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

(b)(6)

[redacted]

DATE: MAR 19 2014 OFFICE: TEXAS SERVICE CENTER [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 Texas Service Center Director denied the preference visa petition. The petitioner filed an appeal with the Administrative Appeals Office (AAO), that was dismissed. The matter is now before the AAO on a motion to reconsider. The motion will be granted. Notwithstanding the granting of the motion, the AAO will affirm the underlying decision dismissing the appeal.

The petitioner is a Texas corporation that seeks to employ the beneficiary as its sales 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. Procedural History

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

On appeal, counsel for the petitioner asserted that the director failed to consider the beneficiary's role of a function manager. Although counsel acknowledged that the beneficiary performs some non-qualifying tasks, he contended that such tasks would not account for the primary portion of the beneficiary's time in his proposed employment with the petitioning entity. Counsel also addressed the beneficiary's former employment abroad, claiming that the beneficiary performed primarily managerial job duties. Counsel also challenged the director's reliance on the beneficiary's H-1B nonimmigrant status as an indicator that the beneficiary's former employment abroad was not in a managerial or executive capacity.

The AAO dismissed the petitioner's appeal. Although the AAO conceded that the beneficiary's current H1B nonimmigrant status is not relevant to the issue of the beneficiary's employment capacity in his former position with the foreign entity, the AAO nevertheless concluded that the petitioner failed to establish that the beneficiary's former and proposed employment fit the statutory definition of managerial or executive capacity. The AAO focused on the beneficiary's job descriptions in his respective positions with the former employer abroad and his proposed U.S. employer and determined that the petitioner lacked an organizational complexity at the time of filing and thus was not likely to have possessed the capability of relieving the beneficiary from having to allocate his time primarily to the performance of non-qualifying tasks. Additionally, while the AAO acknowledged the petitioner's submission of an organizational chart depicting the foreign entity's staffing hierarchy, it ultimately determined that the record lacked sufficient evidence to corroborate the information put forth in the chart.

On motion, counsel objects to the AAO's analysis of the facts presented and asserts that a denial of the petition was not warranted on either of the grounds cited in the service center's and the AAO's respective decisions.

II. 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--
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> (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.

III. Analysis

The two key issues raised on appeal and motion concern the beneficiary's employment capacity in his respective positions with his former employer abroad and his proposed U.S. employer. Specifically, the AAO will explain why the evidence of record falls short of meeting eligibility criteria, which requires the petitioner to establish that the job duties the beneficiary performed abroad and those he would perform in his proposed position with the petitioning entity were and would be primarily within the purview of someone employed in a managerial or executive capacity.

A key consideration in determining whether the beneficiary has been or would be employed in a managerial or executive capacity is the 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 entity's staffing is often considered in tandem with the beneficiary's job duties. Next, the AAO considered the weight of the evidence, focusing heavily on the beneficiary's job descriptions and the staffing at each entity. As such, counsel's contention that the AAO made a "sweeping conclusion" that was not accompanied by "any meaningful discussion" of the evidence is without a basis. Furthermore, counsel's repeated references to an unpublished AAO case as a basis for his arguments will not be deemed sufficient to overcome the AAO's decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all employees of the U.S. Citizenship and Immigration Services (USCIS) in the administration of the Act, unpublished decisions are not similarly binding and thus do not carry the evidentiary weight of published AAO decisions.

Counsel then proceeds to address the issue of the petitioner's limited personnel, by claiming that the beneficiary assumes the role of a function manager and thus is not required to manage personnel. In the

alternate, counsel states that as the petitioner continues to grow and develop, its current part-time employees will eventually be employed on a full-time basis. However, neither of counsel's assertions properly addresses the basis of the AAO's decision, which is that the petitioner failed to establish its eligibility at the time of filing. 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). Regardless of any actual or anticipated growth the petitioner may experience, if the petitioner lacked the ability to employ the beneficiary in a qualifying managerial or executive capacity at the time the Form I-140 was filed, eligibility has not been established and the petition must be denied.

