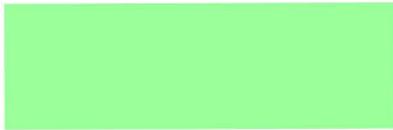




U.S. Citizenship  
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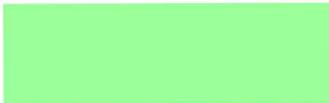


Date: JUN 20 2013

OFFICE: NEBRASKA SERVICE CENTER

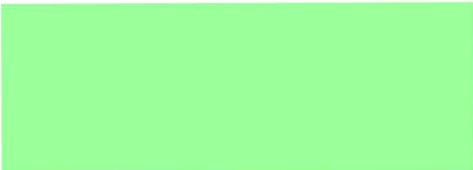


IN RE: Petitioner:  
Beneficiary:



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. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. 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 AAO will dismiss the appeal.

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 [REDACTED] corporation established in 1989, engages in the tire pressure monitoring systems (TPMS) business. It is an affiliate of the beneficiary's foreign employer, [REDACTED] (the foreign entity), located in Taiwan. The petitioner seeks to employ the beneficiary as its Sales Manager, [REDACTED]

The director denied the petition, concluding that the petitioner failed to establish the following: (1) that the beneficiary was employed abroad in a qualifying managerial capacity in one of three years prior to his entry into the United States; and (2) that the beneficiary is currently employed in a managerial position with the U.S. petitioning entity.

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, the petitioner asserts that the beneficiary is employed in the United States in a managerial capacity, specifically, as a function manager. Counsel submits a brief and additional evidence in support of the appeal.

#### 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;

With respect to managerial and executive capacity, section 101(a)(44) of the Act defines the terms 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.

(B) 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. Analysis

### Employment capacity abroad

The first issue to be addressed is whether the petitioner established that the beneficiary was employed abroad in one of three years prior to his entry into the United States in a qualifying managerial capacity.

The petitioner filed Form I-140, Immigrant Petition for Alien Worker, on March 15, 2012. In a letter accompanying the initial petition, the petitioner asserted that the beneficiary was employed aboard by the foreign entity in a managerial capacity as the Sales Manager from March 3, 2008 until October 19, 2010, when he entered the United States in L-1A status. The petitioner described the beneficiary's job duties abroad as follows:

This position was related to the one he performs inside the United States. Specifically, he helped support and promote the sale of [the company's] products to markets throughout the world; advised on product improvement and development; created and oversaw marketing plans and sales strategies; and communicated to engineering teams and overseas manufacturers feedback received from our customers.

The director issued a request for evidence (RFE), requesting the petitioner to submit, *inter alia*, additional evidence regarding the beneficiary's job duties abroad, including the following: a detailed description of the day to day duties performed including the percentage of time the beneficiary spent on each duty, and the amount of time spent supervising/managing subordinates; the number of staff supervised along with a brief description of their duties and educational degrees; a statement as to the beneficiary's immediate supervisor, including title, and level of authority; and an organizational chart showing the beneficiary's position abroad.

In response to the RFE, the petitioner described the beneficiary's job duties abroad as follows:

[The beneficiary] was the Sales Manager for [the foreign entity] from March, 2008 until October, 2010. In this position, [the beneficiary] helped establish, create, and oversaw the sales department that sold [the company's] products, including the Tire Pressure Monitoring Devices. [The beneficiary] helped create this department, as it was recently established when he was hired.

In this position, [the beneficiary] directed and coordinated the distribution of [the company's] products to international markets, including the United States.

- [The beneficiary] created goals, sales territories, and oversaw the initiation and growth of the recruitment programs to locate independent sales representatives to help sell [the company's] products. 20% of his time spent on these duties.

- [The beneficiary] created the initial pricing schedules for [the company's] products. This was based on reviewing market analysis and the cost of various supplies to manufacture the product. 3% of his time spent on these duties.
- [The beneficiary] oversaw marketing activities. 15% of his time spent on these duties.
- [The beneficiary] monitored customer feedback. 12% of his time spent on these duties.
- [The beneficiary] conferred with potential customers, as needed. 15% of his time spent on these duties.
- [The beneficiary] worked and communicated with other [company] employees, department heads, and executives to improve products and efficiency. This included working with [company] departments located in Taiwan, Japan, China, France, and the United States; 15% of his time spent on these duties.
- [The beneficiary] coordinated inventory management; 5% of his time spent on these duties.
- [The beneficiary] planned and was involved with product research, implementation, validation, and testing. 15% of his time spent on these duties.

...

[The beneficiary] was employed as Sales Manager by [the foreign entity], which is Taiwan's [company] office. Regarding the supervised staff, this office is smaller than the [company] location in the United States and did not have any immediate staff to supervise. [The beneficiary] was initially hired to create the sales department and to get it established. In that role, he worked on creating policies, procedures, goals, and helped establish the structure to recruit, train, and hire independent sales representatives to sell [the company's] products, including TPMS aftermarket products. [The beneficiary] had wide latitude in this important position.

