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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

[Redacted]

DATE: **DEC 24 2013** OFFICE: TEXAS SERVICE CENTER FILE: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

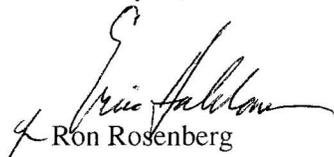
ON BEHALF OF PETITIONER:
[Redacted]

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

The petitioner is a Texas corporation that seeks to employ the beneficiary as its president. 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 the beneficiary had been employed abroad or would be employed in the United States in a qualifying managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the petitioner established by the preponderance of the evidence that the beneficiary has been and would be employed in a qualifying managerial or executive capacity. Counsel contends that the director ignored significant evidence which shows that the beneficiary manages and supervises employees and subcontractors of companies who work with the petitioner as part of the same project team. Counsel submits a brief and additional evidence 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 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. Procedural History

The record shows that the petitioner filed the Form I-140 on September 27, 2012 and submitted a number of supporting documents in an effort to establish eligibility for the above stated immigration benefit. The

petitioner stated on the Form I-140 that it is engaged in the business of providing expertise and management services with regard to the design and installation of wall panels that are used in "clean rooms" within the semiconductor manufacturing process. The petitioner provided business contracts as well as tax and corporate documents in support of the petition.

The petitioner also provided a supporting statement dated September 21, 2012, which contained a description of the beneficiary's proposed employment. The petitioner discussed the nature of the business it conducts in the United States and abroad through its parent entity. The petitioner also provided percentage breakdowns which addressed the beneficiary's duties and responsibilities in his respective positions with the foreign and U.S. entities. The petitioner indicated that the beneficiary would allocate the majority - approximately 75% - of his time overseeing the work of engineers and managers who partake in activities that are associated with the engineering, construction, and/or installation of specially engineered wall panels used in the construction of clean rooms. Looking to the job description pertaining to the beneficiary's employment abroad, it appears that a considerable portion of the beneficiary's time was similarly allocated, although it is unclear precisely how much time given that the petitioner assigned 75% of the beneficiary's time to multiple functions, including presiding over company meetings, reviewing and signing contracts and other legal documents, and overseeing the managers and engineers who worked for the foreign entity as well as those who were hired by other companies which, like the foreign entity, were involved in various aspects of the engineering, construction, and/or installation of wall panels in clean rooms.

On January 9, 2013, the director issued a request for evidence (RFE), indicating that the record did not contain sufficient evidence of eligibility to warrant approval of the petition. The director instructed the petitioner to provide evidence establishing that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity. The director also asked the petitioner to provide organizational charts illustrating each entity's hierarchical structure and the beneficiary's direct subordinates. Lastly, the director instructed the petitioner to provide various financial documents to establish its ability to pay the beneficiary's proffered wage.

The petitioner's response included a statement from counsel dated April 1, 2013. Counsel pointed out the applicable standard of proof, restated the relevant statutory and regulatory provisions, and stated that the petitioner's failure to respond to an RFE should not be the sole basis for denying a petition. The petitioner supplemented the record with additional documents, including evidence of its ability to pay the beneficiary's proffered wage, quarterly wage reports, and organizational charts for the beneficiary's foreign and U.S. employers. The foreign entity's chart depicts the beneficiary at the top of the organizational hierarchy in the position of CEO with an outside director, an auditing director, and the managers and directors of the sales team, an engineering team, an accounting team, and two technical teams as the beneficiary's direct subordinates. The chart shows an executive director, a manager, and a deputy senior manager as the employees who headed the sales, engineering, and accounting teams, respectively. Additionally, the petitioner provided job descriptions of the seven employees who were depicted as the beneficiary's direct subordinates. The job descriptions indicated that the foreign entity had a number of employees who were tasked with sales-related duties, while others were tasked with overseeing subcontractors hired by other companies who took part in the process of outfitting clean rooms with highly specialized wall panels.

The petitioner's organizational chart provides an illustration of a less complex organizational hierarchy consisting of five employees - the beneficiary as the company's CEO, followed by an accounting team and a director as the beneficiary's two direct subordinates, and two technical teams subordinate to the director. Each technical team is shown as consisting of one in-house employee overseeing subcontracted workers of other companies. The chart further shows that the accounting team is comprised of a senior manager.

