



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE:

AUG 07 2013

OFFICE: TEXAS SERVICE CENTER

FILE:

IN RE:

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 dismissed the petitioner's subsequent motion to reopen. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a South Carolina limited liability company engaged in the sale of retail consumer products, foods, and automotive products. It seeks to employ the beneficiary as its senior 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 director denied the petition concluding that the petitioner failed to establish that it will employ the beneficiary in a qualifying managerial or executive capacity. The director dismissed the petitioner's subsequent motion to reopen.

On appeal, counsel disputes the director's findings and provides an appellate brief laying out the grounds for challenging the denial.

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 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).

II. FACTS AND PROCEDURAL HISTORY

The sole issue addressed by the director is whether the petitioner established that the beneficiary would be employed in a primarily managerial or executive capacity.

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.

The petitioner indicated on the Form I-140, Immigrant Petition for Alien Worker, that it is engaged in the retail sale of consumer products, food, and automotive products with three employees and a gross annual income of \$1,080,000. The petitioner states that it wishes to employ the beneficiary as its Senior Manager and indicates that she will be responsible for "the development of client and customer contacts, as well as managing retail consumer products, securing warehouse, hiring employees, and undertaking other business development activities."

In a supplement to the Form I-140, the petitioner stated that the beneficiary has been "responsible for operations and startup of the US operation." The petitioner stated that the beneficiary will perform the following duties: formulating plans for analyzing operations, determine areas of potential cost reduction, program improvement, or policy change. In her role as Senior Manager since 2010, the petitioner states that the beneficiary also hired senior staff, established relationships with vendors, and engaged banks.

With respect to the nature of the business, the petitioner stated that it operates using the trade name of "[REDACTED]." The petitioner stated that the company has three employees, not including the beneficiary, who "handle all the administrative and general operational duties to operate the US business." The petitioner submitted photographs of a retail store offering grocery items, several varieties of fast food, and gasoline.

In support of the petition, the petitioner provided *inter alia*, the following evidence: 2010 IRS Form 1120, U.S. Corporation Income Tax Return; a lease for the current premises described as "[REDACTED]" and photographs of the business; IRS Form W-2, Wage and Tax Statement and IRS Form 941 Employer's Quarterly Federal Tax Return, for 2010. The IRS Form W-2 for 2010 shows payments to three employees who earned \$1,595, \$1,305, and \$1,595 respectively. The 2010 IRS Form 1120 shows \$1,595 in salaries and wages paid and \$1,595 in compensation to officers.

The director issued a request for evidence ("RFE"). The director requested that the petitioner provide, *inter alia*, evidence that the beneficiary will act in a qualifying capacity as a multinational executive or manager. Specifically, the director requested the following: (1) the beneficiary's position title and specific daily duties; (2) percentage of time spent on each duty; (3) organizational chart for the petitioner including job titles, duties, and educational levels for each employee as well as whether the employee works full or part-time; (4) IRS Forms W-2, for the relevant years for each employee, and (5) the petitioner's 2011 federal income tax returns.

The petitioner submitted a letter in response providing a two-page list of the beneficiary's duties and sub-duties. The petitioner indicated that the beneficiary's tasks include: future business expansion planning, negotiations with vendors/contractors, purchase or repair of equipment, fund allocation and provision, selection of employees, quality control, pricing, filing of taxes, and creation of a customer retention program. The petitioner stated that the beneficiary will spent 70% of her time performing these duties, and 30% of her time as a "regular employee."

The petitioner provided the names, job titles and brief job descriptions for three subordinate employees. Specifically, the petitioner claimed that the beneficiary manages a store manager, marketing planner/cook/clerk, and a cook/clerk. According to the provided descriptions, the store manager is responsible for store administration, vendor/contract management, timely payment to vendors, banking, providing feedback to the owner, customer relationship, procurement and employee management, and he spends 30% of his time handling a cash register. The marketing planner/cook/clerk is claimed to divide his time as follows: marketing (10%), handling register (35%), stocking (10%), cooking (25%) and cleaning (10%). The cook/clerk is claimed to perform the same duties, with the exception of marketing.

