

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 30 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 New York corporation that seeks to employ the beneficiary in the United States as its 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 January 13, 2012, which contained relevant information pertaining to the beneficiary's employment abroad and with the petitioning entity. The petitioner also provided supporting evidence in the form of corporate, business, and tax documents pertaining to both entities.

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 June 2, 2012 informing the petitioner of various evidentiary deficiencies. The RFE included requests for more detailed job descriptions pertaining to the beneficiary's foreign and proposed employment. The petitioner was asked to provide a list of the beneficiary's specific daily job duties and their time allocations and to provide both entities' organizational charts depicting the respective staffing structures and the beneficiary's placement therein. Additionally, with respect to the beneficiary's prospective employment in the United States, the director asked the petitioner to provide each employee's IRS Form W-2 for the relevant time period.

The petitioner's response included supplemental job descriptions pertaining to the beneficiary's foreign and U.S. employment, organizational charts depicting each employer's staffing composition, and various payroll and tax documents pertaining to each company's employees.

After considering the petitioner's response, the director determined that the petitioner failed to establish that the beneficiary was employed abroad or that he would be employed with the U.S. entity in a qualifying managerial or executive capacity. The director found that the job descriptions pertaining to the beneficiary's foreign and proposed employment were deficient and that the petitioner failed to establish that the beneficiary's time in either position has been and would be allocated primarily to the performance of tasks within a qualifying managerial or executive capacity. The director made an affirmative finding with regard to the beneficiary's U.S. employment, concluding that the beneficiary's time would be primarily spent performing non-qualifying tasks. The director also pointed to the low salaries paid to the petitioner's employees in 2011 and questioned the petitioner's ability to relieve the beneficiary from having to allocate his time primarily to the performance of non-qualifying tasks. In light of these adverse findings, the director issued a decision dated September 13, 2012 denying the petition.

On appeal, counsel provides an appellate brief disputing the director's findings and asks the AAO to consider the supplemental job descriptions the petitioner submits in support of the appeal. Counsel addresses each portion of the hourly breakdowns provided on appeal and discusses each component of the job description within the context of each organization.

After reviewing counsel's statements and considering them in conjunction of the evidence on record, the AAO finds that the petitioner has overcome the director's adverse finding with regard to the beneficiary's employment abroad. The hourly breakdown provided on appeal contains sufficient information about the job duties the beneficiary performed during his employment abroad. The AAO has considered this information in light of the foreign entity's complex staffing and management structure and finds that the petitioner has established by a preponderance of the evidence that the beneficiary was employed in a qualifying managerial or executive capacity.

Notwithstanding the favorable finding with regard to the beneficiary's employment with the foreign entity, the AAO cannot issue a similar finding with regard to the beneficiary's proposed position with the U.S. entity. The discussion below will address the relevant evidence that contributed to the AAO's conclusion.

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.

As indicated above, the primary issue to be addressed in this proceeding is the beneficiary's proposed position with the U.S. entity and whether the petitioner provided sufficient evidence to establish that the proposed position fits the definition of managerial or executive capacity as discussed below.

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) the beneficiary's subordinate employees and their respective job duties, the nature of the petitioner's business, the size of the petitioner's subordinate staff, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role in the proposed employer's organizational hierarchy.

The AAO notes that a job description alone, even one containing sufficient information about the beneficiary's proposed job duties, is not sufficient to make a determination as to the nature of the proposed employment. Rather, the petitioner must provide supporting evidence to establish that claims made in the job description regarding the beneficiary's assigned job duties are realistic within the context of the petitioner's staffing at the time the job offer was made. Applying this reasoning to the matter at hand, merely citing a set of job duties that fit either of the statutory definitions is not sufficient to establish eligibility. The petitioner is also expected to establish that the company has sufficient personnel to relieve the beneficiary from having to allocate his time primarily to performing non-qualifying tasks.

As counsel properly contends on appeal, the beneficiary is not expected to allocate 100% of his time to managerial- or executive-level tasks, so long the petitioner provides sufficient evidence to establish that the non-qualifying tasks the beneficiary would perform would only be 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'r 1988). In order to accurately gauge the qualifying nature of the beneficiary's proposed employment, the AAO finds it necessary to consider the petitioner's organizational hierarchy and the employees who were employed by the petitioner at the time the petition was filed and the job duties they performed. Such information allows the AAO further insight as to who would perform the petitioner's daily operational tasks. While no organization, regardless of its personnel size, is precluded from establishing eligibility to classify a beneficiary as a multinational manager or executive, no entity—large or small—will be exempt from the burden of having to establish that it has the ability to relieve its beneficiary from having to allocate his or her time primarily to carrying out the daily operational and administrative tasks even if an entity's small personnel size suits its business needs.

In the present matter, despite the hourly breakdown submitted on appeal, the AAO finds that evidence of the petitioner's support personnel at the time of filing fails to establish that the petitioner was able to relieve the beneficiary from having to allocate his time primarily to the performance of non-qualifying tasks. Although the record confirms the petitioner's claim of having 15 employees at the time of filing, the petitioner's state quarterly wage report for the first quarter of 2012 indicates that the vast majority of its staff, including the petitioner's vice president, who serves as the beneficiary's direct subordinate, and the sales department manager, received wages that were commensurate with those of part-time workers. Furthermore, according to the petitioner's organizational chart, the purchasing department had no employees at all, thus leaving no one to perform the job duties of the purchasing department's manager and purchasing clerk. It is unclear who, other than the beneficiary, could assume the job duties that would normally be assigned to employees within the purchasing department.

In other words, while the AAO does not place undue emphasis on the petitioner's staffing, it is important to acknowledge that staffing is an important component in establishing whether the beneficiary would be employed in a qualifying managerial or executive capacity because when a petitioner is not adequately staffed the AAO must question whether the beneficiary would serve as a substitute to perform the non-qualifying tasks that cannot be performed when certain positions are vacant or are filled with part-time employees who cannot fully carry out the required tasks of their respective positions. As indicated above, the AAO does not impose upon the petitioner the unreasonable burden of expecting it to establish that the beneficiary would

spend all of his time carrying out managerial- or executive-level tasks. It is expected that in an organization of any size even executives and managers are often called upon to carry out purely functional tasks, such as reviewing and personally responding to correspondence or meeting with important clients. However, when the beneficiary's job duties include analyzing department reports with the assistance of his subordinate and the evidence of record shows that both the subordinate along with other managerial employees work on a part-time basis while key departments—in this instance the purchasing department—are entirely devoid of employees, it is reasonable to question how the petitioner's limited staffing would be adequate to relieve the beneficiary from having to allocate his time primarily to tasks of a non-qualifying nature, regardless of what the beneficiary's job description may indicate. Thus, despite counsel's claim that approximately 64% of the beneficiary's time would be allocated to the performance of purely managerial- or executive-level tasks, when the AAO considers other relevant factors it cannot conclude that counsel's assertions are supported by the evidence of record. 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).

Accordingly, in light of the deficiencies pointed out in the above discussion, the AAO finds that the petitioner has failed to establish that the beneficiary's proposed employment would be within a qualifying managerial or executive capacity and on the basis of this 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.