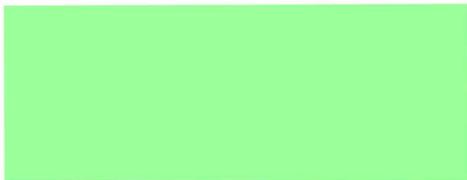


(b)(6)

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



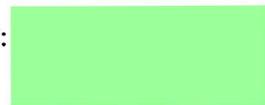
U.S. Citizenship
and Immigration
Services



DATE: FEB 08 2013

OFFICE: NEBRASKA SERVICE CENTER

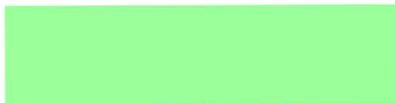
FILE:



IN RE:

Petitioner:

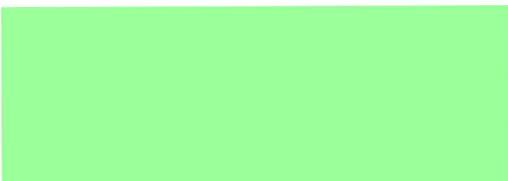
Beneficiary:



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 in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Ron Rosenberg

Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a corporation, organized in Delaware and operating in California, which develops and sells computer software. The petitioner is wholly owned by a British Virgin Island (BVI) parent company, which also maintains ownership of the petitioner's affiliate in Pakistan. The beneficiary established the affiliate in Pakistan and served as its Chief Executive Officer (CEO) for five years. After a successful product launch, the beneficiary founded the petitioning corporation and later consolidated ownership of the United States and Pakistani affiliates under the BVI parent company. The petitioner seeks to employ the beneficiary as its CEO and filed this immigrant visa petition to classify the beneficiary as a multinational executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

The director denied the petition based on the following grounds of ineligibility: (1) the petitioner failed to establish that the beneficiary's proposed employment with the U.S. entity would be within a qualifying managerial or executive capacity; and, (2) the petitioner submitted two organizational charts with significant inconsistencies.

On appeal, the petitioner 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.

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. The statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The term "executive capacity" is defined at section 101(a)(44)(B) of the Act as "an assignment within an organization in which the employee primarily-

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

8 U.S.C. § 1101(a)(44)(B).

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. Section 101(a)(44)(C) of the Act.

Finally, a newly established and unproven company may not file a visa petition seeking the classification of an alien under section 203(b)(1)(C) of the Act. The prospective United States employer must have been doing business in a regular, systematic, and continuous manner for at least one year prior to filing the visa petition. 8 C.F.R. § 204.5(j)(3)(i)(D).

II. Executive Capacity

Upon review of the record, the AAO will withdraw the director's decision and sustain the appeal. The petitioner has provided sufficient evidence to establish that the beneficiary will serve in a primarily executive capacity within the corporation.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a relatively complex organizational hierarchy, including major components or functions, and that person's authority to direct the organization. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of the organization. Section 101(a)(44)(B)(i) and (ii) of the Act. Inherent to the definition, the organization must

have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broader "goals and policies" of the organization rather than the day-to-day operations.¹ The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* at (iii) and (iv).

As detailed in the statutory definition, executive-level employment would encompass high-level positions such as the CEO, president, vice president, chief financial officer, secretary, or treasurer of a corporation. Nonetheless, an individual will not be deemed an executive under the Act simply because he or she has an executive title. *See Q Data Consulting, Inc. v. I.N.S.*, 293 F.Supp.2d 25, 29 (D.D.C., 2003).

Instead, the AAO looks first to the petitioner's description of the job duties to determine whether a beneficiary will serve in an executive capacity. 8 C.F.R. § 204.5(j)(5). A detailed and clearly defined job description is pivotal to the determination. The actual duties reveal the true nature of the employment; otherwise, meeting the definitions would simply be a matter of reiterating the definition. *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). As the beneficiary must "primarily" serve in an executive capacity, the description should demonstrate what proportion of the beneficiary's duties would be executive in nature and what proportion would be non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991); *Q Data Consulting, Inc.*, 293 F.Supp.2d at 29.

