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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:

OFFICE: TEXAS SERVICE CENTER

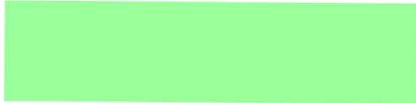
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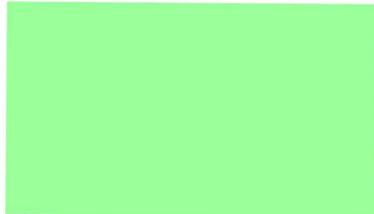
Petitioner:



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 (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

Acting Chief, Administrative Appeals Office

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

The petitioner seeks to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner, a Texas corporation established in 2002, is a distributor of consumer goods.¹ It is a subsidiary of [REDACTED] (the foreign entity), located in India. The petitioner seeks to employ the beneficiary as its Chief Executive.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in a qualifying managerial or executive capacity

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that the evidence of record establishes that it will employ the beneficiary in a qualifying managerial or executive capacity. Counsel submits a brief in support of the appeal.

I. The Law

Section 203(b) of the Act states in pertinent part (with emphasis added):

(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.

With respect to the term "managerial capacity," Section 101(a)(44)(A) of the Act defines the term as follows:

(A) The term "managerial capacity" means an assignment within an organization in which the *employee* primarily--

¹ The petitioner was incorporated in Texas under the name [REDACTED] and does business under the assumed name of [REDACTED]. The petitioner filed the instant petition under the name [REDACTED]

- (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.

Section 101(a)(44)(B) of the Act defines the term "executive capacity" as 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.

II. Statement of Facts and Procedural History

The sole issue to be addressed is whether the petitioner established that the beneficiary will be employed in a qualifying managerial or executive capacity.

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on April 19, 2004.² The petitioner stated that it seeks to employ the beneficiary as its Chief Executive. In a letter accompanying the initial petition, the petitioner asserted that the beneficiary "is responsible for the entire operation" and "supervises the functioning of all employees, receives no supervision from any other person in the organization, is

² Subsequent to filing the instant appeal, the petitioner filed a second Form I-140 on February 17, 2012, which remains pending. The instant appeal will only address the Form I-140 filed on April 19, 2004 and the supporting documentation submitted in support thereof; no documentation submitted with the second Form I-140 will be considered in the adjudication of the appeal.

responsible for smooth function of the organization and enjoys complete authority in making decisions." The petitioner also asserted that the U.S. entity is "currently operating wholesale and retails [*sic*] trading business of consumer goods [and] currently has 8 full time workers."

The petitioner indicated that the beneficiary will allocate his time among the following duties:

Financial Responsibilities: 40% time commitment

- Responsible for maintaining the enterprise on sound financial footing.
- Primary contact with the bank to make timely deposits, responsible for timely payment to international suppliers.
- Primarily responsible for payments to local [*sic*]
- Primarily responsible for arranging
 - Working capital necessary to purchase inventory,
 - Pay employee salaries; and
 - Pay the running expense of the operation.

Operational Responsibilities: 40% time commitment

Inventory Management:

- Responsible for vendor relations and inventory management.
- Responsible for maintaining optimum level of inventory.
- Responsible for ordering inventory on time, ensuring proper pricing and display.
- Responsible for maintaining proper accounts payable and sustaining vendor relations.

Personnel Management:

- Responsible for hiring and firing of the employees.
- Responsible for work schedules on a daily, weekly and monthly basis.
- Ensuring that complete personnel files are maintained for all employees.
- Ensuring that [*sic*] proper screening of all employees.

Premises Management

- Responsible for lease negotiations, ensuring compliance with lease terms by the landlord.
- Responsible for security arrangements.
- In case of any mishaps, responsible for dealing with the local law enforcement.

Regulatory Responsibilities: 20% time commitment

- Responsible for ensuring that all relevant licenses have been obtained and are current.
- Ensuring that [*sic*] proper procedures for maintenance of books of accounts;

- Ensuring proper calculation of taxes and timely payments to the local, provincial and federal government of India.

The petitioner submitted an organizational chart for the U.S. entity, depicting the beneficiary at the top as CEO. The next tier of employees directly below the beneficiary consists of an Office Manager, a Vendor Relations Manager, and a Marketing and Sales Manager. The Office Manager is depicted as overseeing a Receptionist/Telephone Operator. The Vendor Relations Manager is depicted as overseeing an Assistant Vendor Relations. The Marketing and Sales Manager is depicted as supervising two Outdoor Salesmen (commission based).

