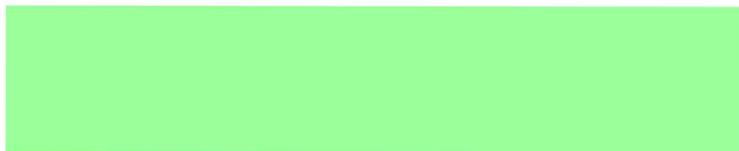




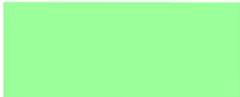
U.S. Citizenship  
and Immigration  
Services

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DATE: **AUG 22 2013**

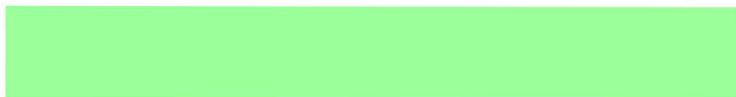
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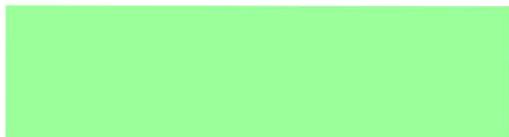
Petitioner:

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

Chief, Administrative Appeals Office

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

The petitioner is a branch office of a [redacted] corporation doing business in the State of [redacted]. It seeks to employ the beneficiary as its general manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition, finding that the petitioner had not established that the beneficiary will be employed in an executive or managerial capacity in the United States.

On appeal, counsel asserts that the director abused his discretion by ignoring evidence establishing that the beneficiary will be employed as an executive or manager as defined by the Act. Counsel submits a brief and the petitioner's updated employee list in support of the appeal.

**I. The Law**

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

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

\* \* \*

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a

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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--

- (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. The Issues on Appeal**

**A. Employment with the petitioner in a managerial or executive capacity**

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

In denying the petition on this basis, the director noted that the petitioner had submitted a vague description of duties for the beneficiary in his capacity as general manager in the United States. Further, the director reasoned that the petitioner had not sufficiently responded to the request for evidence (RFE) in not providing sufficient descriptions of the beneficiary's claimed subordinates and noted an inconsistency in the record regarding the number of employees working for the company.

On appeal, counsel asserts that the director's decision was an abuse of discretion. Counsel states that the petitioner submitted sufficiently detailed description of duties for the beneficiary and contends that the duties of his subordinates, which include cashiers, stockers and meat counter staff, should be self-explanatory based on their job titles. In support of the appeal, the petitioner submits a more detailed organizational chart that includes duty descriptions for the beneficiary's subordinates, as well as an explanation for the variations in the petitioner's staff size.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary acts, or will act, in a qualifying managerial or executive capacity with the petitioner.

In order to determine whether the beneficiary would be employed in a qualifying executive or managerial capacity, U.S. Citizenship and Immigration Services (USCIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the RFE, the director requested that the petitioner provide a very detailed description of the beneficiary's proposed duties in the United States, including an estimate of the percentage of time the beneficiary would dedicate to each specific duty. In response, the petitioner provided categories of duties with percentages of time spent on each duty category as follows:

- Human Resources (20% of his time)
- Fiscal Operations (20% of his time)
- Marketing & Advertising (25% of his time)
- Quality Control (20% of his time)
- Inventory Control (15% of his time)

The petitioner submitted explanations of the duties encompassed within each general duty category. For instance, the petitioner explained that the beneficiary's "human resources" duties include responsibility for the hiring, firing, and training all subordinate managerial personnel and having final say over the hiring of their subordinates; developing organizational policies and goals for the company including those related to franchise operational procedures, OSHA compliance, food service regulation compliance, and customer service standards; directing meetings with management on a bi-weekly basis to manage their performance, amongst other duties. With respect to "fiscal operations," the petitioner indicated the following duties for the beneficiary: determining necessary changes in programs or operations after conferring with staff and reviewing reports; ensuring that operating statements complied with company procedures and are completed in a timely manner; implementing changes to reduce costs, and meeting with the president and accountant to review all company reports. The petitioner explained that the beneficiary's "marketing and advertising" responsibilities include reviewing and authorizing all advertising layouts, negotiating all marketing contracts, and overseeing the development of marketing strategies. The beneficiary's stated duties within the "quality control" area include: developing training manuals and procedures for subordinate staff; implementing and maintaining quality standards such as hours of operation and store cleanliness; and being responsible for food and food storage equipment inspection procedures and procedures for food ordering. Lastly, the petitioner stated that the beneficiary's "inventory control" duties include reviewing all inventory reports to determine necessary changes, contacting suppliers in order to negotiate supply, and conferring with management to assure the proper ordering of supplies.

As noted, the director concluded that the duties provided for the beneficiary were overly vague. The AAO does not concur with this conclusion on the part of the director. However, the petitioner did not provide any detail regarding the employment of the individuals claimed to be subordinate to the beneficiary's position. For example, although the petitioner claims that the beneficiary will spend 25 percent of his time on marketing and advertising duties, the petitioner does not identify any particular employee who performs the operational tasks associated with marketing and advertising duties. Accordingly, the petitioner has not identified any personnel that will relieve the beneficiary from performing the non-qualifying duties related to the actual tasks outlined in the description of the beneficiary's duties. Likewise, the petitioner states that the beneficiary will spend 20 percent of his time on quality control and an additional 15 percent of his time on inventory control. Yet the record does not include evidence that the petitioner employs individuals who perform the operational tasks associated with maintaining quality control or the operational tasks of preparing inventory reports, contacting and negotiating with suppliers, and ordering inventory. 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).

