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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: NOV 05 2013

OFFICE: TEXAS 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)

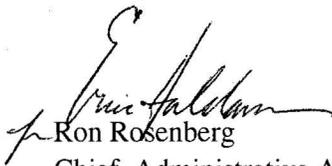
ON BEHALF OF PETITIONER:
[REDACTED]

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,


Ron Rosenberg

Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Texas corporation that seeks to employ the beneficiary as its engineering 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 record shows that the petitioner filed the Form I-140 on October 24, 2012 and submitted a number of supporting documents in an effort to establish eligibility for the above stated immigration benefit. The petitioner's submissions included various tax and financial documents, corporate and bank documents, as well as documents that address the beneficiary's former employment with the foreign entity as well as his prospective employment with the U.S. entity.

After reviewing the petitioner's submissions, the director determined that the petition did not warrant approval. Accordingly, on January 15, 2013, the director issued a request for evidence (RFE) instructing the petitioner to provide supplementary job descriptions for both positions listing the beneficiary's specific daily job duties with each entity and the amount of time that was and would be allocated to the items listed. The director further instructed the petitioner to provide both entities' organizational charts, evidence of wages and salaries paid to the petitioner's employees during the relevant time period, and job titles, job descriptions, and educational credentials of the beneficiary's subordinates.

The petitioner responded to the RFE, providing job descriptions and organizational charts that addressed the beneficiary's employment and the employment of his subordinates at both entities. Nevertheless, the director denied the petition in a decision dated June 4, 2012, concluding that the petitioner failed to establish that the beneficiary's respective positions with his former employer abroad and with his prospective employer in the United States fit the statutory criteria for managerial or executive capacity.

On appeal, counsel disputes the director's decision, asserting that the director failed to apply the preponderance of the evidence standard of proof when examining the petitioner's supporting evidence and thus improperly determined that the petitioner is not eligible for the immigration benefit sought herein. With regard to the proposed employment, counsel asserts that the director may not apply a higher standard of proof based on the petitioner's small size.

Upon review, and for the reasons discussed herein, finds that counsel's assertions are not sufficient to establish that the beneficiary was employed abroad and that he would be employed in the United States in a qualifying managerial or executive capacity.

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.

In general, when examining whether the beneficiary was or will be employed in a managerial or executive capacity, 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 and size of the beneficiary's subordinate staff, the nature of the business conducted by the entity in question, and any other relevant facts that may contribute to a comprehensive understanding of the beneficiary's respective roles within the organizations of the former employer abroad and the petitioning U.S. employer.

First, the AAO will review evidence pertaining to the beneficiary's employment with the foreign entity, including the initial job description the petitioner provided in its supporting statement dated October 12, 2012 followed by a review of the petitioner's RFE response, which includes a second and vastly different job description pertaining to the same position with the foreign entity. Turning first to the supporting statement, the petitioner stated that the beneficiary assumed the position of senior engineer of the Fab Engineering department in December 2001. The petitioner stated that during such employment the beneficiary performed the following job duties: (1) drew up, proposed, and helped make modifications in semiconductor equipment, machines, processes, or materials such that would result in cost reduction or improved operations; (2) provided engineering services and trained employees of customer companies in the use, operation, and maintenance of equipment; and (3) prepared reports, records, and directives for review by his supervisors. The AAO notes that nowhere within the original job description did the petitioner refer to the beneficiary as having assumed a supervisory position wherein he managed the work of subordinate engineers or other professionals. Moreover, a review of the beneficiary's Form G-325A, Biographic Information, which was submitted with his concurrently-filed Form I-485 Application to Adjust Status, shows that the beneficiary identified his position title abroad, as well as his initial position with the U.S. entity, as that of "engineer." In

fact, the Form G-325A shows that the beneficiary did not identify himself as an engineering manager until his third year of employment with the petitioning U.S. entity.

