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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: MAR 05 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 is a Texas corporation that seeks to employ the beneficiary in the United States as its general manager. 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 May 10, 2011, which contained relevant information pertaining, in part, to the beneficiary's proposed employment with the petitioning entity. The petitioner also provided supporting evidence in the form of corporate, business, and financial documents pertaining to the beneficiary's U.S. and foreign employers.

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 October 7, 2011 informing the petitioner of various evidentiary deficiencies. The petitioner was instructed to provide a more detailed job description pertaining to the beneficiary's proposed employment listing the beneficiary's job duties and their time allocations. The petitioner was also asked to provide its organizational chart depicting the beneficiary's subordinates, their job titles, job duties, and respective educational levels. The director requested the same evidence to establish that the petitioner's foreign parent company employed the beneficiary in a qualifying managerial or executive capacity. Additionally, the director requested copies of the beneficiary's quarterly tax returns, including the tax return for the second quarter of 2011 during which the Form I-140 was filed.

Although the petitioner provided supplemental job descriptions for the U.S. and foreign positions and the requested quarterly tax returns, it did not provide the requested organizational charts or any information pertaining to the petitioner's staffing.

After considering the petitioner's response, the director determined that the petitioner failed to establish that the beneficiary's employment with the U.S. entity would be within a qualifying managerial or executive capacity. The director determined that the petitioner provided a deficient job description that lacked sufficient information about the beneficiary's specific job duties or the roles of others within the petitioner's organizational hierarchy. The director also commented on the petitioner's lack of organizational complexity, questioning how the petitioner's limited two-person staff would be sufficient to relieve the beneficiary from having to allocate his time primarily to the performance of non-qualifying managerial or executive capacity.

With respect to the beneficiary's foreign employment, the director found that the petitioner's response to the RFE was insufficient to establish that he was employed in a managerial or executive capacity. The director noted that the position description provided was overly broad and offered little understanding of the beneficiary's actual duties or the percentage of time he would allocate to specific tasks. The director further commented that, while the petitioner claimed that the beneficiary supervised five sales employees, it had not established that the beneficiary primarily performed high-level tasks, or that he supervised a subordinate staff of professionals, supervisors or managers.

On appeal, counsel for the petitioner disputes the denial of the petition and the director's underlying findings and asserts that the beneficiary was employed abroad and would be employed in the United States in a qualifying capacity.

The AAO finds that counsel's assertions are not persuasive and thus fail to overcome the director's adverse decision. A comprehensive analysis of the AAO's findings is provided 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.

Turning to the first issue addressed by the director — the beneficiary's employment capacity in his proposed position with the petitioning entity — the AAO gives primary consideration to the petitioner's description of the beneficiary's proposed position, as a detailed description of the beneficiary's actual daily tasks tends to 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). The AAO also gives ample consideration to the job duties of the beneficiary's subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts that contribute to a comprehensive understanding of the beneficiary's actual role in a business.

In the present matter, the AAO finds that the beneficiary's job description is not supported due to the lack of an available support staff. To clarify, the petitioner's use of the term "supervise" implies that the petitioner is staffed with employees whom the beneficiary would supervise as they, rather than the beneficiary, would perform the underlying operational tasks. However, as properly pointed out in the director's decision, the petitioner's second quarterly tax return for 2011 indicates that the petitioner had no more than two employees, including the beneficiary, at the time the Form I-140 was filed.

Not only does the evidence of record conflict with the petitioner's original claim of having three employees, but it gives rise to doubt as to the petitioner's ability to relieve the beneficiary from having to allocate his time

primarily to non-qualifying operational tasks. In other words, merely claiming that the beneficiary would assume a leadership position and exercise discretionary decision-making is not sufficient to establish that the beneficiary would primarily perform tasks of a qualifying nature when there is an overall lack of evidence showing who, if not the beneficiary, would carry out those tasks that are required for the petitioner to successfully sell its products on a daily basis. The petitioner has not provided adequate supporting evidence establishing who would market and sell its products and who would perform its routine administrative and clerical tasks, all of which are undoubtedly necessary components of the petitioner's sales-based business. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Although counsel's appellate brief refers to an employment appointment letter and receipt for tax services, neither document is sufficient to overcome the director's findings. The employment letter, which is dated October 31, 2011, indicates that the petitioner hired to manage the petitioner's daily sales, purchases, shipments, and payments. However, as the letter is dated five months after the petition was filed, it does not determine that was employed at the petitioning entity at the time of filing. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The hiring of an employ after the filing of the petition is not relevant in overcoming the denial in this matter. Additionally, the AAO questions who was performing job prior to the date she was hired. Similarly, as the tax service receipt that the petitioner submitted is undated, the relevance of this evidence is also questionable given the uncertainty as to the date(s) that the tax services were provided.

Finally, the description of the beneficiary proposed employment indicates that a considerable portion of the beneficiary's time would be allocated to daily operational tasks such as networking with and visiting clients, conducting research to find new suppliers, negotiating with suppliers and shipping companies, and reporting to the parent entity regarding business opportunities. 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).

Despite the petitioner's need for the beneficiary to carry out tasks that are outside the parameters of the statutory definitions, the petitioner maintains the burden of establishing that the beneficiary would more likely than not primarily perform tasks within a qualifying managerial or executive capacity. Given the numerous deficiencies discussed above, the AAO finds that neither the beneficiary's job description nor the petitioner's organizational composition at the time of filing adequately establish that the petitioner would be able to relieve the beneficiary from having to allocate the primary portion of his time to non-qualifying operational tasks. Therefore, on the basis of this conclusion, the instant petition cannot be approved.

Finally, as determined by the director, the record contains similarly deficient evidence with regard to the beneficiary's employment capacity with the foreign entity. The director emphasized that the petitioner's response to the RFE did not include the requested detailed description of the beneficiary's actual duties, and

further found that, based on the description submitted, it appeared that the beneficiary was primarily engaged in the first-line supervision of non-professional sales personnel. The AAO further notes that the petitioner also failed to provide the requested organizational chart depicting the beneficiary's position within the foreign entity's organization. It is noted that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

On appeal, the petitioner submits a revised position description for the beneficiary's former role as the foreign employer's vice president and senior sales manager and asserts that such job duties reflect that the beneficiary was employed in an executive capacity abroad. The AAO notes that the revised duties suggest a significantly heightened level of authority when compared to the position description the petitioner submitted in response to the RFE. For example, where the petitioner initially stated that the beneficiary was responsible to "maintain and extend client networks by attending conferences," it now asserts that the beneficiary's position involved "establish[ing] the goals and policies of the Organization through reviewing other employees' reports of visiting conferences and seminars to maintain and extend client networks." The petitioner has similarly altered all five job duties submitted in response to the request for evidence, added phrases such as "plans and directs the sales division," and "directs the company" without explanation for these changes.

The petitioner was given the opportunity to provide a detailed and comprehensive description of the beneficiary's foreign duties in response to the RFE and failed to do so. The new position description submitted on appeal does not add further clarity to the prior position description but instead adds new generic language without further specifying the nature of the beneficiary's actual duties. Other than submitting the revised position description, the petitioner does not otherwise address the beneficiary's foreign employment on appeal. Accordingly, the petitioner has failed to overcome the director's adverse findings, and the appeal will be dismissed based on the petitioner's failure to establish that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.