The director reviewed the petitioner's submissions and determined that the record lacked sufficient evidence to establish that the beneficiary was employed abroad or that he would be employed by the U.S. petitioner in a qualifying managerial or executive capacity. With regard to the beneficiary's employment abroad, the director determined that the beneficiary was unlikely to have "purely provided managerial or executive duties" and further stated that the beneficiary likely spent time carrying out duties of an administrative nature. The latter determination was apparently based on the fact that none of the foreign entity's employees were shown to perform administrative tasks as part of their respective positions. Lastly, the director found that the beneficiary's job description was vague, while also finding that the job description listed the "routine and administrative tasks of a first line supervisor" rather than those of an individual who was employed in a qualifying managerial or executive capacity.

With regard to the beneficiary's proposed employment with the U.S. entity, the director determined that the petitioner offered a job description that indicates that the beneficiary would primarily perform non-managerial job duties. The director further indicated that the petitioner has a limited organizational hierarchy that would not support the beneficiary's performance of duties that are primarily managerial or executive in nature.

In light of the above adverse findings, the director issued a decision dated June 12, 2013 denying the petition.

On appeal, counsel disputes the director's decision, indicating that the director failed to apply the preponderance of the evidence standard of proof when examining the petitioner's supporting evidence and thus improperly determined that the petitioner is not eligible for the immigration benefit sought herein. Counsel asserts that the director may not deny the petition based on a company's limited personnel and cites one district court case and one unpublished AAO decision in support of the assertion. Counsel restates the previously provided job descriptions, and challenges the director's determination that the beneficiary engaged in performing administrative tasks with the foreign entity given the considerable number of employees listed in the foreign entity's organizational chart. Counsel contends that the director failed to properly examine the evidence or give due consideration to the information provided and concludes that the director's decision is erroneous.

III. Analysis

Upon review, counsel's assertions are not sufficient to establish that the beneficiary was employed abroad and that he would be employed in the United States in a qualifying managerial or executive capacity.

In general, when examining the executive or managerial capacity of a given position, the AAO reviews the totality of the record, starting first with the petitioner's description of the beneficiary's job duties. *See* 8 C.F.R. § 204.5(j)(5). As the director stressed in the RFE and later in his denial of the petition, 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).

Additionally, the evidence of record must show that the petitioner is capable of relieving the beneficiary from having to primarily perform non-qualifying tasks. This analysis often calls for an examination of the petitioner's staffing structure, as merely claiming that the petitioner is capable of employing the beneficiary in a qualifying capacity is not sufficient without actual supporting evidence establishing who within the petitioner's organizational hierarchy is available to perform the non-managerial, day-to-day tasks of the company. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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 at 42; *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).

Turning first to the beneficiary's proposed position with the U.S. petitioner, the record shows that at the time of filing the petitioner's staff was comprised of five employees, including the beneficiary. When this information is considered in light of the beneficiary's job description and the beneficiary's own statement dated March 23, 2013, where the beneficiary stated that he actively manages and oversees the work of subcontractors hired by other companies, it becomes doubtful that the petitioner would employ the beneficiary in a primarily managerial or executive capacity. Based on the beneficiary's March 23, 2013 statement, which was submitted as part of the petitioner's RFE response, providing specialized expertise and management services to the petitioner's clients would require the work of managers with "specialized knowledge gained through years of experience" The beneficiary likened the petitioner's business function and means of operation to that of an architectural firm, which works with laborers, whom the architectural firm itself neither contracts nor hires. The beneficiary explained that the petitioner operates similarly in the sense that it is paid by its clients to "provide expertise to those labors [*sic*], engineers and other workers that work on the project" To the extent that the beneficiary would directly oversee the various subcontractors hired by the companies that are involved in the panel construction process, the beneficiary would be carrying out the tasks that are necessary to provide the management consulting services that the petitioner sells to its clients.

While the AAO acknowledges that no beneficiary is required to allocate 100% of his or her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988). In the present matter it is not clear how much of the beneficiary's time in the proposed position would be allocated to providing the services offered by the petitioning organization. Looking to the job description included in the petitioner's initial Form I-140 supporting statement, the petitioner indicated that the beneficiary would spend a combined total of 75% of his time supervising the petitioner's own employees as well as "the managers and engineers working in conjunction with [the petitioner]."

