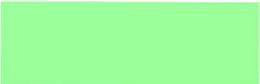


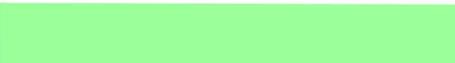


U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **OCT 22 2014** 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)

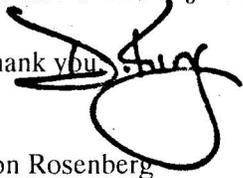
ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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 Texas Service Center Director denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this Form I-140, Immigrant Petition for Alien Worker, 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 petitioner, a Maryland corporation, is engaged in power equipment, research and development, and marketing, and claims to be a subsidiary of [REDACTED], the beneficiary's former employer in China. The petitioner seeks to employ the beneficiary in the position of General Manager.

The director denied the petition on March 10, 2014, concluding that the petitioner failed to establish the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to us for review. On appeal, counsel submits a brief disputing the director's adverse findings.

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.

II. THE ISSUE ON APPEAL

A. U.S. Employment in a Managerial or Executive Capacity

The issue to be addressed is whether the petitioner established that it will employ the beneficiary in a qualifying managerial or executive capacity.

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.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

1. Facts

The petitioner has offered the beneficiary the position of General Manager. In a letter dated June 26, 2013, the petitioner explained the role of the general manager as follows:

The General Manager at [the petitioner] guides the company towards regionalizing and localizing its international sales and to direct its marketing and sales strategies. The General Manager needs to be familiar with [the petitioner's] management, the targeted markets, and stay on top of market trends, so as to make sound business decisions regarding overall internal management, R&D, and global business development.

The petitioner also explained that the petitioner employs a Market Research Analyst, a Sales Representative, an Administrative Assistant, and a bookkeeper. In addition, the petitioner "works closely with its Chinese parent company, and has outsourced most of its work to [the parent company]." The key personnel located at the parent company office that assists the petitioner is a Sales Manager, a Senior Engineer, and two Sales Assistants.

The petitioner also submitted an assignment letter from the Deputy General Manager of the parent company dated June 20, 2013, that listed the duties to be performed by the beneficiary as follows:

- Take charge of the overall control and management of the U[.]S[.] subsidiary;
- Plan, develop, and establish the subsidiary's operational policies and objectives;
- Set up departments; determine staffing levels; and interview/hire management personnel, and evaluate, promote and terminate personnel based on their qualifications and job performance;
- Review financial reports and activity data to assess the strategy and progress of the subsidiary's business, and develop future business goals and plans;
- Develop and monitor the sales strategies and marketing plan for the U[.]S[.] subsidiary;
- Oversee the subsidiary's budget, adequately fund operations, increase efficiency, and maximize investments; and

- Meet with other corporate and business leaders to develop new customers, and cultivate the subsidiary's business networks in the international markets.

On August 10, 2013, the director sent a request for evidence ("RFE"). In part, the director requested a detailed job description of the beneficiary's specific tasks (rather than categories of duties) on a normal business day including the percentage of time spent on each task. The director also requested information regarding the beneficiary's subordinates.

In response, counsel for the petitioner included a percentage break down for each duty the beneficiary will perform in the proffered position as follows:

- Develop a detailed phase implementation plan of the company's strategic plan approved by the Board of Directors. Adjust the work plan in accordance with actual progress, chair regular staff meetings, follow up on the work of all departments; coordinate activities among departments. 10%
- Direct and conduct studies, research and analysis on industry trends, market trends, target customers, product demand, regional and local cultural tastes, legal requirements, and distribution channels. 20%
- Develop a plan for new products and direction of product line, oversee product development including product designs for international markets. 10%
- Plan and establish the company's staffing level, operational policies and objectives, set policies for recruiting new employees, make final decisions on hiring, promotion, and termination. Conduct staff training on industry knowledge, company products, and sales skills. 10%
- Perform customer relation duties, including maintaining regular email, telephone contact, and face to face meeting with the management of key customers. Cultivate relationship with potential customers, build up business networks in the international markets, and negotiate with key customers. 20%
- Establish financial and budgetary plans, review financial reports and activity data to assess the progress of the company's business, oversee the company's budget, approve funding for business operations, increase efficiency, and maximize profit. 10%
- Set sales objectives, utilize existing business networks to promote new products. Review sales reports from the sales manager, approve special pricing products, and formulate pricing strategies for target customers. 20%

Counsel listed the petitioner's current employees as follows: the beneficiary as General Manager, a market research analyst, a sales representative, a part-time administrative assistant and a part-time

bookkeeper. Counsel provided the education level, years of work experience, salary and a brief job description for each employee.

