



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: OFFICE: TEXAS SERVICE CENTER

JAN 16 2014

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)

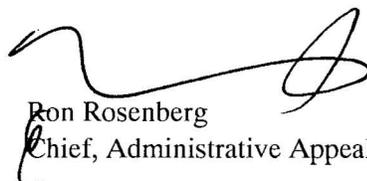
ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center. The Administrative Appeals Office (AAO) dismissed the petitioner's subsequent appeal. The matter is now before the AAO on a combined motion to reopen and reconsider. The AAO will grant the petitioner's motion to reconsider and affirm its previous decision.

The petitioner is engaged in stainless steel pipe and tubing manufacturing and claims to be a subsidiary of [REDACTED]. It seeks to employ the beneficiary as its sales 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.

The director denied the petition on August 27, 2010, concluding that the petitioner failed to establish that the beneficiary's proposed employment with the U.S. entity would be within a qualifying managerial or executive capacity. The petitioner appealed the director's decision to the AAO, which dismissed the appeal on October 9, 2012 based on the same adverse finding. The AAO further found that the record did not include sufficient evidence to corroborate the claimed parent-subsidiary relationship between the beneficiary's last foreign employer and the petitioning company.

The matter is now before the AAO again on a combined motion to reopen and motion to reconsider. Counsel asserts that the AAO's decision to dismiss the appeal was incorrect as a matter of law as the AAO failed to consider the totality of the evidence submitted and ignored relevant documentation that establishes that the beneficiary acts as a function manager and is relieved from performing non-qualifying duties. Counsel further contends that the petitioner misapplied the law pertaining to function managers and failed to cite to any legal authority in support of its finding that a function manager cannot perform "operational functions."

With respect to the AAO's finding that the petitioner submitted insufficient evidence to establish its claimed qualifying relationship with the foreign entity, counsel asserts that the AAO did not have the authority to deny the petition on this basis as the petitioner was not given notice of any deficiencies in a request for evidence pursuant to 8 C.F.R. § 103.2(b)(8). The petitioner submits copies of previously submitted evidence as well as additional evidence pertaining to its qualifying relationship with the foreign entity.

## I. The Law

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.

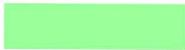
The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its 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.

## II. Employment in a Managerial or Executive Capacity

In examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Published case law clearly supports the pivotal role of a clearly defined 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). USCIS reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the petitioner's business, the employment and remuneration of employees, as well as the job descriptions of the beneficiary's subordinates, if any, and any other facts contributing to a complete understanding of a beneficiary's actual role within a given entity.

The petitioner submitted a position description consisting of eight duties in its initial letter dated October 14, 2009, and subsequently added the percentage of time allocated to each duty in response to the director's request for evidence (RFE). The petitioner described the beneficiary's duties as follows:

1. Managing all technical and commercial aspects of the United States sales operations, including discretionary authority on matters relating to the development of new and existing customers; (20%)
2. Negotiating sales agreements with North American customers; (15%)
3. Making personnel recommendations to the general manager of the Houston office concerning the hiring and dismissal of any sales employees, should such be necessary; (2%)

4. Planning and managing sales functions, including organizing presentations, meetings, conferences, and participating in trade shows and fairs; (15%)
5. Ensuring that all contractual conditions and requirements are met to the customers' satisfaction; (13%)
6. Overseeing the timely dispatch of goods; (10%)
7. Preparing and presenting written and oral reports to customers and to senior management as necessary; (10%) and
8. Generating technical proposals and cost estimates for sales, including new products based on customer demand and feasibility studies. (15%)

The petitioner stated that the purpose of the beneficiary's transfer to the United States was to "assist [the foreign company] in its goal of increasing market share in the United States." The petitioner also stated that "because the sales operations in the United States are still somewhat nascent, [the beneficiary] does not directly supervise any staff in the United States, but he is responsible for the daily decisions and work efforts required to grow the sales of [the foreign company's] products in the United States." The petitioner added that the beneficiary "exercises discretion over the day-to-day operations of every aspect of the sales operation of [the petitioner], which includes the creation of markets, the identification of customers, and ultimately the development of a sales force."

