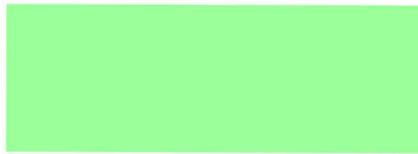




**U.S. Citizenship
and Immigration
Services**

(b)(6)



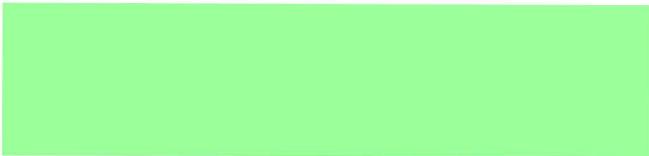
DATE: **MAY 07 2013** OFFICE: NEBRASKA SERVICE CENTER

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, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a multinational corporation that seeks to employ the beneficiary in the United States as its human resources 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 August 20, 2010. The petitioner provided little information about the beneficiary's employment abroad, focusing on the beneficiary's proposed position with the U.S. entity. The petitioner provided a description of the duties to be performed by the beneficiary along with a proposed percentage breakdown and a list of the beneficiary's subordinate employees and descriptions of their respective job assignments. The petitioner indicated that the beneficiary is a function manager and provided an organizational chart depicting the proposed position within the human resources department.

The director reviewed the petitioner's submissions and determined that an approval was not warranted. The director issued a request for evidence (RFE) dated August 10, 2011 informing the petitioner of various evidentiary deficiencies concerning the beneficiary's foreign and proposed employment. The director instructed the petitioner to provide the foreign and U.S. entities' organizational charts depicting the beneficiary's respective positions with each entity. The director also asked the petitioner to provide a more detailed description of the beneficiary's employment abroad, and evidence of the beneficiary's qualifying employment accompanied by a detailed description of the duties the beneficiary performed and the percentage of time the beneficiary allocated to the performance of each of his assigned tasks. The director asked the petitioner to refrain from grouping tasks together when assigning time constraints. Similarly, the director asked the petitioner to provide a list of the beneficiary's proposed job duties and their respective time constraints. Based on information gathered from the previously provided U.S. organizational chart, the director observed that the beneficiary would oversee one manager and several non-professional employees.

In response the petitioner provided a statement dated October 28, 2011 from counsel addressing the beneficiary's proposed employment and a statement dated October 10, 2011 from the foreign entity's human resources director addressing the beneficiary's prior employment with the foreign entity. Although instructed to do so in the RFE, the petitioner did not provide a copy of the foreign entity's organizational chart depicting the beneficiary's position abroad prior to assuming his position with the U.S. entity.

After considering the petitioner's response, the director determined that the petitioner failed to establish that the beneficiary was employed abroad and would be employed by the U.S. entity in a qualifying managerial or executive capacity. The director considered the job descriptions provided in response to the RFE as well as the information contained with the petitioner's organizational hierarchy and concluded that the evidence does not establish that the beneficiary's foreign and proposed positions are primarily comprised of tasks within a qualifying managerial or executive capacity. The director issued a decision dated December 28, 2011 denying the petition.

On appeal, counsel provides a brief in which he summarizes the evidence submitted in support of the petition and provides further clarification about the beneficiary's job duties and responsibilities in his position with

the U.S. entity. Counsel urges the AAO to consider and rely on prior approvals of the L-1 nonimmigrant petitions that the petitioner filed on behalf of the same beneficiary.

The AAO has reviewed the record in its entirety and finds that counsel's assertions are not persuasive in overcoming the director's finding of ineligibility. The AAO will address the petitioner's eligibility and counsel's statements 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

[REDACTED]

(b)(6)

Page 4

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.

As indicated above, the two primary concerns in this proceeding call for an analysis of the beneficiary's employment capacity in his position with the foreign entity and his proposed position with the petitioner. In order to address these issues, the AAO will first look to the job descriptions of the beneficiary's respective positions with the foreign and U.S. employers. See 8 C.F.R. § 204.5(j)(5). While other factors are also considered, published case law supports the pivotal role of a detailed 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).