Further the petitioner did not adequately support the submitted position description with evidence of the beneficiary's performance of executive or managerial duties. For instance, the duties assert the beneficiary's performance of various duties consistent with an executive or manager, such as hiring and firing managers,

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creating and implementing policies and standards, determining necessary changes to programs or operations, developing marketing strategies, and negotiating contracts. However, the petitioner has provided few specific examples or supporting documentation to establish his actual performance of these duties, such as managers hired and fired, specific policies and standards implemented, marketing strategies implemented, or documentation of contracts or other negotiations conducted. 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)).

When examining the managerial or executive capacity of a beneficiary, USCIS reviews the totality of the record, including descriptions of a beneficiary's duties and 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 manager position.

The petitioner did not provide a description of the beneficiary's duties, an organizational chart, or other evidence of the personnel structure of the company at the time of filing, beyond stating on the Form I-140 that the company has 14 employees. Consistent with the above, the director asked in the RFE that the petitioner submit a detailed organizational chart, including the names of all departments, teams, employees, their titles, and a description of their job duties. Further, the director stated that the petitioner should submit information regarding the scope and nature of the company's operations and the context of the beneficiary's position relative to those operations, including supporting documentary evidence. However, in response, the petitioner provided a vague and incomplete organizational chart for the petitioner that did not include job duty descriptions for the two asserted supervisory or managerial employees, the meat department manager and head cashier, and the seven other supporting employees.

On appeal, the petitioner now submits an organizational chart that includes job duty descriptions for the employees of [REDACTED]. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). 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).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Further, the brief position descriptions provided do not establish that the beneficiary's

direct subordinates, the meat department manager and the head cashier, are supervisory employees. The petitioner states that the meat department manager "places orders, cuts and prepares the meat in display, services the customers," and the head cashier "operates cash register, lotto machine and process[es] bills, sees over the cashiers, prepares deposits." Based on these limited descriptions, the petitioner has not established that either of these employees is a supervisor; rather, both employees seem to perform essentially the same duties of the meat department employees and other cashiers they are claimed to supervise. Based on the evidence of record, the petitioner has provided insufficient evidence to establish that the beneficiary acts as more than a first-line supervisor of non-managerial and non-professional employees. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. See *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988).

The petitioner also submits for the first time on appeal an organizational chart for [REDACTED] a business that was not mentioned by the petitioner or documented in the record at the time of filing or in response to the RFE. While the petitioner now indicates that the six employees of this business report to the beneficiary, it has provided no additional evidence of its existence nor any explanation as to why this business and its employees were not mentioned previously. The petitioner's introduction of this additional business and its staff will not be considered on appeal. 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).

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).

Here, the petitioner indicated that the beneficiary performs various duties consistent with an executive or manager, such as hiring and firing managers, creating and implementing policies and standards, determining necessary changes to programs or operations, and developing marketing strategies. However, based on the limited evidence submitted, the duties of the remainder of the petitioner's employees are limited to the routine functions typically performed by cashiers and meat counter clerks, and the record as a whole does not support a finding that the beneficiary will be performing primarily managerial or executive duties. As noted, the petitioner does not claim to have lower-level employees who relieve the beneficiary from performing non-qualifying duties associated with marketing and advertising, routine financial duties, monitoring the cleanliness of the store, food and equipment inspection, completing orders with suppliers, reviewing and managing inventory, or providing first-line supervision of non-professional personnel. Although the petitioner asserts that the beneficiary is only dictating policies and procedures with respect to these various operational tasks, the petitioner does not claim that his subordinate staff is responsible for relieving him of these types of non-qualifying duties. As such, the AAO concludes that it is more likely than not that the

beneficiary will primarily engaged in performing these non-qualifying operational duties. 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 *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)).

In conclusion, after analyzing the totality of the evidence presented, the petitioner has not submitted sufficient evidence to establish that it will employ the beneficiary in a qualifying managerial or executive capacity. For this reason, the appeal must be dismissed.

**B. Foreign employment in a managerial or executive capacity**

Beyond the decision of the director, the petitioner has not established that the beneficiary was employed in a qualifying managerial or executive capacity with the foreign employer in one of the three years preceding his entry into the United States on nonimmigrant status.

The pertinent regulation at 8 C.F.R. § 205.5(j)(3)(i) states that the petitioner must submit the following evidence to qualify the beneficiary as a multinational executive or manager:

- (i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

\* \* \*

- (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity

In support of the Form I-140 petition, the petitioner did not submit any evidence relevant to his foreign employment prior to entering the United States. As such, the director requested that the petitioner submit "a very detailed description of the beneficiary's position abroad," including an estimate of the percentage of time the beneficiary formerly dedicated to each specific duty. Further, the director asked the petitioner to submit a detailed organizational chart relevant to the foreign employer corresponding to his employment abroad, including names of all departments, employees, their titles, and a description of their duties. In response, the petitioner did not provide a duty description for the beneficiary in his former managerial or executive capacity abroad. The petitioner provided a foreign organizational chart noting the beneficiary as general manager of a foreign business called [REDACTED]. The organizational chart indicates that

the beneficiary supervised a store manager and two cashiers. However, the organizational chart includes no explanation of the duties of these subordinate employees, or the business conducted by the foreign employer. Again, the regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). 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).

Therefore, due to the lack of evidence submitted on the record related to the beneficiary's previous foreign employment, it cannot be determined whether the beneficiary was employed in a qualifying managerial or executive capacity with the foreign employer in one of the three years prior to his entry into the United States on nonimmigrant status. For this additional reason, the appeal will be dismissed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

### III. 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.