The petitioner stated in its letter that it employs eight full-time employees. It submitted copies of IRS Forms W-2, Wage and Tax Statement issued to seven employees in 2003. During that year, the employees were paid as follows: the beneficiary was paid \$13,000; the office manager, vendor relations manager and receptionist were each paid \$440; the marketing and sales manager was paid \$2,200; the vendor relations assistant was paid \$3,360; and both outdoor salesmen were paid \$2,640.

The director issued a request for evidence (RFE) on March 10, 2005 in which she instructed the petitioner to submit, *inter alia*, the following: the petitioner's updated organizational chart, evidence of the petitioner's staffing levels; position titles, duties, hours worked and educational levels for all employees.

The petitioner submitted an updated organizational chart indicating that the company maintained the same structure it had at the time of filing, with seven employees reporting directly or indirectly to the beneficiary. The petitioner also provided copies of its IRS Forms W-2, IRS Forms 941, Employer's Quarterly Federal Tax Return, and Texas Forms C-3, Employer's Quarterly Report, for 2004. The Form C-3 for the second quarter of 2004, the quarter in which the petition was filed, indicated that the petitioner had three employees in April and May and four employees in June 2004. The petitioner paid \$7,300 in wages to the beneficiary and paid the remaining staff as follows during that quarter: [REDACTED] (marketing and sales manager) -\$440; [REDACTED] (assistant, vendor relations) - \$1440; and [REDACTED] (outdoor salesman) - \$1320.

The petitioner issued a total of six IRS Form W-2s in 2004. The beneficiary received \$29,200 in annual wages. The remaining five employees received salaries ranging from \$440 to \$3,840. The employees identified on the initial organizational chart as receptionist and vendor relations manager did not receive any wages in 2004, nor did the second outdoor salesman. The remaining employees who received wages were: (1) the office manager identified on the initial organizational chart, who earned \$440 and appears to have worked only during the third quarter of 2004; and (2) a vendor relations manager also hired after the petition was filed and identified for the first time on the petitioner's 2005 organizational chart. The total wages paid to all subordinate employees combined, as reported on the petitioner's IRS Form 1120, U.S. Corporation Income Tax Return, for 2004 was \$10,669.

The director subsequently issued a second RFE, requesting the petitioner to submit, *inter alia*, a definitive statement describing the beneficiary's proposed job duties in the United States, including: position title; list of all duties; percentage of time spent on each duty; number of subordinate managers/supervisors or other employees who will report directly to the beneficiary; a brief description of their job titles, duties and

educational level; and a description of who provides the product sales/services or produces the product of the business. The director also requested copies of the petitioner's IRS W-2 forms for 2005 and 2006.

In response to the RFE, the petitioner confirmed that the same seven positions identified at the time of filing continue to report to the beneficiary, including the office manager, receptionist, vendor relations manager, vendor relations assistant, sales and marketing manager, and two outdoor salesmen.

As to the U.S. entity's business activities, the petitioner asserted that the U.S. entity sells general merchandise and consumer items manufactured in the United States, China, and other Far East Asian countries. The petitioner asserted that it buys the items from importers in the United States, and sell the items to local wholesalers and retailers. The petitioner also asserted that it buys cigarettes and other tobacco products from wholesalers and retailers.

The petitioner provided an amended organizational chart for the U.S. entity. No changes were made to the organizational structure, although the petitioner indicated that most of the subordinate positions had been filled by different individuals since the time the petition was filed. The petitioner provided duty descriptions for the positions of office manager and marketing manager.

With respect to the director's request that the petitioner provide a more detailed description of the beneficiary's position, the petitioner re-submitted the position description provided at the time of filing, indicating that the beneficiary allocates 40% of his time to various financial responsibilities, 40% of his time to operational responsibilities, and 20% of his time to regulatory responsibilities, as stated above.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in a qualifying managerial or executive capacity. The director noted that the petitioner has not demonstrated that the beneficiary's primary job assignment will involve directing the management of the organization nor that the beneficiary will be primarily directing or supervising a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The director also observed discrepancies in the petitioner's claimed staffing levels and business addresses.

On appeal, counsel for the petitioner asserts that the beneficiary has been and will be primarily performing executive and managerial tasks. Counsel also asserts that the beneficiary has subordinate employees to manage and perform duties for him. As to the discrepancies in the petitioner's claimed staffing levels, counsel asserts that these discrepancies are irrelevant because the statute does not require the petitioner's subordinate employees to be full-time employees. As to the discrepancies in the petitioner's business addresses, counsel explains that the petitioner has more than one business location, including office space and a "separate warehouse location." The petitioner does not submit any documentation to support the appeal.