In examining the claimed executive capacity of the beneficiary, USCIS reviews the description of the job duties within the context of the totality of the record. This review takes into account the description of a beneficiary's duties, the beneficiary's position within the organizational hierarchy, the presence of subordinate employees, the employment and remuneration of those employees, the nature of the petitioner's business operations, and any other evidence that contributes to a complete understanding of a beneficiary's true role in the business. The evidence must substantiate that the duties of the beneficiary correspond to his or her placement in the 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 position.

Ultimately, the truth is to be determined not by the quantity of evidence alone but by its quality. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). If USCIS fails to believe the facts

¹ The plain language of the statute does not contemplate the first-line supervision of subordinate employees. At a minimum, the statute heavily implies that an executive would supervise other executives or a lower tier of managerial staff. *See* sec. 101(a)(44)(B)(i) of the Act ("directs the management of the organization"). As the first-line supervision of non-professional employees is disqualifying for managers, if it requires more than half of the manager's time, it is reasonable to conclude that such duties are similarly incompatible with the statutory definition of executive capacity. *Cf.* sec. 101(a)(44)(A) of the Act.

avowed in the petition are true, then those assertions may be rejected. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The petitioner has submitted relevant, probative, and credible evidence that leads the AAO to conclude that the beneficiary will, more likely than not, be employed in an executive capacity.

The petitioner presented a detailed description of the beneficiary's duties. The petitioner stated that the beneficiary's role with the petitioner is critical as he will "lead the establishment, development, and execution of our key strategic objective of growing the company by 50% per annum over the next two years and be the face of our company to continue investment in our products." In this role, the petitioner describes the beneficiary as responsible for the "leadership; planning and strategy; business performance; innovation and growth; sales, business and product strategy; and, relationship management." On appeal, the petitioner asserts that the beneficiary "serves as the ultimate leader of the organization with the ability to make decisions affecting the course, growth, and direction of the company" and that the beneficiary is also "managing seasoned professionals in their goal of high growth in sales, market expansion, and customer support."

In a letter accompanying the petition, the petitioner explained that it is launching a new product that will provide an "enterprise private social networking solution for businesses." The petitioner explained that following its initial product successes, it "developed a series of prototypes that attracted the attention of investors" which enabled it to secure additional investment capital in the amount of \$2,317,118.00. Angel investors and two major corporations, one a well-known leaders in the software industry, contributed this capital investment.

The beneficiary's claimed executive duties are credible in light of the nature of the petitioner's business and its organizational structure. At the time of filing, the petitioner employed a CEO, a Head of Platform, a Vice President of Sales, a Vice President of Business Development, a Sales Manager, and a Manager of Operations/Sales. In addition, the petitioner established that it works closely with its affiliate in Pakistan, which is "responsible for the product design, engineering and quality assurance" of the petitioner's products. While the U.S. operations employed a total of five managerial or executive staff, the petitioner's affiliate in Pakistan employed an additional 24 employees, including multiple software and quality assurance engineers. The foreign affiliate includes the organization's core product architecture team, application development team, and quality assurance team. The petitioner provided an organizational chart with specific job descriptions for all individuals employed with the affiliate company abroad. The organizational claims are supported by probative evidence.

While the statute and regulations focus on the actual duties of an executive within the petitioning United States entity, it may be reasonable for a beneficiary to devote a significant portion of his or her time to directing the management of a related international entity. The regulations should be viewed in a manner that would serve the overarching purpose of this immigrant visa category - facilitating the exchange and development of managerial and executive personnel within

multinational companies. Given the prevalence of offshore facilities, "twin plant" manufacturing, and other international business structures, the management of a multinational business may frequently involve such activities.

If a petitioner claims that the beneficiary will supervise directly or indirectly the employees of a foreign parent, affiliate or subsidiary in the course of performing his or her executive duties, the petitioner must establish that the employees are engaged in duties that support or relate to the operations of the U.S. entity. See 8 C.F.R. § 204.5(j)(2) (defining the terms parent, affiliate and subsidiary); see also sec. 101(a)(28) of the Act (defining of the term "organization"). A petitioner would normally submit detailed and credible evidence to establish the existence of the foreign organization, its qualifying relationship to the petitioner, the existence and remuneration of subordinate staff, and the nature of that staff's work, among other material issues. Simple assertions, without supporting documentary evidence, are 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).

