

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass Ave N.W., Rm. 3000
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B4



File: [Redacted]
LIN 06 253 50850

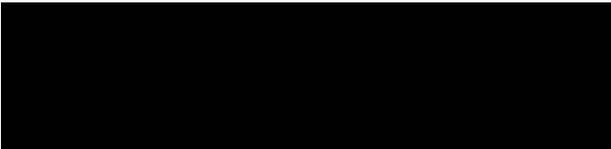
Office: NEBRASKA SERVICE CENTER

Date: DEC 16 2008

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)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner was incorporated in the State of Florida on February 12, 2003, and claims to be engaged in construction services. It seeks to employ the beneficiary as its president 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 claims that it is the subsidiary of Affordable Contracts Limited, located in Scotland.

The director denied the petition, finding that the petitioner had failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. On appeal, counsel contends that the petitioner has sufficient staff at the U.S. office to support the beneficiary in a qualifying managerial or executive position.

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 the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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 that 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. *See* 8 C.F.R. § 204.5(j)(5).

The issue in this matter is whether the petitioner has established that the beneficiary will be employed in a managerial or executive capacity for the United States entity.

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.

On Form I-140, filed on August 11, 2006, the petitioner indicated that the beneficiary would be employed as its president. In a letter of support from the petitioner's former counsel, dated August 8, 2006, the beneficiary's duties were described as follows:

- Developing and creating new business markets, including soliciting new business and maintaining contacts with existing customers.
- Interviewing, selecting and supervising independent contractors for the business including[:] site supervisors, painters, general contractors, carpenters, etc.
- Creating, implementing and overseeing all internal company policies per US guidelines.
- Developing marketing strategies for the business enterprise including seeking out new advertising venues, etc.
- Developing and overseeing all internal human resource policies for the business per US labor laws including[:] working with accountants to determine rate of pay, and working with insurance agents to insure that all projects and workers are insured.
- Obtaining competent legal and accounting firms for the business enterprise.
- Insuring that all federal, state and local taxes are paid in a timely fashion.
- Developing customer service policies for the business enterprise including follow up calls to insure that all jobs are completed properly and in a timely fashion, as well as receiving feedback from customers to determine what areas may need improvement.

In a second letter of support from the petitioner dated July 1, 2006, the petitioner expanded the list of the beneficiary's duties as follows:

- Developing and creating new business markets, including soliciting new business and maintaining contacts with existing customers. [The beneficiary] will spend approximately 30% of his time with these duties. Interviewing, selecting and supervising independent contractors for the business including[:] site supervisors, painters, general contractors, carpenters, etc. [The beneficiary] will spend approximately 15% of his time with these duties.
- Creating, implementing and overseeing all internal company policies per US guidelines. [The beneficiary] will spend approximately 5% of his time with these duties.
- Developing marketing strategies for the business enterprise including seeking out new advertising venues, etc. [The beneficiary] will spend approximately 10% of his time with these duties.
- Developing and overseeing all internal human resource policies for the business per US labor laws including[:] working with accountants to determine rate of pay, and working with insurance agents to insure that all

projects and workers are insured. [The beneficiary] will spend approximately 15% of his time with these duties.

Obtaining competent legal and accounting firms for the business enterprise. [The beneficiary] will spend approximately 1% of his time with these duties.

Insuring that all federal, state and local taxes are paid in a timely fashion. [The beneficiary] will spend approximately 9% of his time with these duties.

Developing customer service policies for the business enterprise including follow up calls to insure that all jobs are completed properly and in a timely fashion, as well as receiving feedback from customers to determine what areas may need improvement. [The beneficiary] will spend approximately 15% of his time with these duties.

The petitioner also provided a list of the independent contractors it currently employs. The list included a total of fifteen contractors including site supervisors, carpenters, aluminum installers, masons and concrete finishers, painters, drywall installers, engineers, general contractors, plumbers, etc. The petitioner also submitted copies of its Forms 1099, Miscellaneous Income, issued to the contractors for 2005. The AAO notes however, that despite claiming to have fifteen contractors in its letter dated July 1, 2006, it provided documentation for only nine of these persons. Finally, the petitioner submitted copies of local newspaper articles and advertisements for the petitioner's business.

