

(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:

JUL 25 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
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 engaged in the importation and distribution of olive oil, and it seeks to employ the beneficiary 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.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary's proposed employment with the U.S. entity would be in a qualifying managerial or executive capacity. The director also found that the petitioner failed to establish that it has the ability to pay the proffered wage. The director noted in his denial that the petitioner failed to respond to the Notice of Intent to Deny.

The petitioner contacted the service center and provided evidence that the response had in fact been submitted and requested a review of the file. The service center then issued a second denial advising that the petitioner's "appeal" was dismissed as a Form I-290B was not filed. The petitioner then filed a Form I-290B motion to reopen and reconsider with evidence that the response to the Notice of Intent to Deny was submitted as well as a copy of the response. The director granted the motion to reopen and reconsider, acknowledging that the response was submitted. The director found that the petitioner established that it had the ability to pay the beneficiary's proffered wage and withdrew his previous adverse finding. However, the director determined that the petitioner failed to establish that the beneficiary's duties are managerial or executive in nature and affirmed the denial of the petition based on this sole ground.

On appeal, counsel disputes the director's findings and provides an appellate brief laying out the grounds for challenging the denial. Counsel attaches 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 the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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 that 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. *See* 8 C.F.R. § 204.5(j)(5).

II. FACTS AND PROCEDURAL HISTORY

The sole issue in this proceeding is whether the petitioner submitted sufficient evidence to establish that the beneficiary would be employed in a primarily managerial or executive capacity.

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 petitioner indicated on the Form I-140, Immigrant Petition for Alien Worker, that it is engaged in the importation and distribution of olive oil with two employees and a gross annual income of \$688,642. The petitioner states that it wishes to employ the beneficiary as its Chief Executive Officer. In a letter submitted in support of the initial petition, the petitioner stated that the beneficiary has discretionary authority with limited supervision from abroad to ensure company objective and goals are met, as well as coordinating and implementing the overall operation and policies of the company. Specifically, the beneficiary will be responsible for the following duties:

- Oversee the development, and implementation of corporation operations in the US and coordinating the same with our parent company . . . in Italy;
- Manage all recruitment, training and management of [the petitioner's] personnel in North America, including the sales department, logistics department, administration department, brokers, sales representatives and distributors;
- Represent [the petitioner] at conferences, industry events, etc.;
- Manage marketing, production, planning, logistics, budgeting, hiring and supervision responsibilities as well as oversee administrative operations, including the handling of personnel and general administrative affairs such as hire, supervise, and oversee regional coordinators and subordinates as the Company expands;
- Establish, implement and monitor administrative and corporate policies and procedures to ensure effective operations, and develop and implement plans for long-term growth and increased revenue and sales;
- Establish performance assessment, review and retraining protocol;
- Review reports submitted by staff members to recommend approval or to suggest changes; and

- Review budgets for approval, including those for funding or implementation of programs.

In support of the petition, the petitioner provided *inter alia*, a copy of its 2010 IRS Form 1120, U.S. Corporation Income Tax Return, the petitioner's organizational chart, a copy of the executive employment agreement between the petitioner and the beneficiary, and a copy of the beneficiary's resume.

The petitioner's organizational chart shows the beneficiary as President/CEO reporting to the Board of Directors. Reporting to the beneficiary is a Sales Manager. Reporting to the Sales Manager are three departments: (1) sales department/ logistics department/administration department consisting of seven independent contractors; (2) brokers/sales representatives consisting of five independent contractors; and (3) "distributors per area" consisting of 25 independent contractors. The petitioner did not identify any specific independent contractors, their titles, or the duties they perform.

The petitioners IRS Form 1120 for 2010 shows total salaries paid of \$7,880 and \$78,360 paid in compensation to officers. The petitioner did not provide evidence of payments to contractors and such payments were not clearly reflected in its corporate tax return.

The executive employment agreement specifies that the beneficiary shall perform duties and responsibilities "as are customary for the officer of a corporation in the position of CEO." The petitioner's resume shows that she has served as President/CEO from August of 2007 to present. The duties listed include the following: managing a portfolio of global accounts in the North American Market; "personally opened" corporate accounts including small, mid-sized, and large food chains; management of marketing strategies, PR activities, advertising plans; logistic management; website development; overview quarterly economic and financial reports, annual budgets, and profit & loss statements; participation and collaboration in new products development and pricing policies; and creation and design of all point of sales materials.

The director issued a Notice of Intent to Deny ("NOID"). The director requested that the petitioner provide, *inter alia*, evidence that the beneficiary will act in a qualifying capacity as a multinational manager. The director noted that the petitioner lacks the organizational complexity to warrant the employment of the beneficiary in a primarily executive of managerial capacity.

The petitioner submitted a letter in response providing the same job duties as submitted with the initial petition. The petitioner stated that it has secured a number of additional accounts within the past year. The petitioner explained that the beneficiary's "services as head decision maker and chief liaison will be of utmost importance to the retaining, renewal, and expansion" of the new accounts as well as future accounts.

In support of the response, the petitioner included copies of the vendor agreements as well as copies of its 2010 and 2011 IRS Form 1120, U.S. Corporation Income Tax Returns.