The petitioner did not provide the educational level of the employees or indicate whether they work full or part-time. The petitioner also failed to provide copies of its IRS Forms W-2 for 2011.

The petitioner provided its 2011 IRS Form 1120, U.S. Corporation Income Tax Return. The tax return indicates that the petitioner paid \$15,834 in compensation of officers and \$7,540 in salaries and wages. According to IRS Form 1125-E, Compensation of Officers, the petitioner paid \$7,540 to the marketing planner/cook/clerk and \$8,294 to the store manager.

The director ultimately denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive position. In denying the petition, the director found that the description of the beneficiary's duties was vague and did not support a finding that the duties would be primarily managerial in nature. The director also noted that the four employees are not full-time employees, and therefore, it was questionable whether the beneficiary would be employed in a managerial or executive capacity.

The petitioner filed a motion to reopen. The petitioner provided a position description for the beneficiary including a breakdown of the time spent on each duty. Counsel for the petitioner stated on motion that the beneficiary is relieved from performing non-managerial duties by the store manager and his subordinate staff. Counsel for the petitioner asserted that the beneficiary's "primary activities revolve around the financial responsibilities" of the operation and therefore she does not perform the day to day duties of the convenience store. Counsel further claimed that the small number of employees is sufficient to support the store operations. Finally, counsel asserted that the beneficiary's hire and fire authority and signature on company documents are indicative of her managerial level position. The petitioner included copies of checks signed by the beneficiary and a five-page detailed description of the beneficiary's duties.

The director dismissed the motion, noting that the petitioner had previously failed to respond to the director's request for a percentage breakdown of the beneficiary's duties, and that such evidence could not be considered "new" facts in support of a motion to reopen. Nevertheless, the director acknowledged the petitioner's assertions and noted that the beneficiary's signatory authority does not establish that she is a multinational manager or executive. The director reiterated the findings in the prior decision that the record does not establish that the petitioner's three employees are full-time employees. The director also stated that the approval of prior nonimmigrant petitions does not guarantee that USCIS will approve an immigrant petition filed on behalf of the same beneficiary.

On appeal, counsel asserts that evidence of record is sufficient to establish that the beneficiary will be employed in a qualifying managerial or executive capacity. Specifically, counsel asserts that the director's decision on the petitioner's motion to reopen was based solely on whether a job description including percentages of time was provided. Counsel further states that the petitioner provided a detailed description as requested in response to the RFE and again on motion to reopen. Finally, counsel cites to previous cases approved by the Texas Service Center for general managers of convenience stores. Counsel for the petitioner acknowledges that USCIS is not bound by prior adjudications, but observes that a departure from prior rulings in similar cases is "arbitrary and capricious."

III. DISCUSSION

Upon review of the petition and evidence, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity.

As an initial matter, counsel's suggestion that the agency has inconsistently interpreted the applicable regulation is not supported by the record. To be inconsistent and actionable, it is well established that an agency "interpretation" that serves to modify a previous interpretation must be in the form of an actual precedent decision, regulation, or other published rulemaking. *See, e.g., SBC Inc. v. Federal Communications Com'n.*, 414 F.3d 486, 498 (3rd Cir., 2005) (citing *Paralyzed Veterans of America v. D.C. Arena, L.P.*, 117 F.3d 579, 586 (D.C.Cir. 1997)). Rulemaking by "practice" does not exist. Only when the agency specifically designates a decision as precedent can it bind future decisions. 8 C.F.R. § 103.3(c). The stream of unpublished, non-binding service center decisions, such as counsel's vague reference to unpublished contradictory adjudications, would not be enough to document an inconsistent agency interpretation. *See, e.g., R.L. Inv. Ltd. Partners v. INS*, 86 F.Supp.2d 1014, 1024-25 (D.Hawai'i, 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001).

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). Published case law clearly supports the pivotal role of a clearly defined job description, as the actual duties themselves reveal the true nature of the 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); *see also* 8 C.F.R. § 204.5(j)(5). That being said, however, USCIS reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the petitioner's business, the employment and remuneration of employees, as well as the job descriptions of the beneficiary's subordinates, if any, and any other facts contributing to a complete understanding of a beneficiary's actual role within a given entity.