The director found the initial evidence insufficient to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. Consequently, a request for evidence was issued on June 11, 2007. In the request, the director required the petitioner to submit an organizational chart demonstrating the beneficiary's role in the organizational hierarchy of the petitioner. In addition, the director requested copies of the Form W-2, Wage and Tax Statement, issued to the beneficiary and to all other contractors or employees, as well as the petitioner's most recent Form 1120, U.S. Corporation Income Tax Return.

In a response dated August 27, 2007, the petitioner addressed the director's requests. The petitioner's organizational chart demonstrated that the beneficiary, as president, was at the top of the organizational hierarchy. Directly below the beneficiary was [REDACTED] of [REDACTED]'s Repair" as a Site Supervisor. Finally, the chart indicated the [REDACTED] oversaw ten subordinate contractors and/or individuals.

The petitioner also submitted a Form W-2 for the beneficiary for 2006, indicating that he received \$37,500 in wages that year. The petitioner's Form 1120, however, indicated that it paid no salaries or wages to any individuals that year. However, the amount of \$37,500 was listed on Line 12 under "Compensation of Officers;" however, the corresponding Schedule E for this section was not completed. Finally, the petitioner submitted eleven 1099 forms for 2006.

On October 19, 2007, the director denied the petition. The director noted that based on the organizational chart, it appeared that the beneficiary was responsible for all operational duties of the

company, such as day-to-day marketing, accounting, financial and office management. Moreover, the director noted that the petitioner submitted no evidence to demonstrate that the beneficiary managed a subordinate staff of professionals. Finally, the director concluded that the record was insufficient to establish that the beneficiary was primarily a function manager.

On appeal, newly-retained counsel for the petitioner alleges that the director's decision was erroneous. In support of this contention, counsel submits a twenty-two page brief which dissects the director's decision into "queries." Counsel specifically addresses each paragraph of the decision individually, and seeks to overcome the director's conclusions or refute the legal premises upon which the director based the decision.

Upon review, the AAO concurs with the director's findings. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

In this matter, the petitioner and former counsel for the petition provided a detailed overview of the beneficiary's proposed position in the United States. The overview provided in the petitioner's letter dated July 1, 2006 further provided an approximately breakdown of time the beneficiary spent on each identified task. The AAO acknowledges that based on this description, it does appear that the beneficiary will engage in some high level responsibilities as contemplated by the definitions. However, the petitioner has failed to demonstrate that these duties will constitute a majority of the beneficiary's tasks.

The director relied on the organizational chart as a basis for this conclusion. Before addressing the merits of the director's findings, the AAO will first review the organizational chart and the conflicting number of contractors claimed in the record. It is noted that in the letter dated July 1, 2006, the petitioner claimed to employ the beneficiary and fifteen contractors. However, the petitioner's 1099 forms for 2005 indicate that it compensated a total of nine contractors for the year, as opposed to fifteen. Subsequently, the petitioner submitted its 1099 forms for 2006, which demonstrated that it compensated eleven contractors during that period. 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. 1971). Therefore, since the petition in this matter was filed on August 11, 2006, the relevant documents to examine are the 2006 forms.

However, the fact that the 2006 forms, which may or may not represent the staffing of the petitioner at the time of filing, further contradict the claim that the petitioner employer fifteen contractors at the time of filing. Between the forms for 2005 and 2006, the petitioner failed to establish that it ever

compensated more than eleven contractors in a calendar year. It is noted that, on appeal, counsel dismisses this issue by claiming that the total number of employees varies from year to year. While true, the petitioner likewise failed to demonstrate that it ever employed fifteen contractors as claimed on Form I-140. Therefore, this unresolved discrepancy raises questions regarding the legitimacy of the petition. 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).