However, when turning to the evidence provided in its RFE response with regard to the same position abroad, the record shows that the petitioner put forth an entirely different set of facts, asserting that instead of actually performing the job duties listed above in Nos. 1-3, the beneficiary "was in charge of managing" those very functions. The petitioner went on to provide a more detailed job description, claiming that the beneficiary was charged with overseeing a staff of seven employees who carried out the steps to provide a work product for the end user, i.e., the foreign entity's customer. While the petitioner maintained that a portion of the beneficiary's time was allocated to management of non-professional employees, the tone of the updated job description focuses on the beneficiary's supervisory job duties, including evaluating the work product created by subordinate employees, leading meetings within his own department - Fab Engineering - and attending management meetings with other department heads, analyzing the results of monthly, quarterly, and yearly business plans in order to identify problems and adjust the plans as needed, and actually creating the monthly, quarterly, and yearly business plans to serve the needs of the employer and customer. Although the petitioner's updated job description indicates that the beneficiary primarily performed tasks within a managerial capacity, the AAO cannot overlook the considerable inconsistency between the latter job description and the original description, which contained no indication that the beneficiary acted in the role of either a personnel or a function manager.

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). In the present matter, the petitioner neither acknowledges nor provides a plausible explanation for having submitted two such vastly distinct job descriptions both of which were intended to address the same position held by the beneficiary during his former employment with the foreign entity. As such, the AAO cannot determine which, if either, of these job descriptions is the more accurate depiction of the beneficiary's former employment. Given the petitioner's failure to provide sufficient credible evidence regarding the beneficiary's employment abroad, the AAO cannot conclude that the beneficiary was employed in a qualifying managerial or executive capacity and on the basis of this initial adverse conclusion, the instant petition cannot be approved.

Next, turning to the beneficiary's proposed employment with the U.S. entity, the AAO takes note of the U.S. entity's staffing composition. For instance, the beneficiary's two professional subordinates in his proposed position dedicate only 50% of their time to the work that they perform under the beneficiary's supervision. The record indicates that these employees would spend the remaining 50% of their time carrying out sales, marketing, and administrative tasks under the supervision of the company's president, thus leaving the beneficiary to oversee the work of non-professional and non-supervisory employees.

While 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 during his former employment with the foreign entity were 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).

In the present matter, the time allocations that the petitioner provided do not establish the proportion of time the beneficiary would allocate to overseeing the non-professional staff members, who outnumber the professional employees and work under the beneficiary's supervision on a full-time basis. Furthermore, while the beneficiary allocated a considerable portion of his time - 40% - to reviewing the work product during his employment abroad, the job description with regard to the beneficiary's proposed employment indicates that the beneficiary would allocate only 10% of his time to this job duty and focus his time more on managing personnel and meeting with customers to resolve problems and customer complaints. While the adverse decision in this matter does not rest on a single component of the job description, when the job description is considered in its totality along with the petitioner's limited staffing, the petitioner has not established that the beneficiary would more likely than not allocate his time to the performance of tasks within a qualifying managerial or executive capacity.

Although counsel has also indicated that the beneficiary will manage a function, the fact remains that the provided job description places great emphasis on the beneficiary's role as a personnel manager. 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). If the petitioner wishes to raise this claim, it must provide a job description demonstrating that the beneficiary will *manage* the function rather than *perform* the duties related to the function. As noted above, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be 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. at 604. The petitioner may not claim to employ the beneficiary in the role of a function manager as a default mechanism when the petitioner cannot establish the beneficiary's role as a personnel manager whose primary concern is to manage a subordinate staff of managerial, supervisory, and/or professional employees.

Additionally, counsel erred in relying on a district court case in order to establish that the size of the petitioning entity is not relevant. In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Given the AAO's consideration of the totality of the record, the petitioner's staffing was not considered alone to the exclusion of other relevant factors. Rather, the AAO duly considered the beneficiary's job description

along with the provided time allocations. In light of the evidence presented, the AAO finds that the petitioner has not established that the beneficiary's time would be primarily spent performing tasks within a qualifying capacity. As such, the petitioner has failed to demonstrate that it is eligible for the immigration benefit sought herein and on the basis of this second adverse conclusion the instant petition cannot be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.