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



U.S. Citizenship
and Immigration
Services

DATE: FEB 19 2015

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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:

[REDACTED]

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg

Chief, Administrative Appeals Office

DISCUSSION: The Nebraska Service Center Director denied the preference visa petition. The matter 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 is engaged in marketing services, and claims to be a subsidiary of [REDACTED] the beneficiary's former employer, located in Australia. The petitioner seeks to employ the beneficiary in the position of Chief Executive Officer.

On June 12, 2014, the director denied the immigrant petition, finding the petitioner failed to establish that the beneficiary would be employed 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, the petitioner submits a brief disputing the director's adverse findings.¹

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.

¹ We conduct appellate review on a *de novo* basis (See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)).

Additionally, the regulations at 8 C.F.R. § 204.5(j)(3)(i) state that the petitioner must provide the following evidence in support of the petition in order to establish eligibility:

- (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
- (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
- (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
- (D) The prospective United States employer has been doing business for at least one year.

In addition, 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.

Finally, 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.

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.

1. Facts

The petitioner offered the beneficiary the position of Chief Executive Officer. The record reflects that the petitioner was established as a Nevada limited liability company in [REDACTED] and registered to do business in California in January [REDACTED]. In a letter in support of the petition, the petitioner states that it "specializes in providing an end-to-end, cross-discipline marketing services to medical and dental professionals utilizing its extensive experience in web and marketing technology and in integrating new technologies such as mobile apps into its product offering." In addition, the petitioner provided a job description for the proffered position that states the following:

The Chief Executive positions are [sic] specific executive/management position within our North American Operations. As CEO, [the beneficiary] will be responsible for implementing the strategy and vision of our parent company into our U.S. operations. He will provide direction and leadership to [the petitioner], actively explore business opportunities and develop our market, drive sales and profitability, develop budgets, set targets and monitor performance, and serve as an ambassador of [the petitioner's] brand image in the United States.

To maintain efficiency, [the beneficiary] is relied upon to direct subordinates and manage a team of associates to ensure their compliance with [the petitioner's] company policies, procedures, and standards. Additionally, he is expected to track and analyze performance, operational records and reports, and prepare executive reports and recommendations for use in policy direction and decisions. [The beneficiary] will be put in charge of recruitment and will manage all employee relations matters. He will be instructed to liaise with [the foreign company] in matters pertaining to major issues and decisions, maintaining productive relations with our parent company. Given his work history and his extensive knowledge of our parent company's operations, he will be depended on to develop strategic partnerships with all levels of the business.

The petitioner also submitted an organizational chart that indicated Board Members who supervise the beneficiary as CEO, who in turn supervises the following: Chief Financial Officer (to be hired); Chief Operations Officers (to be hired); Staff Accountant (to be hired); Marketing and Sales Manager (to be hired); Bookkeeper (to be hired); Senior Account Executive and four Account Executives. The petitioner stated that its current employees are the beneficiary, the senior account executive, and four account executives. It provided copies of independent sales representative agreements with the account executives which were signed in May 2013, but did not provide evidence that it had made any payments to the account executives as of the date of filing on June 19, 2013.

The job description of the Senior Account Executive is the following:

- U.S. Client Liaison/Sales Management
- Devise new advertising strategies in accordance with Communications Manager (Australia)
- Research, profile prospective clients
- Sales of Medical/Dental Marketing Systems & Solutions.

The independent sales representative agreements indicate that the account executives will work on commission only and are responsible for "research, profile prospective clients" and "sales of Medical/Dental Marketing Systems & Solutions."

On March 27, 2014, the director sent a Notice of Intent to Deny ("NOID") that noted the petitioner employs one individual; thus, the "beneficiary fails to manage/supervise subordinates in the U.S. at the time of filing Form I-140," and "the petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position."

In a letter dated April 22, 2014, the petitioner explained that it employs a full-time senior account executive and four account executives and the company has plans to hire five additional employees "in line with the development and expansion program of the company." The petitioner also stated that the beneficiary will perform in an executive capacity and "will also perform an essential function for [the petitioner]." The petitioner states that "as a newcomer in the industry, it is essential that the company come up with a strategic plan to penetrate the market," and the beneficiary's job will "entail expanding potential market through new users or new uses which will require the planning and managing of market research and analysis."

The petitioner also explained the beneficiary's duties, in part, as follows:

[The beneficiary] will be responsible for directing and controlling the company's operational and financial activities. He will also be responsible for product development and establishing technical standard and ensure adherence to the product development polices. He will confer with other executives to discuss issues, coordinate activities and resolve major problems. One of his major duties will be to analyze business and development operations to determine areas of potential cost reduction program improvement and policy change if required. He will direct, plan and implement policies, objective and activities of the business in order to ensure continuing operations and to maximize profits. He will appoint department head or managers and assign or delegate responsibilities to them. He will have complete hiring and firing authority.

The director denied the petition finding that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

On appeal, the petitioner contends that the beneficiary would be employed in the sole capacity of a CEO and would not assist with the day-to-day, non-supervisory duties. The petitioner asserts that it has all the required staff to provide the services of the company and that it requires the beneficiary's services in an executive capacity to oversee the company's expansion.

2. Analysis

Upon review, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity.

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). We 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.