Despite the managerial or professional nature of the outside employees contracted by other companies that are involved in the engineering, construction, and installation of wall panels used in clean rooms, any time the beneficiary would spend managing the contracted employees of other companies would be deemed in this instance as time spent performing tasks that are necessary to provide a service, albeit a management service, that the petitioner is hired to provide as a general contracting company and, thus, would be non-qualifying. In other words, the petitioner does not provide employees or contractors who would relieve the beneficiary from having to provide the management services offered to the petitioner's clients. Rather, the record indicates that the beneficiary himself would actively engage in providing these services as a general contractor by managing and/or overseeing contractors and in doing so, would not be carrying out tasks that fall within the statutory criteria of a qualifying managerial or executive capacity.

Additionally, it is noted that the petitioner has failed to establish that its in-house staff are managerial, supervisory, or professional employees. Section 101(a)(44)(A)(ii) of the Act. While the director oversees two employees and would therefore be deemed a managerial subordinate of the beneficiary, the senior manager of the accounting team lacks the subordinate employees that would qualify the position as supervisory or managerial and further does not have the educational credentials to be deemed a professional employee. Thus, in addition to providing a management service to the petitioner's clients, the beneficiary would allocate additional time to performing the tasks of a first line supervisor by overseeing the work of a non-professional employee. The petitioner has failed to establish that the time spent performing these non-qualifying tasks would be only incidental to the beneficiary's proposed position.

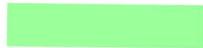
While counsel is correct in pointing out that a petitioner's staffing size should not be the sole consideration in determining the petitioner's eligibility, the key factor in the present matter that points to the petitioner's ineligibility is the beneficiary's job description rather than the petitioner's personnel size. Regardless of the petitioner's staffing, any time a beneficiary allocates his or her time primarily to providing the services of the organization or other non-qualifying tasks, that individual cannot be deemed as being employed in a qualifying managerial or executive capacity. 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 petitioner has offered a job description that indicates that the primary portion of the beneficiary's time would be allocated to carrying out the management service that the petitioner offers to its clients. Based on this fact alone the beneficiary's proposed position does not fit the statutory criteria and the petitioner has not established that the beneficiary would be employed in a qualifying managerial or executive capacity.

Next, turning to the facts pertaining to the foreign entity, the record shows that the beneficiary was charged with overseeing a staff of seven employees - three more employees than the beneficiary would supervise in his proposed position with the petitioning entity. Notwithstanding the three additional employees, however, the petitioner's March 23, 2013 statement expressly indicates that the beneficiary's job duties with the U.S. entity "are very similar" to those the beneficiary previously performed during his employment with the foreign parent entity. Although the job description contained within the petitioner's RFE response statement indicates that the beneficiary allocated some of his time to qualifying tasks, such as overseeing in-house managerial employees, presiding over company meetings, and reviewing and signing contracts, the description also indicates that a significant portion of his time was allocated to performing the non-qualifying tasks of providing management services to the foreign entity's clients and overseeing three potentially non-managerial, non-supervisory, and non-professional employees - an outside director, an auditing director, and a deputy senior director in the accounting department. The petitioner did not identify these employees as supervisors and did not provide their educational credentials in response to the RFE, thus precluding a determination that they qualify as professional employees.

While the petitioner indicated that 75% of the beneficiary's time was allocated to this mix of both qualifying and non-qualifying tasks, the burden is on the petitioner to establish that the primary portion of the beneficiary's time was allocated to tasks within a qualifying managerial or executive capacity. Given that the petitioner did not indicate how the duties accounting for 75% of the beneficiary's time were divided, it cannot be determined whether the beneficiary performed primarily qualifying duties or whether he allocated his time primarily to the tasks that were necessary to provide the services of the foreign entity, i.e., managing the subcontractors hired by companies that took part in the wall panel design, construction, and installation process.

Moreover, given the adverse conclusion with regard to beneficiary's proposed employment and the petitioner's claim that the beneficiary's foreign position was "very similar" to the position he fills in the United States, the record supports and warrants a similar adverse finding with regard to the beneficiary's former position abroad. While the employee job descriptions offered in response to the RFE indicate that a number of the foreign entity's administrative duties were carried out by the accounting team senior manager, the record indicates that the beneficiary was performing a number of other non-qualifying tasks, including actually providing the management services that the foreign entity offered to its clients. The additional flow charts and counsel's appellate brief are not sufficient to establish that the beneficiary performed primarily qualifying managerial or executive tasks.

Lastly, despite counsel's focus on the standard of proof that is applicable to the matter at hand, it must be noted that going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The record in the present matter does not contain sufficient evidence to establish that the beneficiary was employed abroad or would be employed in the United States in a qualifying managerial or executive capacity. Therefore, based on the above adverse findings, 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.