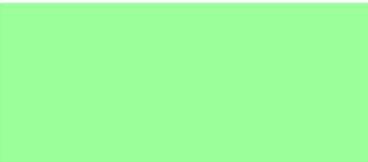


(b)(6)

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

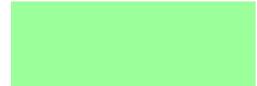


U.S. Citizenship
and Immigration
Services

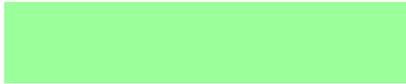


DATE: **DEC 23 2013** OFFICE: TEXAS SERVICE CENTER

FILE:

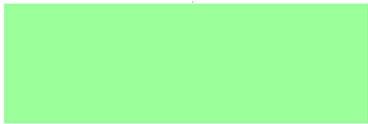


IN RE: Petitioner:
Beneficiary:



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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".
Ron Rosenberg

Chief, Administrative Appeals Office

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

The petitioner is a Rhode Island limited liability company engaged in automobile sales. It seeks to employ the beneficiary as its president and CEO. 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 would employ the beneficiary in a qualifying managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director's decision failed to address all of the submitted evidence pertaining to the petitioner's personnel structure and failed to include any analysis of the beneficiary's job duties or the reasonable needs of the organization.

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 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.

Additionally, with regard to the petitioner's initial filing requirements, the regulations at 8 C.F.R. § 204.5(j)(3)(i) state that the petitioner must provide the following evidence in support of the petition in order to establish eligibility:

- (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least

one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or

- (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;
- (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
- (D) The prospective United States employer has been doing business for at least one year.

II. Procedural History

The record shows that the petitioner filed the Form I-140 on June 10, 2013. The petitioner indicated that it was engaged in the business of auto sales and claimed a total of five employees at the time of filing. The petition was accompanied by a variety of supporting documents, including the petitioner's organizational chart that depicted a board of directors at the top of the petitioner's hierarchy with the beneficiary at the level directly following the board. The chart identifies thirteen additional positions six of which - workshop, a CPA, a sales person, a detail/driver, a vehicle transporter, and a property maintenance employee - are depicted as the beneficiary's direct subordinates. The chart also shows a bookkeeper directly subordinate to the CPA, a second sales person subordinate to the first sales position, a cleaner subordinate to the property maintenance position, and a variety of four repair positions listed under the workshop position. Additionally, the petitioner submitted its corporate records, a lease agreement, evidence showing the beneficiary's partial ownership of the petitioning entity, the petitioner's tax and payroll records for 2012, and a supporting statement dated May 1, 2013, which included the beneficiary's position description.

The petitioner indicated that the beneficiary is the sole decision-maker with the authority to bind the company contractually and make all decisions regarding personnel as well as other business matters, including acquiring new dealerships, selling the business, setting sales goals and making policies, seeking financing, allocating funds for cash reserves, expenditures, marketing, determining which automotive brands the petitioner will sell and deciding to add different product lines to the petitioner's inventory, and setting sales prices and discounts. Additionally, the petitioner indicated that the beneficiary would communicate with legal and financial advisors, negotiate lending terms with outside lenders in order to offer financing options to buyers, negotiate lines of credit to meet the petitioner's cash flow needs, and network with new and existing dealerships to negotiate possible resale agreements. The petitioner stated that the beneficiary reports only to the board of directors.

The director reviewed the petitioner's submissions and determined that the record did not support a favorable finding. Accordingly, the director issued a request for evidence (RFE) dated July 5, 2013, instructing the

petitioner to provide additional supporting documentation with regard to its claimed qualifying relationship with the beneficiary's former employer abroad. The RFE also contained instructions asking the petitioner to provide a flow chart depicting its permanent employees accompanied by a list of the employees' respective job titles and job duties.

The RFE response included a statement dated August 15, 2013 in which the petitioner indicated that the director applied a heightened burden of proof rather than the preponderance of the evidence standard, which is applicable in this proceeding. The petitioner claimed and provided evidence to show its 50% ownership of the foreign entity and addressed the director's request with regard to the petitioner's staffing. The petitioner provided an organizational flow chart that depicted an updated organizational structure showing a general manager as the beneficiary's direct subordinate.

After reviewing the petitioner's submissions, the director determined that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity and denied the petition in a decision dated September 5, 2013. The director focused primarily on the petitioner's organizational structure, observing that the number of employees shown in the petitioner's organizational chart was significantly greater than the number indicated in the petitioner's Form I-140.

III. Discussion

As indicated above, the primary issue in this proceeding requires a review of the facts that pertain to the beneficiary's proposed employment within the petitioning entity. Although the director's analysis focused primarily on the petitioner's organizational structure and the beneficiary's support staff, the AAO will provide a comprehensive discussion, which will include a review of the totality of the record, starting first with the description of the beneficiary's job duties. *See* 8 C.F.R. § 204.5(j)(5). A detailed job description is crucial, as the duties themselves will reveal the true nature of the beneficiary's foreign and proposed employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The beneficiary's job description can then be considered in light of other relevant factors, including (but not limited to) support personnel in terms of the number of employees available at the time of filing and their respective job descriptions, the nature of the business conducted by the entity in question, and any other relevant facts that may contribute to a comprehensive understanding of the beneficiary's actual role within the organization of the petitioning U.S. employer. Among these factors, a company's staffing is highly relevant and should be considered as a means of gauging which employees the beneficiary would directly oversee in his managerial or executive role and the extent to which the petitioner would be able to relieve the beneficiary from having to carry out the company's daily operational tasks.