Furthermore, as to the claim that the beneficiary would assume the role of a function manager, counsel appears to be relying on this assertion as a default position by virtue of the petitioner's extremely limited support personnel, which precludes the petitioner from being able to establish that the beneficiary would assume the role of a personnel manager whose primary concern is to manage a subordinate staff of managerial, supervisory, and/or professional employees. Any entity claiming to employ the beneficiary in the role of a function manager must support this claim with sufficient evidence, which includes furnishing a written job offer that clearly describes the duties to be performed, i.e., identifying the function with specificity, articulating the essential nature of the function, and establishing the proportion of the beneficiary's daily duties attributed to managing the essential function. 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.

In the present matter, as discussed in the AAO's earlier decision, the petitioner provided a deficient job description, both for the beneficiary's former employment with the foreign entity and for his proposed employment in the United States. Although counsel objects to the AAO's discussion of the beneficiary's job duties as inaccurate and incomplete due to the AAO's selective focus on only certain portions of the job description, the AAO points out that it is under no legal obligation to recite, verbatim, entire portions of the record. Additionally, contrary to counsel's assertion, the AAO is not required to point out and analyze the nature of the petitioner's business where such analysis would not enhance an understanding of why the petitioner is deemed as having failed to establish eligibility for the benefit sought.

Here, the AAO's finding as it pertains to the beneficiary's proposed position was based primarily on the petitioner's failure to (1) provide a proper breakdown of time the beneficiary would allocate to his proposed list of job duties; (2) establish that the beneficiary's time would be allocated primarily to job duties at a managerial or executive level; and (3) demonstrate that the petitioner's staffing at the time of filing was sufficient to relieve the beneficiary from having to allocate the primary portion of his time to the performance of non-qualifying operational tasks. A discussion of the nature of the petitioning entity's business would not be effective in establishing that the petitioner overcame any of the three adverse findings. In fact, given that the petitioner operates a sales-based enterprise, the AAO is justified in its inquiry into the petitioner's staffing based on the understanding that a sales-based business cannot operate without an active sales staff. Where, as in the present matter, a company's entire staff consists of two part-time employees and the beneficiary, it is reasonable for the AAO to question how the petitioner would relieve the beneficiary from having to allocate his time to primarily non-qualifying tasks or why the petitioner would even require the services of an employee whose primary concern would be to perform tasks at a managerial or an executive level.

Additionally, counsel asserts that the AAO erroneously "imputes the duties of the beneficiary's subordinates onto the beneficiary," referring to the task of preparing sales reports, which counsel denies is a task assigned

to the beneficiary. While the petitioner offered a different job description on appeal and has resubmitted that description in support of the motion, claiming that the beneficiary would be responsible for "supervising sales reports made by the sales support team," a review of the set of proposed job duties that the petitioner offered in response to the director's request for evidence shows that the beneficiary would be directly responsible for "preparing sales reports for each one of the represented manufacturers." The petitioner's attempt to significantly alter the beneficiary's job responsibilities associated with the proposed employment gives the AAO cause to question the petitioner's eligibility as well as the credibility of the claims being made. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Moreover, 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The AAO also rejects counsel's contention that the discussion on appeal lacked a "substantive analysis" of the beneficiary's job description and finds that the assertion that the AAO "reached [its] conclusion by distorting the beneficiary's job duties" was based on an incorrect interpretation of the AAO's analysis. Regardless of whether the AAO restated each of the tasks enumerated in the petitioner's RFE response statement dated March 13, 2013, the information was duly considered and properly weighed in the context of the totality of the evidence presented. In doing so, the AAO's adverse finding did not, as counsel suggests, focus on the fact that the petitioner chose to use a percentage rather than an hourly breakdown to describe the beneficiary's proposed job duties. Rather, the AAO focused on the fact that the petitioner failed to assign a percentage of time, i.e., a time constraint, to each of the beneficiary's individual job duties and instead assigned the requested time constraints to three broad categories that served as general headings for the more tasks listed therein. When a particular position is comprised of both qualifying and non-qualifying tasks, it is critical for the petitioner to establish that the primary portion of the beneficiary's time is allocated to tasks that are within a qualifying managerial or executive capacity. The most effective way to do that is to assign a unit of time, using a percentage or hourly breakdown, to show how much of the beneficiary's time would be allocated to qualifying tasks versus those that are non-qualifying. Given the petitioner's failure to assign a time allocation to each of the beneficiary's individual tasks, the AAO was unable to draw a conclusion as to the precise breakdown of time spent performing qualifying versus non-qualifying tasks. Notwithstanding this deficiency, the AAO was able to determine that the beneficiary would not allocate his time primarily to the performance of qualifying tasks based on the time assigned to two of the categories, which would comprise a total of 55% of the beneficiary's time and consist entirely of the following non-qualifying tasks:

> Forty five percent (45%) of his time is used in sales activities such as:
>
> - Making important new sales calls . . . .
> - Directing visits to customers and doing extensive travelling throughout the whole sales territory to keep customers attended. . . .
> - Preparing sales reports for each one of the represented manufacturers.[1]
> - Reporting senior management on sales metrics, opportunities, threats and contingency plans.

[1] As previously noted, the petitioner altered this job duty in the job descriptions provided on appeal and in support of the motion.

- Dealing with problem issues with the represented manufacturers[.]

The remaining ten percent (10%) of his time is used:

- Training personnel.
- Representing the company at trade shows, technical organizations, Forums, Sales Seminars, and other Chamber of Commerce activities.

Counsel has not explained how or why any of the tasks listed above should be deemed as those that the beneficiary would perform within the purview of a multinational manager or executive. Additionally, the AAO determined that a number of the tasks listed in the first job category, which discussed the beneficiary's role in marketing, administration, and finances, are also non-qualifying. Namely, creating marketing strategies, recruiting personnel, seeking manufacturers, and negotiating discounts with suppliers, while valuable to the success of the petitioner's operation, cannot be deemed as tasks that would be performed within a managerial or executive capacity, even if the individual who would perform these tasks, i.e., the beneficiary, is head of that operation. Accordingly, while the petitioner precluded the AAO from being able to quantify the specific portion of the beneficiary's time that would be devoted to the performance of non-qualifying tasks, based on the finding that two of the categories comprising 55% of the beneficiary's time consist entirely of non-qualifying tasks along with the non-qualifying tasks listed in the first job category it was logical for the AAO to conclude that "at least 55% (or possibly more)" of the beneficiary's time would be allocated to tasks that are not within a qualifying capacity, regardless of the beneficiary's position title or leadership role within the petitioning entity.

Lastly, counsel objects to the AAO's expectation that the petitioner should have submitted evidence to support claims made in the foreign entity's organizational chart, asserting that the AAO is precluded from issuing an adverse finding based on the absence of evidence that the director did not request in the RFE. However, a thorough review of page two of the RFE shows that the director expressly addressed the issue of outside contractors when he instructed the petitioner to provide evidence showing how many contractors the foreign entity used if the claim suggests that contract labor was hired. Given that the foreign entity's organizational chart showed that five out of seven individuals who were part of the foreign entity's sales force were outside contractors, the petitioner was made aware and certainly had the opportunity to provide the requested documentary evidence. Therefore, the AAO properly noted the petitioner's failure to comply with the RFE instructions, which expressly addressed the need to submit documentation to support the claims being made. 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).

Furthermore, USCIS is not required to issue an RFE or notice of intent to deny (NOID), even in instances where it is determined that the petitioner has not provided all required initial evidence or has not demonstrated eligibility. Rather, USCIS has the discretion to issue either an RFE or NOID or to deny the petition outright for lack of initial evidence. 8 C.F.R. § 103.2(b)(8)(ii). Therefore, contrary to counsel's understanding, the AAO acted well within its legal limits when it determined that the petitioner failed to provide evidence of the foreign entity's support staff, regardless of the contents of the RFE. Additionally, while the petitioner provided additional evidence in support of the motion to reconsider, including paystubs for one in-house sales person and two outside sales people, all of whom the foreign entity employed in 2005 during the beneficiary's employment abroad, the record still lacks evidence to show the foreign entity's employment of the three remaining outside sales people who were named in the foreign entity's organizational chart.

IV. Conclusion

In general, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act.

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. Here, the petitioner has not sustained that burden.

ORDER: The motion is granted. The underlying petition is denied.