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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

DATE: **MAY 13 2013** OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 four-employee California corporation that seeks to employ the beneficiary in the United States as its "CEO/President." 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 March 20, 2012, which contained information pertaining to the beneficiary's employment abroad and with the petitioning entity. The petitioner also provided corporate and financial documents pertaining to the beneficiary's employer abroad and the prospective U.S. employer.

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 May 14, 2012 informing the petitioner of various evidentiary deficiencies. With regard to the beneficiary's positions with the foreign and U.S. entities, the director requested the submission of more detailed job descriptions pertaining to the beneficiary's foreign and proposed employment. The director instructed the petitioner to list the beneficiary's job duties with each entity and to indicate the percentage of time the beneficiary allocated and would allocate to each item on the list. Additionally, the director asked that the petitioner provide both entities' organizational charts depicting each company's staffing structure and the beneficiary's placement therein as well as the titles and job descriptions of each entity's employees. The petitioner was expressly asked to assign time allocations to the beneficiary's individual job duties rather than groups of tasks.

With regard to the petitioner's qualifying relationship with the foreign entity, the director instructed the petitioner to provide additional evidence establishing that the beneficiary's U.S. and foreign employers share common ownership and control.

Although the petitioner responded to the RFE, it failed to provide the requested organizational chart that corresponds with the beneficiary's employment abroad. Instead, the petitioner provided the foreign entity's organizational chart reflecting the staffing as of August 31, 2011 at which time the beneficiary was already working for the U.S. entity. The petitioner did, however, provide a copy of its own organizational chart complete with the names, position titles, and job descriptions of the five employees (including the beneficiary) who were depicted in the chart. The petitioner also provided a statement dated August 2, 2012 which contained supplemental job descriptions pertaining to the beneficiary's respective positions with the foreign and U.S. employers. Lastly, with regard to the petitioner's qualifying relationship with the foreign entity, the petitioner provided various documents, including banking transactions, which showed the foreign entity's fund transfer for the purpose of purchasing the petitioner's stock and the foreign entity's registration documents showing a change of name and address as well as changes in the list of board members.

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. The director also found that the petitioner did not provide evidence to support the claim that the foreign company underwent a name change and therefore failed to establish that a qualifying

relationship exists between the petitioner and the foreign entity. The director therefore issued a decision dated September 13, 2012 denying the petition based on the adverse findings discussed herein.

On appeal, counsel for the petitioner provides an appellate brief disputing the director's adverse findings on the basis that such findings are erroneous and amount to an abuse of discretion. With regard to the issue of a qualifying relationship, counsel points to the additional name change certificate that has been provided on appeal to establish that the foreign entity underwent a name change on June 4, 2010. The AAO finds that this document along with other foreign documents that were submitted on appeal constitute sufficient evidence of an ongoing qualifying relationship between the petitioner and the beneficiary's employer abroad. Therefore, the AAO hereby withdraws the director's adverse finding regarding the requisite qualifying relationship.

Notwithstanding the above, the AAO concludes that the petitioner has failed to overcome the deficiencies that were pointed out in the RFE with regard to the beneficiary's qualifying employment with the foreign and U.S. entities. Therefore, the discussion below will address the two remaining adverse findings.

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.

In general, 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 by the entities in question, the size of the subordinate staff of the foreign and U.S. entities, and any other facts contributing to a comprehensive understanding of the beneficiary's actual roles in the two respective entities.

The statements submitted in the RFE response regarding the deficient job descriptions fail to comply with the director's express instructions. Namely, despite the director's request to have the petitioner specify the beneficiary's individual tasks and their respective time allocations, the petitioner assigned time allocations only to broad job responsibilities, thereby failing to clarify how much time the beneficiary allocated and would allocate to specific tasks. The AAO notes that the description of the beneficiary's employment abroad shows that the beneficiary performed the following non-qualifying duties: conducting daily research of "economic indices," gathering market data of competitors, visiting competitors' retail locations, maintaining relationships with customers, communicating with vendors, and hiring and training warehouse personnel. Given that the beneficiary's list of job duties was comprised, in part, of non-qualifying tasks, the AAO finds that it is particularly necessary to establish how much time the beneficiary allocated to qualifying tasks versus the non-qualifying ones. 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 or would perform were/are only incidental to the position in question. 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).

Moreover, the AAO cannot overlook the fact that the petitioner failed to comply with the director's request for the foreign entity's organizational chart "that corresponds with the beneficiary's qualifying employment abroad." Given that the beneficiary has been employed by the petitioning entity since 2009, providing an organizational chart that reflects the foreign entity's organization as of August 2011 fails to address the director's request. 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).

In light of the above, the AAO finds that the petitioner failed to provide the evidence and information that is necessary to establish that the beneficiary allocated his time primarily to the performance of qualifying managerial- or executive-level tasks. On the basis of this adverse conclusion, the instant petition cannot be approved.

Turning to the issue of the beneficiary's proposed employment with the U.S. entity, the AAO notes that the petitioner provided a job description that was not in compliance with the director's request in that a time percentage was not assigned to specific job duties, but rather to broad categories. Although this flaw is less problematic with respect to the beneficiary's proposed job description, given that only 30% of the job duties can be affirmatively deemed to be non-qualifying, the evidentiary value of the job description is diminished nevertheless due to the petitioner's use of vague terms to describe certain aspects of the job as well as an overall incongruity between claims made in the job description and those depicted by means of its organizational chart.

With regard to the level of detail in the job description, the AAO finds that no determination can be made as to the qualifying nature of certain job duties, including researching applicable legal, regulatory, and ethical compliance requirements, overseeing warehouse activities, and overseeing analysis of invoices and work and purchase orders. The petitioner did not clarify the means by which the beneficiary would oversee these various operational tasks, nor is it apparent that the beneficiary's role would be limited to merely oversight

with regard to invoicing, as none of the employees listed in the chart are tasked with any invoice-related job duties. The AAO therefore finds that the petitioner has failed to establish that the beneficiary's role is merely supervisory rather than participatory with respect to these tasks.

Additionally, in reviewing the petitioner's organizational chart as offered in the RFE response, the AAO notes that a CFO is depicted as the beneficiary's direct subordinate who oversees three employees with managerial position titles—a production manager, a general manager, and a warehouse manager. However, despite the fact that the CFO is depicted as the direct subordinate of the employees at the bottom tier of the petitioner's organizational hierarchy, the beneficiary's job description indicates that the beneficiary would actively engage in overseeing the lower-level employees directly by evaluating employee performance, overseeing the warehouse activities, and supervising employees in receiving, storing, testing, inspecting, and shipping fabric and clothing. Moreover, the chart does not indicate that any of the managerial position titles of the employees the beneficiary oversees are accurate in indicating that the employees are managerial or supervisory. Given that the beneficiary would play a significant role in overseeing the lower-tier employees, the question of how much time the beneficiary would allocate to managing these employees is also one of considerable significance, as overseeing the work of non-supervisory, non-professional, or non-managerial employees cannot be deemed as time spent in a qualifying managerial or executive capacity.

Published case law supports the pivotal role of a clearly defined job description, deeming the actual duties themselves as the factors that determine 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 petitioner has not provided the necessary clarity with regard to the tasks the beneficiary would perform to enable the AAO to affirmatively conclude that the beneficiary would allocate his time primarily to the performance of tasks within a qualifying managerial or executive capacity. On the basis of this second adverse conclusion, 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.