The petitioner submitted the foreign entity's organizational chart, which depicted the foreign entity has having several different departments, including sales, admin[istration] and accounting, purchase, production, stock, and product development. The foreign entity's sales department consists of two employees: the beneficiary in international sales, and [redacted] in domestic sales. The positions of the beneficiary and [redacted] are depicted as parallel to each other, and having no subordinates.

The director denied the petition, concluding that the petitioner failed to establish beneficiary was employed abroad in a qualifying managerial capacity.

On appeal, counsel for the petitioner asserts that the beneficiary will be employed in the United States in a qualifying managerial capacity. On appeal, counsel does not contest or even address the director's finding that the beneficiary was not employed in a managerial position for the foreign entity. Therefore, the AAO considers this issue to be abandoned. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at \*1, \*9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO).

Even if the issue of the beneficiary's employment capacity abroad were not abandoned, the record supports the finding that the beneficiary was not employed abroad in a qualifying managerial. The AAO reviews each appeal on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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.

Here, an analysis of the beneficiary's job duties abroad indicates that he was heavily involved in performing non-qualifying, operational duties related to providing direct sales. For instance, the beneficiary monitored customer feedback (12%), conferred with potential customers (15%), coordinated inventory management (5%), and planned and was involved with product research, implementation, validation, and testing (15%). These operational duties accounted for 47% of the beneficiary's time.

In addition, the petitioner described the beneficiary as overseeing the sales department that sold the company's products (20%), and overseeing marketing activities (15%). The foreign entity's organizational chart indicates that the foreign entity had no separate marketing department or marketing employees, and no subordinate sales representatives. Rather, the foreign entity's organizational chart depicts the beneficiary as one of two equal employees within the sales department, with no subordinates. Therefore, the petitioner failed to establish that the beneficiary was actually overseeing and managing the sales and marketing activities, as opposed to performing the actual sales and marketing duties himself. When considered with the beneficiary's operational duties as listed above, the record supports the finding that the beneficiary was employed in a primarily non-qualifying capacity. Because the beneficiary was primarily performing the duties related to the function rather than managing the function, he cannot be considered a "function manager" of the foreign entity's sales department, notwithstanding his title.

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 *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)). In this matter, the petitioner has not provided evidence that the beneficiary managed the function.

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

Employment capacity in the United States

The second issue to be addressed is whether the beneficiary will be employed in a qualifying managerial capacity in the United States.

Upon review, the director's determination with respect to this issue will be withdrawn. The evidence submitted supports a finding that the beneficiary will be employed in a qualifying managerial capacity in the United States as a function manager. The petitioner has established that the beneficiary manages an essential function, i.e., the sales department/functions of the U.S. operations. The AAO agrees with counsel's assertion on appeal that the sales function, managed by the beneficiary, qualifies as an essential function. The petitioner asserts, and the director has not disputed, that the sales department is essential to the petitioner's overall operations as it generated over \$3.5 million in sales in 2011.

The petitioner's description of the beneficiary's duties in the United States indicates that he will be primarily performing managerial duties. For instance, the petitioner indicated that the beneficiary will spend 15% of his time directing the hiring/training process and managing the sales representatives, 10% of his time creating and implementing sales policies and goals, 15% of his time overseeing the other employees working within the sales department, 15% of his time communicating with company executives, and 15% of his time budgeting and allocating resources. These managerial duties constitute the overwhelming majority of the beneficiary's time.

In addition, the petitioner's organizational structure supports the finding that the beneficiary has been relieved of performing the non-qualifying, operational duties of the U.S. operations. The petitioner has consistently asserted that it employs a Regional Sales Manager and several independent sales representatives whom perform the actual sales duties, such as selling the company's products directly to distributors and visiting customers. The petitioner has established that its organizational structure and staffing is sufficiently complex to support the beneficiary in a primarily qualifying capacity.

The director's finding that the beneficiary will not be employed in a primarily managerial capacity in the United States appears to have been based upon an incomplete analysis. In denying the petition on this ground, the director concluded that "the petitioner has not established that the beneficiary will manage a subordinate staff of professional, managerial or supervisory personnel who will relieve the beneficiary from

performing the day-to-day duties required to operate the business.” However, the director failed to consider the beneficiary’s employment capacity as a function manager, which is not dependent upon the beneficiary’s supervision or control of a subordinate staff of professional, managerial or supervisory personnel. As stated above, the petitioner’s organizational structure and staffing within its sales department, consisting of a Regional Sales Manager and several independent sales representatives who all perform direct sales functions, is sufficient to establish that the beneficiary manages the function rather than performs the duties related to the function.

### **III. Conclusion**

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. Here, with respect to the question of whether the beneficiary will be employed in a qualifying managerial capacity in the United States, the petitioner has met its burden. With respect to the question of whether the beneficiary was employed abroad in a qualifying managerial capacity, the petitioner has not met its burden.

**ORDER:** The appeal is dismissed.