In this case, the petitioner's offshore business model and probative supporting evidence substantiates the petitioner's claim that the beneficiary will direct the management of an organization that includes both professional and staff employees who will perform the day-to-day operations of the business.

Upon review, the petitioner provided a detailed job description of the job duties performed by the beneficiary, along with detailed job descriptions, education levels, salaries and specific roles of each employee in the petitioning corporation and the affiliated organization abroad. Ultimately, the petitioner submitted sufficient evidence to establish eligibility for this immigrant visa. As CEO of the petitioning corporation, the beneficiary maintains the highest position within a complex, multinational organization.

III. Reasonable Needs

Notably, although the director based his decision partially on the size of the enterprise and the number of staff, the director did not take into consideration the reasonable needs of the enterprise. 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, the director must take into account the "reasonable needs of the organization, in light of the overall purpose and stage of development of the organization."

Reading section 101(a)(44) of the Act in its entirety, the "reasonable needs" of the petitioner may justify a beneficiary who allocates 51 percent of his or 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 reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or

executive capacity. See *Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir., 2008).

The director noted in his decision that all five of the employees in the United States organization purportedly serve in managerial or executive positions, raising doubts about who would perform the non-qualifying administrative and operational tasks.

At the time of filing, the petitioner had been in existence for six years, with a successful product launch occurring soon after formation. As previously discussed, the U.S. operations employed a total of five managerial or executive staff. Regarding the operational side of the enterprise, the petitioner submitted evidence to show that it employed subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. The petitioner's affiliate in Pakistan employs a staff of 24 employees, including multiple engineers, who may be considered an integral part of the organization. The petitioner submitted evidence to demonstrate that its initial product release was successful, receiving accolades from the New York Times, the Washington Post, ZDNet, Wired, and other major media.

The AAO notes that this immigrant visa classification is not intended for start-up or other unproven entrepreneurial enterprises. A newly established company may not file a visa petition seeking the classification of an alien under section 203(b)(1)(C) of the Act. By regulation, the prospective United States employer must have been doing business in a regular, systematic, and continuous manner for *at least* one year prior to filing the visa petition. 8 C.F.R. § 204.5(j)(3)(i)(D).

In this case, however, the AAO also considers the beneficiary's well-established record as an entrepreneur to be material to the reasonable needs of the petitioner, as the beneficiary personally organized, managed and assumed the risks of launching the business enterprise. The petitioner demonstrated that the beneficiary played the key role in establishing the petitioning company, the overseas affiliate, and the BVI parent company. The beneficiary also holds the patents to the company's technology and secured the investments needed to create the multinational business. At the time of filing, the petitioner had been successfully doing business for years and the beneficiary had secured substantial new capital from investors to launch the petitioner's second product line.

Upon review, the petitioner maintains a significant subordinate staff as part of the international organizational structure that relieves the beneficiary from the day-to-day operations of the business. Furthermore, given the beneficiary's key entrepreneurial role in the creation of the enterprise, it is reasonable for the beneficiary to serve as the primary spokesman, the lead recruiter for new investors, and to a certain degree, as the creative force behind the petitioner's products and technology. Considered individually, these duties may not rise to the statutory standard. However, the AAO is satisfied that these responsibilities satisfy the reasonable needs of the petitioner and, most importantly, that the majority of the beneficiary duties are in fact executive in nature.

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Given the overall purpose and stage of development of the petitioning organization, the reasonable needs of the United States petitioner is plausibly met by the services of the beneficiary as chief executive officer and four other executive or managerial employees.

IV. Inconsistencies

The director noted in his decision several inconsistencies in the two organizational charts submitted by the petitioner. One chart was submitted with the initial filing and the second chart was submitted in response to the director's request for evidence.

A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003). However, anytime a petition includes numerous errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after USCIS provides an opportunity to do so, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions.

On appeal, the petitioner provided sufficient evidence to resolve the concerns and establish that a change of personnel occurred between the date that the petition was filed and the time that the response to the request for evidence was submitted. The AAO will withdraw the director's finding that the petitioner submitted inconsistent organizational charts.

V. Conclusion

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.