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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: **MAY 07 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 AAO inappropriately applied the law in reaching its 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 motion 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 any motion to 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, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Florida corporation that is engaged in sales of products and services and consulting, and it seeks to employ the beneficiary 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.

On April 4, 2012, the director denied the petition concluding that the petitioner failed to establish that the beneficiary's proposed employment with the U.S. entity would be within a qualifying managerial or executive capacity.

On appeal, counsel disputes the director's findings and provides an appellate brief laying out the grounds for challenging the denial.

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.

The issue that will be addressed in this proceeding calls for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the petitioner submitted sufficient evidence to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

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.

In examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). Published case law clearly supports the pivotal role of a clearly defined job description, as the actual duties themselves 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); see also 8 C.F.R. § 204.5(j)(5). That being said, however, USCIS reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the petitioner's business, the employment and remuneration of employees, as well as the job descriptions of the beneficiary's subordinates, if any, and any other facts contributing to a complete understanding of a beneficiary's actual role within a given entity.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Upon review of the petition and evidence, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity.

In a letter dated, March 16, 2011, the petitioner explained that the beneficiary's duties include:

[The beneficiary] has the position of General Manager where she directs and manages all aspects of the petitioner business using her vast experience in the industry. Her duties include conducting [sic] general administration affairs of the company, acting as a liaison and representative for the company, engaging in long-range planning, identifying business opportunities, analyze the market conditions to set strategic planning goals, setting quotas, expenses, development of advertising and promoting products in the United States and abroad. She defines the products and services to be promoted in the United States and Latin America. She [is] also in charge of negotiating contracts and business negotiations and obtain new business.

The petitioner further provided a breakdown of the beneficiary's duties, indicating that she allocates: 25% of her time to implementing new policies and goals and coordinating the company's sales, advertising and overall operations; 20% of her time to directing professional and supervisory personnel, including the "Accounting Department, Administrative/Marketing, Import Export and Sales Department"; 5% of her time to recruiting, training and firing personnel; 10% of her time to implementing provision of services and implementing policies and objectives according to market opportunities; 25% of her time to development sales plans and creating advertising and promotional programs; and 15% of her time reviewing financial statements and defining the company's products and services based on market and market analysis.

The petitioner explained that the beneficiary's finance and administrative duties include reviewing financial statements, approval of orders and checks, handling cash flow, supervising accounts payable and receivable, and supervising invoicing, as well as implementing financial and administrative policies. The petitioner specified that the beneficiary's marketing duties including supervising purchase orders placed to suppliers by the import/export department, contacting freight company agents, reviewing the encoding of export material, reviewing export declarations, revising and approving payments for incoming and outgoing freight, and identifying products to be advertised.

The petitioner also provided an organizational chart which indicated the president supervises the beneficiary, who in turn supervises an accountant, an administrative manager/marketing, a sales manager and an employee in the import/export department.

Due to the overly general and vague list of job duties, the AAO is unable to gain a meaningful understanding of how much time the beneficiary will spend performing qualifying tasks versus those that would be deemed non-qualifying.

For instance, in describing the beneficiary's position in the United States, the petitioner stated that the beneficiary will spend 25% of her time with the "implementation of new policies and goals" and "use of [her] overall market knowledge (operational knowledge international/local) when exercising discretion to coordinate the company's sale, advertising and overall operations." The petitioner also stated that the beneficiary will "oversee all activities necessary to provide exceptional sale, contract negotiation, consulting, maintenance to clientele"; "use of industry knowledge to identify opportunities to increase sales"; "implement policies and objectives according to the current market"; "develop a plan for sales for [the petitioner's] products and services in the United States"; "development and creation of advertising and promotional programs for the petitioner"; and, "review financial statements to measure the company's goal achievement, including invoicing, check approvals, cash flow, approval order, etc." However, it is unclear which specific tasks actually fall within these broad categories. Merely using the term "managing" the operations to describe the beneficiary's function does not establish that the supervisory tasks the beneficiary will perform are of a qualifying nature.

The petitioner also provided an organizational chart with all employees supervised by the beneficiary and a brief job description for each employee. According to the organizational chart, the beneficiary supervises employees in the import/export department, accounting department, sales department and administrative/marketing department. The petitioner also stated that three employees supervised by the beneficiary are full-time employees and one employee is not.

The director's decision, dated April 4, 2012, noted a discrepancy with respect to the petitioner's number of full-time employees. The director noted that according to the petitioner's tax documents and quarterly wage reports, the petitioner employs five individuals but it appears that only two individuals work on a full-time basis. It is not clear that the beneficiary's subordinates actually work sufficient hours to relieve her from performing the non-qualifying duties associated with the company's sales, marketing, finance, administrative and import-export activities that she is claimed to supervise and manage. 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). If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In addition, the petitioner did not provide any evidence that it actually employs the accountant independent contractor such as paystubs, a contract agreement or IRS Form 1099. 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)).

As discussed above, the petitioner has not identified employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. According to the documentation submitted, it appears that the beneficiary supervises three employees that are not in full-time positions although the petitioner stated that they were full-time employees. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988). 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).

Although counsel suggests that the beneficiary's position may be deemed as that of a function manager, counsel cannot merely raise these alternate claims to avoid addressing the non-qualifying tasks the beneficiary would have to perform by overseeing the work of non-supervisory, non-professional, and/or non-managerial employees. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, counsel's assertions are not consistent with the job description and the organizational chart that the petitioner has provided in which considerable focus was placed on the beneficiary's supervision of subordinate employees.

Nevertheless, the AAO acknowledges counsel's contention that the beneficiary's position is an essential function within the petitioner's organization. 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 employed in a managerial or executive capacity. *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. at 604. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. As noted above, the petitioner provided a vague job description that does not establish that the beneficiary is primarily performing in a managerial capacity.

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 operations 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 no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of 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.

As discussed above, the inconsistent evidence of the employees supervised by the beneficiary does not provide sufficient evidence of employees, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate her position to that of a "function manager" as contemplated by the governing statute and regulations. As discussed above, the petitioner has not established that the beneficiary's duties are primarily managerial in nature, and thus she cannot be considered a "function manager."

Other than stating that the proposed position will be responsible for managing an unidentified essential function, counsel does not provide sufficient explanation or evidence in support of his claim that the beneficiary would qualify as a function manager pursuant to section 101(a)(44)(A)(ii) of the Act. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

In summary, the petitioner has failed to provide sufficient evidence to establish that the beneficiary was employed abroad and that he would be employed in the United States in a qualifying managerial or executive capacity and based on these findings, the instant petition cannot be approved.

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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.