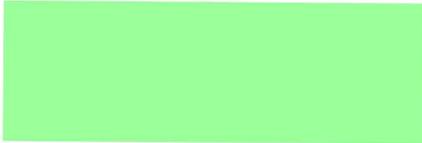


U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

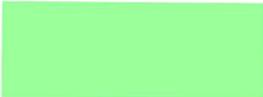


U.S. Citizenship
and Immigration
Services



DATE: **MAY 30 2013**

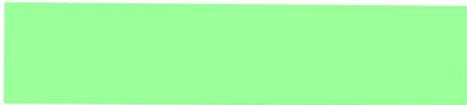
OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE:

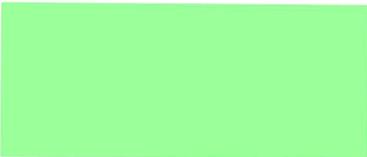
Petitioner:

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:

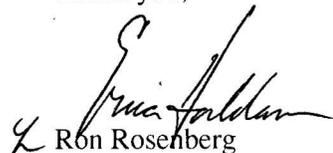


INSTRUCTIONS:

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 claims to be a New York corporation that seeks to employ the beneficiary in the United States 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.

In support of the Form I-140 the petitioner submitted a statement dated November 15, 2011, which contained relevant information pertaining to the petitioner's eligibility, including a brief discussion of the beneficiary's proposed employment with the petitioning entity. The petitioner also provided supporting evidence in the form of corporate, bank, and business documents pertaining to both entities as well as the petitioner's organizational chart, which listed four employees holding the following positions: general manager, marketing department manager, marketing developer, and office administrator. Although the chart also included a manager/cost analyst in the investment department, this position was not yet filled.

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 21, 2012 informing the petitioner of various evidentiary deficiencies. Among the issues addressed was the beneficiary's employment with the U.S. entity. Specifically, the director instructed the petitioner to list the beneficiary's specific daily job duties and time allocations indicating what percentage of each day would be spent performing each of the listed duties. Additionally, the petitioner was asked to provide the IRS Form W-2s for each employee for the relevant time period.

In response, the petitioner provided a job description and organizational chart. However, with regard to the supplemental job description, the AAO notes that the petitioner did not comply with the format that was expressly discussed in the RFE. Namely, the petitioner was asked to provide specific daily job duties and to assign time allocations to individual duties. The petitioner's response strayed from the director's request in that the petitioner assigned time allocations to each of four broad categories—planning management, business management, financial management, and human resource management—but did not assign the requested time allocations to individual tasks. Furthermore, the petitioner did not supplement the record with new information about the beneficiary's proposed employment. Rather, the petitioner provided a paraphrased version of the prior job descriptions, adding little to the director's understanding of the proposed position. The petitioner also provided the requested organizational chart depicting the petitioner's updated organizational hierarchy.

After considering the petitioner's response, the director determined that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity. The director pointed to the petitioner's lack of organizational complexity, finding this factor to be an indicator of the petitioner's likely inability to relieve the beneficiary from having to allocate his time primarily to the performance of non-qualifying tasks. The director further noted that when a company has a limited number of employees questions arise as to who is actually performing the operational tasks. The director incorporated his findings in a decision dated September 26, 2012 denying the petition.

On appeal, counsel disputes the director's conclusion and underlying findings. Counsel provides an appellate brief explaining why the director's decision should be withdrawn. The petitioner offers additional supporting documents, including an approval of the beneficiary's L-1A nonimmigrant classification and the U.S. Department of Labor's discussion of duties pertaining to executive officers and general managers as well as duties pertaining to first-line supervisors of administrative and non-retail workers.

After reviewing counsel's brief and considering the relevant supporting evidence in light of the evidence and information previously submitted, the AAO finds that the petitioner's submissions on appeal are not persuasive in overcoming the basis for denial. The AAO's analysis of the relevant evidence is provided in a 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 of the beneficiary's subordinate employees, the nature of the business conducted, the size of the subordinate staff, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role within the employing entity.

In the present matter, the job descriptions the petitioner provided with regard to the beneficiary's proposed employment are devoid of substantive information that would lead to a meaningful understanding of what actual job duties the beneficiary would carry out on a daily basis. Paraphrasing elements of the statutory definitions, as the petitioner has done in the present matter, does not establish that the beneficiary would allocate his time primarily to performing tasks within a qualifying managerial or executive capacity. For instance, the petitioner stated that the beneficiary implements general policies, attends board meetings, provides leadership to the organization, develops and maintains an organizational plan, oversees business

activities, coordinates departmental activities, directs and coordinates financial and budget activities, provides vision regarding the company's financial health and future fiscal planning, determines staffing requirements, and devises a "basic management philosophy" for managing employees. While these statements are adequate in terms of establishing the beneficiary's level of discretionary authority and top-most placement within the petitioner's organizational hierarchy, they are overly vague and only succeed in providing general information about the beneficiary's ongoing responsibilities as head of a growing company. These statements cannot, however, serve as an accurate representation or sampling of the beneficiary's daily tasks, which remain largely unknown.

Although the petitioner did indicate that the beneficiary would research and write discussion reports, analysis documents, and proposals for the board to review on a need basis, this particular list of duties would qualify as operational tasks that are necessary to provide services. Similarly, negotiating contracts and working closely with manufacturers, suppliers, and purchasers are also operational tasks that do not typically fall within the purview of someone who is to be primarily employed in a qualifying managerial or executive capacity. 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). It is therefore particularly important for the petitioner to provide enough information about the beneficiary's employment to establish how much of the beneficiary's time would be allocated to qualifying tasks versus those that are deemed non-qualifying.

While the petitioner offers supporting evidence in the form of an *O*Net* sampling of tasks that pertain to various types of managers and first-line supervisors, these documents have little probative value as they were not created within the scope of the statutory definitions of managerial or executive capacity and those do not help to establish that individuals who fit the DOL criteria for managers and/or first-line supervisors must necessarily fit the statutory definitions that apply to the matter at hand. Moreover, in reviewing the job description provided by the petitioner in response to the RFE, it appears that the petitioner essentially quoted the various portions of the *O*Net* criteria rather than providing a description of the beneficiary's actual day-to-day responsibilities performed within the context of the petitioner's business. The AAO remains unclear as to who within the petitioning entity was available to provide the consulting services offered to the petitioner's clients at the time the petition was filed. While the record indicates that the petitioner eventually hired two employees, who now comprise the investment department, to provide various client-based services, there is no evidence that the petitioner had any employees, other than the beneficiary, to provide consulting services for the company's clients when the petition was originally filed. It is noted that employees who were hired after the filing of the petition will not be considered for the purpose of establishing the petitioner's eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

In summary, the AAO finds that the record lacks sufficient evidence to conclude that the petitioner was ready and able to employ the beneficiary in a primarily managerial or executive capacity at the time the petition was filed. Neither the beneficiary's job description nor the petitioner's organizational structure indicates that the primary portion of the beneficiary's time would be allocated to tasks within a qualifying capacity. Therefore,

in light of the adverse findings discussed above, the AAO finds that the director properly denied the petition and the petitioner did not offer evidence on appeal to warrant the withdrawal of the director's decision.

Finally, with regard to the petitioner's previously approved L-1 employment of the beneficiary, he AAO notes that 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. The approval of a nonimmigrant petition in no way guarantees that USCIS will approve an immigrant petition filed on behalf of the same beneficiary.

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.