The petitioner further noted that the planned expansion of the company had been suspended due to economic conditions, but that the beneficiary maintains "operational supervisory authority over two Swiss employees and one employee in the Ukraine." The petitioner indicated that the Swiss employees include: (1) a Back Office Coordinator and SAP Expert, who is responsible for all activities related to the documentation and SAP system such as order entry into SAP, export documentation support, order confirmations, order expediting, and international shipping documentation; and (2) a Back Office Supervisor who is responsible for all invoicing activities. In addition, the petitioner indicated that the beneficiary indirectly supervises a Back Office Production Coordinator based in the Ukraine office who is responsible for coordinating communications and production between the sales organization and the company's mill in Ukraine. Finally, the petitioner noted that there is a Production Process Coordinator in the Swiss office who coordinates mill production with customer orders, integrates orders with the production process, provides feedback to the managers, and tracks raw material availability and capacity utilization at the factory level.

As emphasized by counsel on appeal, the petitioner's response to the RFE also included supporting evidence and examples of the beneficiary's work which was not discussed in the service center director's or AAO's decisions. This evidence included: notes from a meeting with [REDACTED] in which the beneficiary was one of nine employees of the petitioner's group present to discuss current and future orders with the client's president and purchase manager; e-mail correspondence between the beneficiary and [REDACTED] purchasing manager in which the beneficiary explained the gap between the petitioner's quoted prices in comparison to its competitors'; e-mail correspondence between the beneficiary and client [REDACTED] in which the beneficiary was asked to respond to customer concerns regarding the technical quality of the products purchased; 2010 annual sales plans and strategies created by the beneficiary; weekly sales reports in which the

beneficiary identified new orders, major quotes submitted, customers visited, and problems reported by customers; copies of price quotes signed by the beneficiary; and the beneficiary's e-mail correspondence with a potential client in which he was seeking approval for the petitioner as a qualified supplier and planning a visit to the client's site;

Finally, the petitioner submitted internal correspondence between the beneficiary and his dotted-line subordinates in Switzerland. The back office employee advised the beneficiary which orders are produced and ready to be shipped and asked advice on the timing of shipment, as well as providing information regarding orders that are delayed. In another exchange, the beneficiary advised the invoicing employee of the prices that should appear on the invoice issued to the customer. Finally, the beneficiary forwarded clients' orders to the Swiss office for entry into SAP and processing by the back office staff.

Based on the petitioner's description of the beneficiary's duties, the nature of the U.S. office, the staffing of the company, and the duties attributed to the beneficiary's indirect overseas subordinates, the AAO concluded that the evidence did not establish that the beneficiary would be employed in a primarily managerial or executive capacity. The AAO also concluded that the evidence did not support the petitioner's specific claim that the beneficiary qualifies as a function manager based on his management of the North American sales function.

The term "function manager" 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. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a detailed description of the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). 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 "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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Accordingly, it is the petitioner's burden to establish that a majority of the day-to-day administrative or non-managerial tasks of the function are performed by someone other than the beneficiary. *Id.* If the beneficiary is "primarily" performing non-managerial tasks, then it logically follows that he could not also "primarily" perform managerial or executive duties. Therefore, the petitioner must still demonstrate that other employees carry out the functions of the organization, even though those employees may not be directly under the function manager's supervision. In reviewing the totality of the record, the AAO will also review other factors such as the beneficiary's position within the organizational hierarchy, the depth of the petitioner's organizational structure, the scope of the beneficiary's authority and its impact on the petitioner's operations, and the indirect supervision of employees within the scope of the function managed.