In addition, counsel explained that 10 key personnel located at the parent company in China are also assisting the petitioner. The employees include a Sales Manager, four sales assistants, a senior engineer, two engineers, and two assistant engineers. Counsel provided the education level, years of work experience, salary and a brief job description for each employee from the parent company that are assisting the petitioner.

The director denied the petition, in part, concluding the petitioner failed to establish that the beneficiary would be employed by the petitioner in a qualifying managerial or executive capacity. In denying the petition, the director determined that the petitioner provided an overly broad job description that failed to convey an understanding of what the beneficiary will primarily do on a day-to-day basis.

On appeal, counsel for the petitioner explains the following regarding the beneficiary's role in the U.S.:

The actual nature of the Beneficiary's involvement is managerial, in that the Beneficiary manages the sales team in charge of the entire international market. Corporate hierarchy places the Beneficiary at the top of the corporation both in the U.S. [sic]. The beneficiary is in a critical position to ensure that his staff members are performing their duties in establishing the new accounts and promoting and selling the company's products within the U.S. At the same time, the Beneficiary directs the senior engineer/engineering manager, who in turn manages the Engineers at [redacted] China to produce the power tools designed for the international market.

2. Analysis

When examining the executive or managerial capacity of the beneficiary, we review the totality of the record, starting first with the petitioner's description of the beneficiary's proposed 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 job descriptions of the beneficiary's subordinate employees, the nature of the business that is conducted, the petitioner's subordinate staff, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role within the petitioning entity. While an entity with a limited support staff will not be precluded from the immigration benefit sought herein, it is subject to the same burden of proof that applies to a larger entity with a moderate or large subordinate staff. In other words, regardless of an entity's size or support staff, the petitioning entity must be able to provide sufficient evidence showing that it has the capability of maintaining its daily operations such that the beneficiary would be relieved from having to primarily perform the operational tasks.

In the present matter, upon review of the totality of the record, the evidence does not support a finding that the beneficiary would allocate his time primarily to the performance of tasks that are within a qualifying managerial or executive capacity.

Looking to the job description the petitioner provided in response to the RFE, we observe that the petitioner assigned a percentage breakdown to groups of actions rather than to individual tasks. For instance, the beneficiary will spend 10 percent of his time to "develop a detailed phase implementation plan of the company's strategic plan approved by the Board of Directors;" however, the petitioner does not provide a detailed description of its mission and goals. In addition, the petitioner stated that the beneficiary will spend 10 percent of his time to "develop a plan for new products and direction of product line, oversee product development including product designs for international markets." The petitioner stated that it is developing a new product but failed to provide any detail about the new product or the day-to-day duties the beneficiary needs to perform to launch the new product. The beneficiary will also spend 10 percent of his time to "establish the company's staffing level, operational policies and objectives, set policies for recruiting new employees, make final decisions on hiring, promotion, and termination." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. The petitioner's descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature.

The job description also includes several non-qualifying duties such as the beneficiary will "direct and conduct studies, research and analysis on industry trends, market trends, target customers, product demand, regional and local cultural tastes, legal requirements, and distribution channels;" "conduct staff training on industry knowledge, company products, and sales skills;" "perform customer relation duties, including maintaining regular email, telephone contact, and face to face meeting with the management of key customers;" and, "cultivate relationship with potential customers, build up business networks in the international markets, and negotiate with key customers." It appears that the beneficiary will be in charge of market research, training, and negotiations rather than directing such activities through subordinate employees. 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. at 604.

In the instant matter, the job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will perform.

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 will perform 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'r 1988).

In addition, the documentation regarding the staff of the petitioner is inconsistent. The initial support letter stated that the four employees from the parent company that are assisting the petitioner included a Sales Manager, a Senior Engineer, and two Sales Assistants. However, in response to the RFE, counsel for the petitioner contends that 10 employees from the parent company are assisting the petitioner. The petitioner never explained why the employees from the parent company that are working with the petitioner changed from 5 employees with the initial petition to 10 employees in response to the RFE. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Furthermore, the petitioner did not provide any documentary evidence that these employees are actually employed by the parent company, such as paystubs or tax records. In addition, the petitioner provided a one sentence description of the job duties performed by these employees which is not sufficient information to understand their role in assisting the petitioner. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

In light of the foregoing discussion, the petitioner has not established that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity and on this basis, this petition cannot be approved.

III. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for denial. 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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.