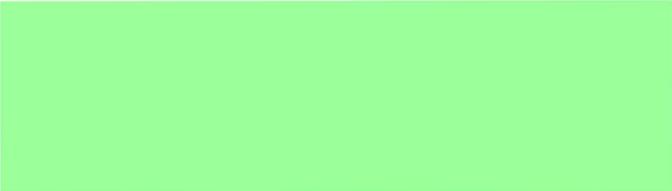


U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



DATE: **MAY 17 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.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center ("the director"). The director dismissed the petitioner's subsequent motion to reopen and reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and entry of a new decision.

The petitioner, a "South African food exporter," seeks to employ the beneficiary in the position of "Function Manager – Market Manager (International Expansion Coordinator)." 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.

On December 20, 2011, the director denied the petition concluding that the petitioner failed to establish that the petitioner has a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel disputes the director's findings and provides an appellate brief laying out the grounds for challenging the denial.

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.

The sole issue addressed by the director is whether the petitioner submitted sufficient evidence to establish that it has a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

In support of its claim that it is a subsidiary of the foreign entity, the petitioner has submitted: copies of its stock certificates and stock ledger; a shareholders' resolution; corporate tax returns (IRS Forms 1120 and 5472); supporting letters and a Dun & Bradstreet report. Upon review, the petitioner has submitted relevant, probative and credible evidence of its ownership by the beneficiary's foreign employer sufficient to establish the claimed parent-subsidiary relationship. Accordingly, as there was no other ground for denial of the petition, the AAO will withdraw the director's decision.

However, notwithstanding the AAO's withdrawal of the director's adverse conclusion on a single issue, the AAO finds that the petition does not warrant approval on the basis of evidence that is currently on record. The AAO reviews each appeal on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). After a thorough review of the record, the AAO finds that the petitioner failed to establish that it will employ the beneficiary in a qualifying managerial or executive capacity as defined at section 101(a)(44) of the Act. Accordingly, the petition will be remanded to the director for further action and consideration pursuant to the discussion below.

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). That being said, however, 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.

In the present matter, an analysis of the record as presently constituted does not lead to affirmative conclusion that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

With regard to the position in the U.S., the petitioner provided a vague and general job description such as the beneficiary will, "provide strategic guidance on U.S. market expansion strategies, including U.S. legal and tax matters;" "provide strategic guidance on international business plan and budget forecasting;" "oversee and provide strategic guidance on international business systems, including coordination of logistics IT to improve delivery, sales statistics and functionality; and, "oversee intellectual property use and registration." It is unclear which specific tasks actually fall within these broad categories and whether the supervisory tasks the beneficiary performed were of a qualifying nature. 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 her daily routine. The actual duties themselves will 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). The petitioner's vague and general description of the beneficiary's position does not identify the actual duties 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 "oversee and coordinate distribution agreements negotiations"; "oversee and coordinate raw material purchasing and supplier agreement negotiations (one-on-one; extensive impersonal relationship not easy to substitute)"; "research and analysis of market statistics, marketing strategies and industry standards, prepare reports of findings"; and, "direct and participate in onsite visits with clients to meet specific demands and/or address grievances." The petitioner does not provide sufficient evidence that the company employs individuals to assist with the budgeting, marketing, bookkeeping, negotiations, purchasing, and importing and exporting operations and, thus, it appears that the beneficiary is performing the duties inherent in operating a business such as finances, customer service, negotiations, contracts, and importing and exporting 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).

The petitioner provided an organizational chart which depicts an "operation director/president" who oversees a retail outlet, internet sales, wholesale sales and consultants. The chart shows administrative, warehouse and support staff working in the retail outlet. There are no named employees identified on the chart and the beneficiary's position of "market manager" is not depicted. In the letter submitted in support of the petition, the petitioner mentioned that it has "over 10 employees (global operations) and subcontractors." However, the petitioner did not submit any documentation supporting its claim of ten employees, or provide any information regarding the beneficiary's subordinate staff. According to the petitioner's IRS Form 1120, U.S. Corporation Income Tax Return, for 2009 and 2010, the petitioner paid \$63,400.00 and \$91,494.00 in salaries and wages, respectively. It is not clear how these reported salary and wage expenses can cover the salary of ten employees. The petitioner failed to provide any evidence of employment of these individuals such as quarterly wage reports, paystubs, payroll records, or IRS Forms W-2 or 1099. As discussed above, the petitioner has not identified employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. 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)).

Upon review of the record, the petitioner does not provide sufficient evidence that the beneficiary's proposed employment with the U.S. entity would be within a qualifying managerial or executive capacity.

Furthermore, the record does not support a finding of eligibility based on an additional ground that was not previously addressed in the director's decision. The record lacks substantive job descriptions establishing what job duties the beneficiary performed during his employment abroad. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Accordingly, the case will be remanded to the director for further review and entry of a new decision. The director shall take proper notice of the beneficiary's employment capacity in the United States and abroad. The director may issue a notice requesting any additional evidence he deems necessary in order to determine the petitioner's eligibility for the benefit sought.

ORDER: The director's decisions dated December 20, 2011 and March 1, 2012 are withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision, which, if adverse to the petitioner, shall be certified to the AAO for review.