In this case, the beneficiary is the sales manager and the sole sales employee employed within the petitioner's two-person U.S. sales office. The other employee is a general manager, who, according to the petitioner, has no responsibilities related to sales. The beneficiary will not directly or indirectly supervise any sales staff located in the United States or overseas. In addition, the petitioner indicates that the beneficiary personally negotiates sales agreements, generates technical proposals and cost estimates for sales, organizes meetings and presentations, prepares and presents reports for customers, duties which are directly related to selling the petitioner's products and account for 55% of the beneficiary's time. The petitioner has not explained how any of these duties fall within the statutory definition of "managerial capacity" or stated whether or how the overseas "back office" employees support him in these functions. As these duties account for more than half of the beneficiary's time, the petitioner has not established that the beneficiary is primarily employed in a managerial capacity.

The AAO acknowledges that the foreign employees do contribute to the sales operations in the areas of invoicing, communications with the manufacturing facility, order expediting and fulfillment, and shipment of completed orders to their destinations. Therefore, such employees appear to relieve the beneficiary of non-qualifying duties associated with his responsibilities for overseeing the commercial and technical aspects of the sales operation, overseeing the timely dispatch of goods, and may assist in ensuring that all contractual conditions and requirements are met to the customers' satisfaction.

However, based on the totality of the evidence submitted, the beneficiary is personally responsible for providing quotes and proposals, visiting existing and potential customers, negotiating prices and terms in an effort to qualify the petitioner as a supplier, responding to customer complaints regarding product quality, creating sales reports and performing essentially all of the customer-facing duties before, during and after sales. While the sales function is technical and complex due to the nature of the products the petitioner sells, the petitioner has not established how the beneficiary's direct responsibility for sales rises to the level of "managing" the sales function for the petitioner's sales office, given that he is the only sales employee in the organization responsible for the region.

Performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties. However, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is a "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial.

The petitioner concedes that its sales organization in the United States is at the "nascent" stage and relies solely on the beneficiary to expand the company's sales and customer base. The record supports a finding that the beneficiary has some decision-making authority over the sales function and develops sales strategies, but he also sells the petitioner's products and performs research, proposal writing and other non-qualifying duties associated with directly selling the products and seeking out new customers. The petitioner established that he oversees foreign staff responsible for coordinating the fulfillment of sales orders once he has submitted them

for processing, but the petitioner has not shown how these employees relieve the beneficiary from selling the petitioner's products, nor has it show that these dotted-line supervisory duties require the majority of his time.

Accordingly, the AAO will affirm its determination that the beneficiary will allocate more than half of his time to duties that cannot be considered qualifying managerial duties and therefore cannot be deemed to be "primarily" managing the sales function.

Counsel asserts that the AAO did not adequately explain why a sales manager could not qualify as a function manager. The AAO has not and will not arrive at any blanket conclusions regarding the occupation of "sales manager" in relation to the statutory definition of "managerial capacity," as such determinations must be made on a case-by-case basis and are dependent on the evidence submitted in support of an individual petition. Our determination that the sales manager position offered to this beneficiary does not meet the statutory requirements is based on an assessment of the beneficiary's job description, the nature of petitioner's business, the availability of direct or indirect employees to actually perform sales duties, and the petitioner's examples of the beneficiary's work.

Based on the foregoing, the petitioner has not established that it will employ the beneficiary in a qualifying managerial capacity.

#### B. Qualifying Relationship

The remaining issue addressed in the AAO's decision was whether the petitioner established that it has a qualifying relationship with the beneficiary's foreign employer, the petitioner's claimed parent company. The AAO found that the petitioner's submission of an annual report and tax return identifying the parent-subsidary relationship was insufficient. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

On motion, the petitioner has submitted sufficient evidence to document its parent-subsidary relationship with the foreign entity. The AAO will withdraw its adverse determination with respect to this issue.

#### III. Conclusion

The petition will remain denied based on the petitioner's failure to establish that it will employ the beneficiary in a qualifying managerial capacity. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The AAO's decision dated October 9, 2012 is affirmed.