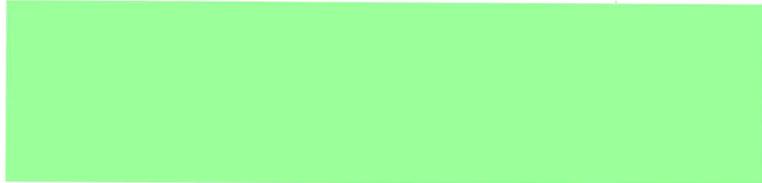


U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave. N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

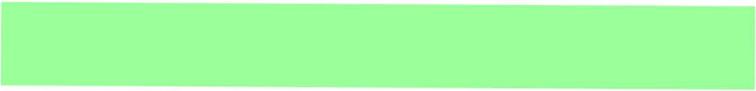


DATE: **MAY 16 2013**

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

The petitioner is a limited liability company organized in the State of Maryland. 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 23, 2011, which contained information pertaining to eligibility criteria, including the beneficiary's employment with the petitioning entity. The petitioner also provided business and financial documents pertaining to the beneficiary's employer abroad and with the proposed U.S. employer.

The director reviewed the petitioner's submissions and determined that additional information was needed with regard to the beneficiary's proposed employment. The director therefore issued a request for evidence (RFE) dated August 15, 2011 instructing the petitioner to provide a more detailed description of the proposed employment specifically enumerating the beneficiary's actual daily tasks and indicating what percentage of time the beneficiary would allocate to each task on the list. The petitioner was also asked to provide a copy of its own organizational chart depicting its staffing structure at the time the petition was filed. The director asked the petitioner to name all employees and to provide job descriptions of the beneficiary's subordinates.

In response to the RFE, the petitioner provided a list of the duties and responsibilities that comprise the beneficiary's proposed employment along with the requested percentage breakdown. The petitioner also provided a copy of its organizational chart listing all positions, indicating which positions were filled and which were vacant and naming the employees who were part of the organization. The organizational chart was accompanied by job descriptions for the director of finance and director of sales—the director's immediate subordinate positions both of which were shown as vacant at the time of filing the petition. Lastly, the petitioner provided copies of employee pay stubs for June, July, and August of 2011 for employees who filled the following positions with the petitioning organization: office manager, warehouse manager, sales manager, sales associate, and CEO (the beneficiary's position).

After considering the petitioner's submissions, the director issued a decision dated May 23, 2012 denying the petition based on the determination that the petitioner failed to establish that the beneficiary would be employed with the U.S. entity in a qualifying managerial or executive capacity. The director properly noted the numerous vacant positions within the petitioner's organizational structure and found that the job description provided in response to the RFE was deficient in that it lacked the necessary degree of detail to clarify what actual tasks the beneficiary would complete on a daily basis.

Although the director made various observations regarding the wage and tax documents pertaining to the 2010 filing period, the AAO finds such observations to be irrelevant in the present matter. Even if it can be determined that the petitioner was not eligible for an immigrant visa in 2010, this fact has no bearing on whether the petitioner is eligible for approval of the instant visa petition, which was filed in 2011. While the petitioner has the burden of establishing eligibility at the time of filing the petition, and is not relieved of that burden until the immigrant visa is issued, the petitioner does not have to establish eligibility prior to the filing of a petition. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971); *see also Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305, 1308 (9th Cir. 1984).

On appeal, counsel for the petitioner asserts that the director's decision is erroneous and asserts that the fact that the beneficiary's name appears on the petitioner's invoices is not an accurate indicator that the beneficiary is performing non-qualifying tasks. It is further noted that counsel marked box B on the Form I-290B, thus indicating that an appeal brief and/or further supporting evidence would be forthcoming. To date, approximately eleven months since the appeal was filed, the record has not been supplemented with any further evidence or information. Therefore, the record will be considered to be complete as presently constituted and a decision will be made based on the evidence that is currently before the AAO.

After reviewing the record in its entirety, the AAO finds that the petitioner has failed to overcome the director's denial and will fully address the relevant documentation 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.

