(b)(6)

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

[redacted]

DATE: JUN 16 2014 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[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 preference visa petition was denied by the Director, Texas Service Center. 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 president/general 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.

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.

Additionally, section 204(c) of the Act prohibits approvals of immigrant visa petitions under the following circumstances:

> Notwithstanding the provisions of subsection (b) no petition shall be approved if (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws or (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

In correspondence with the above statutory provisions, the regulation at 8 C.F.R. § 204.2(a)(1) states the following in pertinent part:

> (ii) Fraudulent marriage prohibition. Section **204(c)** of the Act prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. The director will deny a petition for immigrant visa classification filed on behalf of any alien for whom there is substantial and probative evidence of such an attempt or conspiracy, regardless of whether that alien received a benefit through the attempt or conspiracy. Although it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy, the evidence of the attempt or conspiracy must be contained in the alien's file.

II. Procedural History

The record shows that the petitioner filed a Form I-140 on October 29, 2012. The petition was accompanied by supporting evidence addressing the petitioner's and the beneficiary's eligibility for the immigration benefit sought herein.

On August 13, 2013, the director issued a notice of intent to deny (NOID). The director determined that the beneficiary was ineligible for immigration benefits under section 203(b) of the Act based on the provisions cited in section 204(c) of the Act and the regulation at 8 C.F.R. § 204.2(a)(1), which have the cumulative effect of prohibiting the filing of an I-140 immigrant petition, among others, on behalf of an alien who attempted to obtain an immigration benefit by means of entering into a fraudulent marriage. The director informed the petitioner that the record contains evidence of a statement made by the beneficiary on July 24, 1990 during an application for a Border Crossing Card, in which the beneficiary admitted to having entered into a sham marriage and filed a fraudulent Form I-130, Petition for Alien Relative, for the purpose of obtaining an immigrant visa.

Although the director allowed the petitioner the opportunity to explain, rebut, or present information on behalf of the beneficiary in order to overcome the adverse finding, the record indicates that the petitioner failed to respond to the NOID. Accordingly, in a decision dated October 21, 2013, the director denied the petition, concluding that the petitioner failed to provide evidence to establish that the beneficiary is eligible for the immigration benefit sought.

Counsel, on behalf of the petitioner, filed an appeal seeking to overcome the director's decision.

III. Issue on Appeal

The primary issue in this proceeding is whether the petitioner established that the beneficiary is eligible for the immigration benefit sought herein, despite the petitioner's failure to respond to the NOID, which cited a valid basis for finding ineligibility. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

As previously indicated, the record contains evidence that the beneficiary admitted to having entered into a fraudulent marriage for the purpose of obtaining an immigration benefit. When informed of the derogatory evidence through the issuance of a NOID, the petitioner failed to respond and now, with the assistance of counsel, submits an appellate brief disputing the very ground for denial that was previously cited.

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.

Additionally, even if the petitioner had been able to overcome the derogatory evidence regarding the beneficiary's fraudulent marriage, the petitioner's Form I-140 did not merit approval based on merits of the supporting evidence, which fails to establish that the petitioner meets the statutory criteria under section 203(b)(1)(C) of the Act. Namely, the record lacks sufficient evidence to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. The petitioner's supporting evidence includes the foreign entity's organizational charts – both current and for 2009 – accompanied by employee lists and employee job descriptions, three of which – "perfil gerente de operaciones," "perfil gerente de cuenta estibadores," and "gerente de seguridad" – were not accompanied by English language translations and thus will not be deemed probative or be accorded any weight in this proceeding. *See* 8 C.F.R. § 103.2(b)(3). In addition to the lack of a translation for the position titled "perfil gerente de operaciones," the employee – – was named in the 2009 chart as occupying the position of "GTE De Cuenta" and in the current chart this same individual was identified in the position of "Gerente de Trafico." Thus both organizational charts are at odds with the information provided in the separate job description where the same individual was identified by an entirely different position title. The record also includes a job description, along with the corresponding English language translation, for an accountant – a position the petitioner indicates was occupied by However, neither the position of accountant nor the individual whom the job description indicated as occupying that position was included in the foreign entity's current or prior organizational chart.

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, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591. Based on the inconsistencies discussed in the above paragraph, we cannot determine the reliability of the organizational charts or the remaining job descriptions the petitioner provided with regard to the foreign entity and the beneficiary's employment therein. Given that this information is relevant to the overall issue of the beneficiary's employment capacity during his employment with the foreign entity, the petitioner's submission of inconsistent evidence precludes us from being able to determine whether the beneficiary's employment abroad was in a qualifying managerial or executive capacity.

Next, the regulation at 8 C.F.R. § 204.5(j)(2) defines a *multinational* entity as the qualifying entity, or its affiliate, or subsidiary that conducts business in two or more countries, one of which is the United States.

Although the petitioner provided the foreign entity's business documents showing that the latter company was doing business in 2007, 2008, and 2009, the petitioner filed the Form I-140 in October 2012. The record does not have any evidence documenting the foreign entity's business activities at or near the time of filing.

Lastly, the record lacks sufficient evidence to establish that the beneficiary's proposed position with the petitioning entity would be within a qualifying 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). 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 would perform are only incidental to the proposed position. 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 matter at hand, the beneficiary's job description indicates that an undefined portion of the beneficiary's time would be allocated to non-qualifying tasks, including negotiating with suppliers and clients, making presentations to help sell the services offered by the petitioner, preparing schedules and routes, and conducting market research. The record does not establish what portion of the beneficiary's time would be allocated to these non-qualifying tasks versus tasks that are within a qualifying managerial or executive capacity. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without the relevant evidence, we cannot conclude that the primary portion of the beneficiary's time would be spent performing tasks within a qualifying capacity.

In light of the various evidentiary deficiencies described above, the record fails to establish that the petitioner meets the statutory and regulatory eligibility criteria and the petition would therefore warrant denial based on these grounds, even if the petitioner had overcome the derogatory evidence concerning the beneficiary's admission of marriage fraud.

IV. Conclusion

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.