III. Analysis

Upon review of the record and for the reasons discussed herein, the petitioner has failed to establish that the beneficiary will be employed in a qualifying managerial or executive capacity.

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).

An analysis of the beneficiary's job duties indicates that the beneficiary will be heavily involved in performing non-qualifying, operational duties. In particular, the beneficiary will be performing duties including: making deposits to banks, making payments to local and international parties; paying running expenses of the operation; inventory maintenance and ordering; maintaining proper accounts payable; and maintaining the books of accounts. The AAO observes that the petitioner provided only a combined description of the beneficiary's job duties abroad and in the United States, and did not differentiate between the duties he performed abroad and the duties he will perform in the United States.

While the statute does not require the beneficiary to spend 100% of his time performing qualifying managerial or executive duties, the statute does require the beneficiary to *primarily* spend his time performing qualifying duties, or in other words, more than half of his time performing qualifying duties. *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'r 1988). Conversely, 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 id.* Thus, whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that the beneficiary's duties are "primarily" managerial or executive.

Here, the petitioner fails to adequately document what proportion of the beneficiary's time is spent on qualifying duties, and what proportion is spent on non-qualifying duties. The petitioner lists the beneficiary's duties in broad categories, many of which include both qualifying and non-qualifying tasks, but fails to quantify the time the beneficiary spends on each particular task. For example, in the beneficiary's broad category of "operational responsibilities" which account for 40% of the beneficiary's time, the petitioner includes non-qualifying tasks such as ordering inventory, as well as qualifying tasks such as responsibility for hiring and firing of employees. This failure of documentation is important because several of the beneficiary's daily tasks do not fall directly under traditional managerial or executive duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing qualifying or non-qualifying duties, and accordingly, whether his job duties are primarily managerial or executive in nature.

Further, in the RFE, the director specifically instructed the petitioner to provide a more detailed description of the beneficiary's job duties in the United States, including the percentage of time the beneficiary spends on each job duty, as well as brief descriptions of job duties for all employees directly reporting to the beneficiary. The petitioner failed to fully comply with the RFE. In response to the RFE, the petitioner provided the same job duties for the beneficiary that the director previously deemed insufficient and failed to provide requested position descriptions for most of the claimed subordinate employees. The 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).

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

An analysis of the petitioner's claimed organizational structure reveals significant and unresolved discrepancies. While the petitioner claimed to have eight full-time employees when it filed the petition, the evidence of record indicates that the petitioner paid a total of only six employees in 2004 and had only three employees, including the beneficiary, in the month of April 2004 when the petition was filed. The only employees working for the company during the quarter in which the petition was filed were the sales & marketing manager, the vendor relations assistant and one salesman, according to the relevant quarterly wage report. Further, none of the petitioner's employees, other than the beneficiary, were earning wages commensurate with full-time employment. 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).

Although the director reviewed the petitioner's staffing levels as of 2005 and 2006, the 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). At the time of filing, there was a considerable discrepancy between the number of claimed full-time employees and the number of employees documented in the record. Nevertheless, the AAO acknowledges the director's concerns that the petitioner, as of the date it responded to the director's second RFE, appeared to employ only two full-time employees, out of a total of eight claimed full-time employees. On appeal, counsel does not contest the director's concerns as to this particular issue, and merely asserts that these discrepancies are irrelevant because the statute does not require the petitioner's subordinate employees to be full-time employees.

While it is true that the statute does not require the petitioner's subordinate employees to be full-time employees, the employment status of the subordinate employees is not "insignificant" as counsel claims. First, the petitioner specifically stated that the U.S. entity employs 8 full-time employees. 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. at 591. Second, the fact that the petitioner has only two full-time employees, particularly when the petitioner also claims to conduct business in at least two separate locations in the United States, supports the director's conclusion that the petitioner failed to establish that beneficiary will be employed in a qualifying managerial or executive capacity. On appeal, the petitioner has not offered any explanation as to how two full-time employees would be sufficient to relieve the beneficiary from performing the non-qualifying, operational duties of the U.S. operations. Further, at the time of filing, the petitioner had only two to three part-time staff and no full-time staff other than the beneficiary.

A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act,

8 U.S.C. § 1101(a)(44)(C). However, 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. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. *See Systronics*, 153 F. Supp. 2d at 15.

Based on the petitioner's descriptions of the beneficiary's job duties as well as the significant inconsistencies regarding the petitioner's actual organizational structure and staffing, the record is unclear who is carrying out the operational duties needed to carry out the day-to-day operational tasks of the business. As such, the petitioner failed to establish that the beneficiary will be performing primarily managerial or executive duties. Accordingly, the appeal will be dismissed.

IV. Conclusion

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. 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.