In general, when examining the executive or managerial capacity of the beneficiary, the AAO reviews the totality of the record, starting first 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 then consider this information in light of other relevant factors, including (but not limited to) job descriptions for the beneficiary's subordinate employees, the nature of the petitioner's business, the size of its subordinate staff, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role within the petitioner's organizational hierarchy.

The AAO finds that the petitioner has failed to comply with the director's request for a detailed delineation of the beneficiary's specific daily tasks. Instead, the petitioner merely added a percentage breakdown to a previously existing job description, which the director found to be deficient in its lack of necessary information and thus issued an RFE in an effort to gather additional information. For instance, the petitioner broadly stated that 10% of the beneficiary's time would be allocated to establishing the company's mission and ensuring that this information is conveyed to all employees; 20% would be allocated to establishing and implementing policies and procedures; 5% would be allocated to ensuring the company's compliance with

federal and state laws and regulations; 10% would be allocated to setting reviews and enforcing policies and overseeing managers and consultants; and another 10% would be allocated to ensuring that the petitioner “meets the targeted areas.” It is noted that no clarifying information was provided to explain what the “targeted areas” are, what policies and procedures the beneficiary would be implementing, or how any of the broad job responsibilities listed above translate into actual daily tasks. While the petitioner previously indicated that the beneficiary’s job duties may vary from day to day, none of the above is a sampling of any daily tasks. Rather, the above are vague statements that, at best, convey a sense of the beneficiary’s discretionary authority, but impart no meaningful understanding of what specifically the beneficiary would be doing on a daily basis or how the existing personnel would relieve the beneficiary from having to allocate his time primarily to the performance of non-qualifying operational tasks.

Moreover, the claim that the beneficiary would allocate 10% of his time to handling the recruitment of executives, consultants, and other personnel is not consistent with the evidence on record given the fact that both of the positions shown as the beneficiary’s immediate subordinates were vacant in April of 2011 when the petition was filed, despite the fact that the petitioner has been in existence since 2007 and the beneficiary has been working for the petitioner since 2009. In fact, these vacancies give the AAO cause to question whom the beneficiary supervised at the time of filing, and whether his direct subordinates at the time of filing the petition were supervisory, professional, or managerial employees. The evidence of record strongly indicates that they were not.

Additionally, while counsel asserts that having the beneficiary’s name on the petitioner’s invoices is not an indication that the beneficiary is performing non-qualifying tasks, the AAO disagrees with this assertion. In light of the deficient job description and the numerous vacancies within the petitioner’s organizational hierarchy, the fact that the beneficiary is listed as the contact person on the petitioner’s sales invoices is telling as to the beneficiary’s level of participation and his potentially active role with regard to the sales and customer service aspects of the petitioner’s business, particularly given the fact that the petitioner’s sales manager and sales associates received salaries that indicate that the petitioner either employed these individuals on an extremely limited part-time basis or that it did not employ these individuals at all when the I-140 was filed. In other words, the low salaries indicated on both employees’ W-2 statements for 2011 indicate that both may have been hired later in 2011 or that they may have been fired prior to the filing of the petition thus indicating that the compensation may be a representation of only a fraction of 2011. Although there is no clear statement from the petitioner that would explain why the beneficiary’s name is included on the petitioner’s sales invoices, the AAO finds it odd that the petitioner would choose to include the beneficiary’s name on its sales invoices unless the beneficiary is intended to serve as the point of contact for anyone purchasing the petitioner’s products. Despite counsel’s objection on appeal, counsel has provided no explanation to refute the director’s assessment of the evidence.

Lastly, in reviewing assertions made in the initial supporting statement dated March 23, 2011 with regard to the beneficiary’s proposed employment, the AAO notes the petitioner’s claim that the beneficiary “is in the process of researching and negotiating contracts with clients,” thus further indicating that the beneficiary’s role in developing the business involves performing non-qualifying operational tasks that included a sales and marketing component. As the petitioner failed to provide specific information about the beneficiary’s daily tasks, it is unclear how much time the beneficiary would allocate to qualifying tasks versus those that are non-qualifying. 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 would only be 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).

In light of the deficient job description which failed to identify specific tasks and did not establish how much time the beneficiary would allocate to tasks of a qualifying nature, the AAO is not persuaded that the beneficiary would be primarily employed in a qualifying managerial or executive capacity. On the basis of this finding the 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.