Looking to the job description the petitioner provided with the petition, we observe that the petitioner did not provide a percentage breakdown of the tasks the beneficiary will perform for the U.S. company. The petitioner also provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner stated vague duties such as the beneficiary will be responsible for "implementing the strategy and vision of our parent company into our U.S. operations," "provide direction and leadership to [the petitioner]," and, be "responsible for product development and establishing technical standard and ensure adherence to the product development polices." This description provides little insight into what the beneficiary primarily will do on a day-to-day basis and does not explain the corporate policies, goals and objectives the beneficiary will develop or clarify his role in product development. 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 job description also includes several non-qualifying duties such as the beneficiary is "expected to track and analyze performance, operational records and reports, and prepare executive reports and recommendations for use in policy direction and decisions"; "will be responsible for directing and controlling the company's operational and financial activities"; and be "responsible for product development and establishing technical standard and ensure adherence to the product development polices." As the company only employs one full-time senior account executive and four commissioned account executives, it is not clear who would handle the market research, develop the marketing and sales programs, handle the budgeting and financial operations, customer service, and negotiations and prepare sales contracts. The petitioner's organizational chart indicates that it has vacancies for a chief operating officer, marketing manager, chief financial officer, accountant and bookkeeper, and the petitioner did not indicate who would be performing the responsibilities assigned to these positions, if not the beneficiary, until the company is fully staffed.

Thus, it appears that the beneficiary may initially be required to perform the duties inherent in obtaining new sales for the company and handling all of the financial and administrative operations. An employee who "primarily" performs the tasks necessary to produce a product or provide a service 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).

Furthermore, the petitioner has failed to provide any detailed explanation, along with credible and probative supporting documentation, establishing the U.S. entity's overall organizational structure, staffing levels, and the scope of its business activities at the time of filing. At the time of filing, the record reflected that the beneficiary would supervise one full-time Senior Account Executive who was responsible for sales management, advertising and client liaison. The petitioner also stated that it employed four account executives that were on commission. However, the petitioner did not provide sufficient evidence regarding the hours of employment of the commissioned staff or any evidence of payments to them to establish whether they work full-time, part-time or on a very limited basis. The petitioner also failed to provide a detailed job description for the senior account executive and the account executives. Accordingly, the evidence is unclear as to who is actually performing the day-to-day functions of the U.S. operations such as budgeting, preparing invoices, market research, business development and customer service. In fact, the petitioner submitted copies of sales orders/agreements with U.S. clients that appear to have been drawn up by the beneficiary and which encourage clients to contact him directly with any questions. Overall, the record is insufficient to establish that the beneficiary will be employed in a primarily managerial or executive capacity.

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, we must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional

capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary, for example, to perform the duties of the Senior Account Executive or the Account Executives who are responsible for sales and client development.

Further, the petitioner has not consistently indicated that the senior account executive will act as a supervisor over the commissioned account executives, as such duties were not included in this employee's job description at the time of filing. Moreover, the record reflects that this employee performs many duties that overlap with those of the commissioned workers. Accordingly, the record does not establish that the beneficiary will supervise subordinate managers or supervisors. While the petitioner indicates that it has vacant positions for a chief financial officer, chief operating officer and marketing manager and "intends to beef up our personnel support" as soon as it completes set up of its California operations, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

In addition, the petitioner states that the beneficiary will manage an essential function of the company, specifically, the "planning and managing of market research and analysis." 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 written job offer that clearly describes 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. § 204.5(j)(5). 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 International*, 19 I&N Dec. 593, 604 (Comm'r 1988).

In this matter, the petitioner has not provided evidence that the beneficiary would manage an essential function. It has not clearly articulated the duties the beneficiary would perform to manage the market research and analysis function, nor has it established that the beneficiary's duties would be primarily managerial. The petitioner's assertion that "the percentage of the employee's managerial duties . . . is irrelevant" in the case of a function manager is incorrect.

The petitioner's primary claim on appeal is that the beneficiary will be employed in an executive capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the

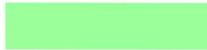
Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

Here, why we do not doubt that the beneficiary will exercise the appropriate level of discretionary authority over the goals and policies of the company, the evidence of record does not establish that he would primarily perform executive-level duties with the support of one full-time employee and four commissioned employees whose level of contribution to the company's day-to-day activities has not been documented.

As required by section 101(a)(44)(C) of the Act, 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.

The petitioner indicates that the beneficiary will be working in its newly established California office, which has one current employee, four individuals on commission, and vacancies for five positions. While the petitioner was established in Nevada in [REDACTED] its tax returns for [REDACTED] suggest that it has been minimally operational, with no salaries or rents paid in [REDACTED] despite having gross receipts of \$119,000 and assets of \$87,765. The California branch was established less than one year before the filing of the petition and is in a preliminary stage of development. The petitioner did not explain how a single employee and four commissioned staff would relieve the beneficiary from significant involvement in the day-to-day, non-executive activities of the company, especially in light of the petitioner's claims that many of its intended positions are not staffed. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as managing director, a senior account executive, and the claimed commissioned staff. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

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 for the petitioner. In light of the foregoing discussion, the petitioner has not established that the beneficiary would be employed by the petitioner in a qualifying managerial or executive capacity.



III. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reason. 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 appeal is dismissed.