



**U.S. Citizenship
and Immigration
Services**

(b)(6)



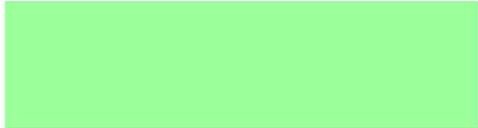
DATE: **FEB 13 2013** OFFICE: TEXAS SERVICE CENTER

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 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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner is a New York corporation that seeks to employ the beneficiary in the United States as its chief executive officer. 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.

In support of the Form I-140 the petitioner submitted a statement dated April 19, 2011, which contained relevant information pertaining to the petitioner's eligibility,¹ including a job description of the beneficiary's proposed employment with the petitioning entity. Although the petitioner indicated that the beneficiary has played an integral role in the petitioner's growth process, a job description of the beneficiary's projected tasks in the proposed position was not included in the initial supporting statement.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a request for evidence (RFE) dated June 27, 2011 informing the petitioner of various evidentiary deficiencies. One of the issues the director addressed was that of the beneficiary's proposed employment with the U.S. entity. Specifically, the director instructed the petitioner to provide a more detailed job description enumerating the beneficiary's job duties and the percentage of time the beneficiary planned to devote to each task. The director also asked the petitioner to submit evidence of its staffing, indicating how many employees it has, the duties performed by each employee, and each employee's educational level.

In response, the petitioner provided a statement dated July 25, 2011, which included a list of the beneficiary's assigned duties and responsibilities. The petitioner provided nearly identical lists describing the beneficiary's foreign and proposed employment and failed to comply with the director's request for a percentage breakdown establishing how much time the beneficiary would allocate to each of the items included in the job description list. The petitioner did, however, comply with the request for an organizational chart, which was included as Exhibit 7, showing that the beneficiary and the company president are situated at similar levels of the petitioner's organizational hierarchy. The chart shows that the beneficiary oversees the company's vice president (who oversees two independent sales contractors), a market research analyst, an accountant (who oversees bookkeeping and payroll services providers), and an independently contracted import/export services agency. Despite the similarity in job descriptions for the beneficiary's foreign and proposed positions, the organizational charts for the two entities show considerably distinct staffing hierarchies.

After considering the petitioner's response, the director determined that the petitioner failed to establish that the beneficiary would be employed with the U.S. entity in a qualifying managerial or executive capacity. The director therefore issued a decision dated December 5, 2011 denying the petition.

¹ In the initial support letter (at page 2, paragraph 3) the petitioner indicated that the instant petition was being filed for the purpose of having the beneficiary's "stay extended on L1A nonimmigrant status." This matter concerns the filing of a Form I-140 immigrant petition seeking an employment-based preference visa for the beneficiary. The matter concerning the nonimmigrant petition is determined in an entirely separate proceeding and has no bearing on the outcome of this proceeding.

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On appeal, counsel restates the same list of job duties that the petitioner provided earlier in response to the RFE and asserts that only skilled staff members are employed in-house while the petitioner's clerical and administrative functions (including bookkeeping, payroll, reception, and sales) are outsourced to independent contractors. Counsel also indicates that the petitioner has recently undergone a merger, which altered the petitioner's organization by adding divisions and skilled employees to its organizational hierarchy and expanding its business to include IT, real estate development, and automotive consulting services. Counsel goes on to describe the beneficiary's role within the petitioner's new organizational hierarchy.

The AAO has reviewed the record in its entirety and finds that counsel's assertions are not persuasive in overcoming the director's finding of ineligibility. The AAO will fully address the petitioner's eligibility and counsel's statements in the discussion below.

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.

The primary issue in this proceeding is the beneficiary's employment capacity in his proposed position with the U.S. entity. In addressing this issue the AAO will first look to the petitioner's description of the beneficiary's proposed job duties. See 8 C.F.R. § 204.5(j)(5). Published case law supports the pivotal role of a detailed job description, as the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990); see also 8 C.F.R. § 204.5(j)(5). Additionally, the AAO finds that it is appropriate to consider other relevant factors, including the petitioner's organizational hierarchy, the beneficiary's position therein, and the petitioner's overall ability to relieve the beneficiary from having to primarily perform the company's daily operational tasks.

Turning first to the beneficiary's job description in this matter, the AAO finds that the list offered by the petitioner in response to the RFE included numerous non-qualifying tasks, such as creating and developing markets for the export business, coordinating export operations, negotiating with suppliers and dealers of used automotive parts, setting up and developing a U.S. inspection station, coordinating debt financing and debt service payments, dealing and negotiating with suppliers and manufacturers, and preparing budgets and forecast reports. The petitioner failed to provide percentage breakdowns to these and other of the

beneficiary's assigned tasks despite having been expressly instructed to do so. This information is needed as it allows USCIS to gauge how much of the beneficiary's time would be allocated to qualifying tasks versus those that would be deemed as non-qualifying.

While 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 reviewing the beneficiary's job description in light of its limited staffing, the AAO questions how the petitioner, given the staffing at the time the Form I-140 was filed, planned to relieve the beneficiary from allocating his time primarily to non-qualifying tasks. While the record clearly shows that the beneficiary's job description for his employment abroad was nearly identical to his job description in the proposed U.S. position, the AAO cannot consider the similarity without also considering the distinction between the two entities' respective organizational hierarchies. The organizational hierarchy of the foreign entity is considerably more complex, showing multiple management and supervisory tiers, as well as an extensive support staff to carry out the company's sales, marketing, clerical, and administrative functions.

On the other hand, the petitioner's organizational hierarchy is considerably more limited. While the petitioner claims that the administrative and clerical functions were being outsourced to independent contractors, the record lacks evidence to support this claim. 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)).

Despite the nearly identical job descriptions of the beneficiary foreign and proposed positions, the AAO cannot ignore the fact that, unlike the petitioning entity at the time of filing, the foreign entity offered the beneficiary a support staff that was capable of relieving him from having to primarily perform non-qualifying 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 light of the differences between the U.S. and foreign entities, the AAO also questions how the petitioner can offer nearly identical job descriptions for what appear to be two very distinct positions.

While counsel offers evidence showing that the petitioner has undergone an organizational transformation subsequent to a merger agreement which was executed on August 12, 2011, the Form I-140 which is the

subject of this discussion was filed on May 13, 2011. Thus the filing of the petition preceded the merger agreement by three months. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In light of the fact that the merger agreement had not gone into effect until after the petition was filed, the petitioner's organizational transformation post-merger cannot be considered in determining the petitioner's eligibility in the present matter. A petitioner cannot offer on appeal a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978).

In light of the discussion above, the AAO finds that the beneficiary's proposed position at the time the Form I-140 was filed did not merit immigrant classification of multinational manager or executive. Therefore, the instant petition cannot be approved.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.