimed to have been in place when the petition was filed.

Notwithstanding the beneficiary's discretionary authority and what can only be assumed as his top placement within the petitioner's organizational hierarchy (as the beneficiary was not specifically depicted in the petitioner's organizational chart), the AAO finds that the petitioner has failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. On this additional basis, this 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.