The definitions of executive and managerial capacity 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).

The AAO recognizes that the position description provided for the beneficiary in response to the RFE was detailed. However, the petitioner failed to provide a specific percentage of time to be allocated to each duty, information that was provided for the first time on appeal. Further, the petitioner's description of the beneficiary's duties includes a majority of managerial level duties. However, the petitioner initially stated that the beneficiary would allocate 70% of her time to the listed duties and 30% of her time as a "regular employee," a role that has not been further explained. On motion and on appeal, the petitioner indicates that the beneficiary allocates 100% of her time to the listed duties. 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). Accordingly, our analysis of the beneficiary's duties will be based on the petitioner's statement that the beneficiary allocates 70% of her time to duties it considers to be managerial in nature and 30% of her time to the non-managerial duties of a "regular employee."

Beyond the required description of the beneficiary's job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

In the present matter, the totality of the record does not support a conclusion that the beneficiary will be primarily performing managerial or executive level tasks. Specifically, the record does not support the petitioner's assertion that the beneficiary allocates 70 percent, of her time to the claimed managerial job duties. The record shows that the beneficiary is the only full-time employee available to perform the day-to-day tasks of the convenience store, which, according to the evidence of record, also sells foods cooked in-house, including hamburgers, fried chicken, biscuits, pizza, etc. The petitioner's 2011 IRS Form 1120 shows that \$7,540 was paid in salaries and wages, and that two of the beneficiary's subordinates compensated as officers also earned low salaries commensurate with part-time employment. The petitioner failed to provide the 2011 Forms W-2 as requested. 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).

Ultimately, the petitioner failed to show that there are any employees consistently available to relieve the beneficiary from performing non-qualifying duties. Without further information including a staff schedule, hours of operation, and full or part-time status of each employee, the record does not support a finding that the beneficiary will be spending a majority of her time performing managerial or executive duties. For example, the petitioner's description of the beneficiary's duties states that she

is supported in most of her responsibilities by the store manager, who is claimed to oversee the day-to-day operations of the store. Based on the compensation of \$8,294 paid to the store manager in 2011, it is apparent that he worked no more than 22 hours per week, and even fewer hours if he received more than the minimum wage of \$7.25 per hour. In addition, the petitioner indicates that the store manager allocates almost one-third of his time to operating a cash register, leaving him a limited number of hours to perform the other non-qualifying administrative, operational and first-line supervisory tasks he is claimed to perform. The remaining two employees appear to have earned lower salaries than the store manager and thus work even fewer hours. Overall, based on the evident part-time status of the employees, and the job descriptions and breakdowns provided, the petitioner does not even claim to have staff operating a cash register for more than 20 or 25 hours per week.

On motion, counsel claimed that the staffing levels of the petitioner are "sufficient" to free up the beneficiary's time to perform the managerial and executive duties. Counsel further claimed that the day-to-day operations of the convenience store can "easily be performed by a handful or regular employees." Counsel fails to document, however, how the three employees working unknown hours and earning salaries of less than \$8,300 each for an entire year would be able to perform the day-to-day activities of the convenience store so the only full-time employee is able to perform primarily managerial duties. The petitioner failed on both motion to reopen, and on appeal, to address the director's findings that all of the petitioner's subordinates were part-time employees and thus unable to relieve the beneficiary of non-qualifying duties. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 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 Obaigbena*, 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).

The proposed position of the beneficiary is a Senior Manager of convenience store that has three part-time employees other than the beneficiary. The petitioner has not demonstrated that the beneficiary, as a personnel manager, will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. See section 101(a)(44)(A)(ii) of the Act. Furthermore, the petitioner has not established that it will employ a staff that will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial duties. Regardless of the beneficiary's position title, the record is not persuasive that the beneficiary will function at a senior level within an organizational hierarchy.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. 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 representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as senior manager and three part-time employees. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of her duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. The petitioner's claim that the beneficiary will allocate the majority of her time to qualifying duties is not supported by the totality of the evidence in the record.

In summary, the petitioner has failed to provide sufficient evidence to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity and the instant petition cannot be approved.

IV. CONCLUSION

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.