Turning first to the beneficiary's employment abroad, the AAO will examine the beneficiary's foreign job description as contained in the October 10, 2011 statement provided by [REDACTED], the foreign entity's director of human resources. According to [REDACTED] job description, the beneficiary allocated his time to ten categories most of which involved non-qualifying tasks. For instance, with regard to the beneficiary's role in resource hunting and recruitment, to which the beneficiary allocated 20% of his time, [REDACTED] indicated that in addition to various qualifying tasks, the beneficiary also allocated his time to mediating union grievances. Similarly, the job description indicated that a portion of the beneficiary's time in the category of reports and records was allocated to such non-qualifying tasks as maintaining employment documents and data and preparing reports reflecting employee turnover rates, affirmative action, personnel actions and safety incidents, creating and organizing records systems for payroll and benefits purposes, and collecting human resources data for the purpose of presenting such data in oral and written reports. With regard to the category of affirmative action and employment opportunity programs, the beneficiary allocated a portion of his time to coaching and counseling plant personnel on dispute resolution and compliance with federal, state, and corporate guidelines, which are also non-qualifying operational tasks. In assessing the job

duties in the liaison category, the beneficiary allocated his time to non-qualifying tasks such as representing the human resources department by facilitating human resources actions, providing job descriptions, and preparing various statements and staff reports. Additionally, the beneficiary allocated his time to counseling all personnel on employment-related policies, procedures, laws, and regulations; advising managers and supervisors on proper supervisory practices; providing solutions to organizational problems; investigating discrimination and harassment complaints; arbitrating employee grievances; and developing an annual budget. These are operational and administrative tasks rather than tasks within a managerial or executive capacity. Furthermore, while [REDACTED] stated that the beneficiary coached over 80 team members, he failed to provide an organizational chart that corresponds with the beneficiary's period of employment abroad, thus failing to establish that the subordinates under the beneficiary's supervision were managerial, supervisory, or professional employees. See section 101(a)(44)(A)(ii) of the Act.

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 performed and would perform are only incidental to his positions. 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).

The petitioner failed to comply with the director's request to list and assign time constraints to individual tasks, choosing instead to assign time constraints to broad categories, which included both qualifying and non-qualifying tasks. This made it impossible either for the director or for the AAO to gauge how much of the beneficiary's time was allocated to qualifying tasks versus those tasks that were indicative of providing services associated with the human resources department.

Turning to the job description for the beneficiary's proposed employment, the AAO finds that the record is similarly deficient. The petitioner failed to provide a comprehensive description of the specific qualifying tasks that the beneficiary would perform. On the organizational chart the petitioner provided to illustrate the hierarchy of the human resources department, the beneficiary's position is not one that is at a senior level with respect to the human resources function. Rather, the chart depicts the beneficiary in a lower-level position, subordinate to a complex human resources manager and a complex manager. If the AAO were to consider the beneficiary as a personnel manager rather than as a function manager, the chart shows that only one of the beneficiary's subordinates at the time of filing the petition was a managerial employee¹ while the remainder of the positions were either clerical or administrative staff, not professionals as the statute requires.

The petitioner claims that the beneficiary was and would be employed in the role of a function manager—a term that 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—while simultaneously discussing the beneficiary's line of subordinate employees, which is applicable to the role of a personnel manager. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). Regardless, whenever a claim is premised on the assertion that the beneficiary is managing an essential function, the petitioner must furnish a written job offer, which identifies the function with specificity, articulates the

¹ While the chart shows a second managerial position subordinate to the beneficiary, that position was vacant at the time the petition was filed.

essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. 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. 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).

The petitioner has failed to establish that the beneficiary's employment abroad and his proposed employment with the U.S. entity required and would require the beneficiary to allocate the primary portion of his time to the performance of tasks in a qualifying managerial or executive capacity. While the AAO acknowledges the previously approved nonimmigrant petitions that the petitioner filed on behalf of the same beneficiary, eligibility has not been established in this matter. Given that the AAO is not required to approve applications or petitions where eligibility has not been established, the AAO finds it unnecessary to give any evidentiary weight to prior approvals which may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). USCIS need not treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). The approval of a nonimmigrant petition does not serve as a guarantee that USCIS will approve an immigrant petition filed on behalf of the same beneficiary. USCIS denies many I-140 immigrant petitions after approving prior nonimmigrant I-129 L-1 petitions. See, e.g., *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 25; *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989).

Each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. USCIS is not required to search through previously provided evidence submitted in support of other petitions to determine the approvability of the petition at hand.

The AAO finds that the petitioner has failed to establish that the beneficiary was employed abroad or that he would be employed in the United States in a primarily managerial or executive capacity and on the basis of these two conclusions the instant 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.