Regardless, the issue that prompted the director to find the beneficiary ineligible for the classification sought stems from the organization hierarchy of the petitioner. Specifically, the beneficiary as president oversees a site manager, who in turn oversees contractors with various skills, whether they be carpenters, painters, etc. It appears that their services are rendered at specific sites where a contract is in place for a home improvement project or other related service. There is no mention in the record, however, of any office personnel to assist the beneficiary with administrative tasks, secretarial duties, marketing, or accounting, all of which are not considered managerial or executive functions. Thus, while the beneficiary did in fact provide a breakdown of the percentage of time he would devote to his high-level managerial duties, he did not account for these essential tasks crucial to the day-to-day operation of the business. Collectively, this brings into question how much of the beneficiary's time can actually be devoted to managerial or executive duties.

Moreover, the breakdown of duties the petitioner provided for the beneficiary also claimed that 50% of his time would be devoted to tasks such as soliciting new business, maintaining contacts with customers, seeking out advertising, and obtaining customer feedback. These duties, which account for at least half of his time on the job, are not high-level duties as contemplated by the regulatory definitions. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Furthermore, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of managerial and/or executive duties identified in the petition, the record does not demonstrate that the beneficiary will function primarily as a manager and/or executive.

As discussed by the director in the denial, 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). In this case, the AAO accepts the petitioner’s contention that the beneficiary does not engage in actual construction work and instead designates contractors to complete the physical labor. However, this alone does not mean that all of the remaining business functions that the beneficiary is responsible for at the home office are primarily managerial or executive. On appeal, in response to “query 5,” counsel argues that the

beneficiary's primary functions involve high level tasks such as implementing company policies and developing marketing strategies. Moreover, counsel contends that the site supervisor is responsible for supervising the lower level employees, and thus the logical conclusion is that the beneficiary is engaged solely in upper level qualifying duties. Again, the AAO disagrees.

Counsel contends that the beneficiary's position at the top of the organizational hierarchy inherently render him a manager or executive for the purposes of this visa classification. Moreover, counsel refutes that director's conclusion that the beneficiary is not overseeing a staff of professionals, and asserts that the contractors used by the petitioner have been in business for years and thus by virtue of their experience are deemed professionals. Although the beneficiary is not required to supervise personnel, if it is claimed that her 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, the AAO 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. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

The petitioner did not provide the level of education required to perform the duties of its contractors or its site supervisor. Thus, the petitioner has not established that these employees possess or require a bachelor's degree, such that they could be classified as professionals. Counsel's contention that they are professionals by virtue of their experience is insufficient for purposes of this analysis.

In conclusion, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's day-to-day business. While the contracted employees may in fact perform the physical labor, there is no explanation of documentation that the petitioner employs additional persons to perform the administrative and operational tasks of the petitioner's business. Therefore, absent evidence to the contrary, the AAO concludes that the beneficiary is primarily responsible for these tasks which would reasonably include marketing and selling the petitioner's services, advertising, providing estimates for home improvement projects, billing customers for services rendered, maintaining finances, and other operational, administrative and clerical tasks. As previously stated, 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 Int'l.*, 19 I&N Dec. at 604.

Finally, counsel argues on appeal that the director has misapplied *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). However, the issue in this matter is not whether documentation has been submitted in support of the petition. The issue in this matter is whether the documentation contained in the record independently and objectively supports the contentions of the petitioner. A petitioner may not simply claim a beneficiary is primarily performing managerial duties without clearly demonstrating that a staff is in place to perform all or most of the non-qualifying duties associated with the petitioner's business. In this case, while the petitioner has demonstrated that the beneficiary has numerous persons to perform the physical services of the company, the petitioner has failed to demonstrate that someone other than the beneficiary will answer the phones, process invoices, market the company's services, provide estimates, and manage the payroll and bank account.

Counsel's statements on appeal ignore this key issue and fail to overcome the basis for the denial. Therefore, as correctly stated by the director, 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 documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Accordingly, the appeal will be dismissed.

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, that burden has not been met.

ORDER: The appeal is dismissed.