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, 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. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In the present matter, the beneficiary's job description does not establish that he would allocate his time primarily to carrying out tasks within a qualifying managerial or executive capacity. While the petitioner emphasizes the beneficiary's discretionary authority over the petitioner's personnel, business transactions, and finances, the job description provided is overly vague and does not convey a meaningful understanding of the specific tasks the beneficiary would perform on a daily basis. For instance, the petitioner claimed that the beneficiary would represent the company in all third party transactions. However, to the extent that the beneficiary would be charged with the task of meeting regulatory and licensing requirements, it appears that these responsibilities would require the beneficiary to carry out the petitioner's operational tasks that are necessary in order for the petitioner to engage in retail. Although the petitioner indicated that the beneficiary would set company goals and policies, it did not explain which of the beneficiary's specific daily tasks reflect his policy- and goal-setting role. Additionally, the petitioner did not explain how networking with dealerships and approaching lending institutions to secure financing reflect managerial or executive tasks. While a level of discretionary authority is implicit in approving certain business and banking transactions, it is unclear how actually performing the underlying negotiations fits the definition of managerial or executive capacity.

It is further noted that the petitioner did not provide any information to establish who carries out the marketing tasks, which are clearly required to target the customers for the business. While the petitioner broadly stated that the beneficiary has "sole authority over the company marketing efforts," none of the employees identified within the petitioner's organizational flow chart have been identified as being responsible for carrying out the underlying marketing tasks. As indicated above, while the beneficiary's discretionary authority is clearly a key factor in assessing his managerial or executive role within the petitioning entity, the petitioner cannot meet either statutory definition unless it presents sufficient evidence to establish that the beneficiary's time would be primarily allocated to the performance of tasks that are within a qualifying managerial or executive capacity.

Accordingly, the discussion must necessarily include due consideration of the petitioner's support staff, as the petitioner cannot claim that the beneficiary would primarily perform qualifying managerial or executive tasks unless it can establish that it employs or contracts sufficient personnel who can relieve the beneficiary from having to carry out the daily operational tasks that are required for the business to function. In the present matter, the petitioner failed to provide sufficient reliable evidence to establish that it had a sufficient support staff in place at the time of filing to relieve the beneficiary from having to devote his time primarily to the performance of non-qualifying tasks. First and foremost, the AAO notes that the petitioner indicated on the Form I-140 that it paid salaries and wages to a total of five employees and contractors at the time of filing. However, looking to the organizational chart that the petitioner provided in support of the petition, which is presumably a representation of the petitioner's staff at the time of filing, a total of fourteen positions were identified, even though the petitioner indicated that the only individuals to whom wages were paid included the bookkeeper, two sales people, a driver/lot person, and one driver. 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).

Even if the other individuals listed in the chart were hired on an as-needed basis, the record lacks sufficient evidence to establish how often such individuals were hired or that they were hired at all. 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)). Moreover, given that the beneficiary was the only employee who was available to manage the staff at the time the petition was filed, it is important for the petitioner to establish how much of the beneficiary's time would be spent overseeing a staff of non-professional and non-supervisory subordinates, as only the supervision of managerial, supervisory, or professional employees would be deemed as fitting within the definition of managerial capacity. Section 101(a)(44)(A)(ii) of the Act.

While the petitioner provided an updated organizational chart in response to the RFE in order to establish that the company expanded enough to require the creation of a general manager position, this information is not relevant for the purpose of determining the petitioner's eligibility at the time of filing, which must be based on the facts and circumstances that existed when the petition was originally filed. 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). If the petitioner relied heavily on contractors and subcontractors at the time the petition was filed, the record must include evidence to support such a claim. 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).

In sum, the deficient job description that the petitioner offered in support of the petition does not meet the regulatory criteria, which requires a detailed description of the beneficiary's actual job duties. *See* 8 C.F.R. § 204.5(j)(5). Additionally, as discussed above, the record lacks sufficient evidence to establish that the petitioner had the organizational complexity at the time of filing to relieve the beneficiary from having to allocate his time primarily to overseeing a staff of non-professional subordinate contractors and employees and performing other operational tasks that would not fit the statutory criteria of managerial or executive capacity. Therefore, the petitioner failed to establish that it will employ the beneficiary in a qualifying managerial or executive capacity and the appeal will be dismissed.

Lastly, the AAO will address counsel's references to the petitioner's current and prior approved L-1 employment of the beneficiary. First and foremost, it is noted that each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof. As such, each petition must stand on its own individual merits. USCIS is not required to assume the burden of searching through previously provided evidence submitted in support of other petitions to determine the approvability of the petition at hand in the present matter. The prior nonimmigrant approvals do not preclude USCIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The approval of a nonimmigrant petition in no way guarantees that USCIS will approve an immigrant petition filed on behalf of the same beneficiary. USCIS denies many I-140 immigrant petitions after approving prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 25; *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989).

Furthermore, if the previous nonimmigrant petitions were approved based on assertions similar to those that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Finally, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

IV. Conclusion

In summary, the petition will be denied for the above stated reasons. 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.