The director ultimately denied the underlying petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive position. In denying the petition, the director found that the petitioner failed to establish that the beneficiary would be performing duties that are executive or managerial in nature.

On appeal, counsel asserts that evidence of record is sufficient to establish that the beneficiary will be acting in a primarily managerial or executive position. Specifically, counsel states that the evidence supports a finding that the beneficiary will be acting in a primarily managerial capacity. Counsel provides the same evidence as provided in response to the NOID regarding the additional accounts secured within the past year and the size of the petitioner's gross sales.

Counsel supplies the same job description with percentage breakdown of duties as provided on the petitioner's initial petition and response to the NOID. Counsel asserts that the beneficiary will be managing subordinate managers and professional-level positions. The petitioner provides copies of brokerage agreements with the petitioner and five associations contracted to sell and market the petitioner's products.

III. DISCUSSION

Upon review of the petition and evidence, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity.

In examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Published case law clearly supports the pivotal role of a clearly defined 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). That being said, however, USCIS reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the petitioner's business, the employment and remuneration of employees, as well as the job descriptions of the beneficiary's subordinates, if any, and any other facts contributing to a complete understanding of a beneficiary's actual role within a given entity.

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).

The beneficiary's job descriptions submitted in support of the initial petition and in response to the RFE were overly general and vague, and therefore do not convey a meaningful understanding of how much time the beneficiary will spend performing qualifying tasks versus those that would be deemed non-qualifying. For instance, the petitioner stated that the beneficiary will establish and implement and monitor corporate policies; manage marketing, production, planning, logistics, budgeting, and

hiring; oversee the development and implementation of corporate operations; and interview, hire, and train new employees. These duties provided little or no insight into what the beneficiary primarily does on a day-to-day basis or how she carries out her objectives as CEO. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of her daily routine. The actual duties themselves will 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).

The beneficiary's resume submitted with the initial petition provides a different description of her duties as the petitioner's CEO. The job duties on the beneficiary's resume indicate that she performs more of the actual administrative and operational functions for the petitioner, while the duties submitted in the petitioner's supporting letter show her performing more of a managerial role. Specifically, the beneficiary's resume states that she performs duties such as: managing a portfolio of global accounts in the North American Market; "personally opened" corporate accounts; website development; participation and collaboration in new products development and pricing policies; and creation and design of all point of sales materials. The beneficiary's resume calls into question whether she is performing primarily managerial or executive duties as claimed in the job description submitted in the petitioner's supporting letter, or whether she is primarily engaged in sales, marketing and other non-qualifying tasks. 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). 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).

Furthermore, it is not clear who will be performing the actual day-to-day operational and administrative work for the petitioning company. The petitioner claims that the beneficiary reviews reports submitted by departments; reviews budgets for approval; establishes performance assessments; manages recruitment, training, and management, of all petitioner's personnel; and manages marketing, planning, production, logistics, budgeting, hiring, and supervision. The petitioner claims to have one employee other than the beneficiary, namely a Sales Manager. The petitioner failed to provide any job description for the beneficiary's claimed subordinate. The petitioner further indicates that the sales manager oversees a total of 37 independent contractors in the sales department, logistics department, and administration department, as well as brokers/sales representatives and distributors. The petitioner has offered little evidence pertaining to most of these contractors or the nature of the services they provide, and thus has not established how they relieve the beneficiary from engaging in non-qualifying duties. 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)).

Although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.¹

The petitioner fails to provide any evidence that the petitioner will be supervising supervisory, managerial, or professional employees. The petitioner's organizational chart shows the position of Sales Manager reporting to the beneficiary. The petitioner has not provided any other evidence, duties, or terms of employment regarding this position. Without a position description or job duties for the position of Sales Manager, the AAO is unable to make a determination regarding whether the position is supervisory, managerial, or professional. The petitioner states that the beneficiary previously held the position of Sales Manager, but does not specify how the duties of this position will change with the new organizational hierarchy including the beneficiary as Chief Executive Officer. Furthermore, it appears from the organizational chart that the position of Sales Manager does not supervise any subordinate positions employed by the petitioner. Rather, the position manages contractors that in turn perform sales and marketing work for the petitioner. As noted above, the petitioner provided insufficient evidence regarding the nature of the services provided by contractors.

The proposed position of the beneficiary is a Chief Executive Officer of an olive oil importer and distributor composed of one employee other than the beneficiary. The petitioner has not demonstrated that the beneficiary, as a personnel manager, will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. *See* section 101(a)(44)(A)(ii) of the Act. Furthermore, the petitioner has not established that it will employ a staff that will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial duties. Further, regardless of the beneficiary's position title, the record is not persuasive that the beneficiary will function at a senior level within an organizational hierarchy.

On appeal, counsel for the petitioner claims that the beneficiary's position is executive in nature. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and

¹ Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary, for example, to perform the secretarial and administrative work of the office secretary, who is among the beneficiary's subordinates. Here, the petitioner failed to submit the requested position descriptions for the beneficiary's subordinates. Without the position descriptions, the AAO is unable to determine whether a bachelor's degree is actually required for performance of the subordinate's duties. 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).

that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. 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 broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. 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.*

Given the conflicting information in the record regarding the beneficiary's duties and the petitioner's failure to provide position descriptions for the beneficiary's sole subordinate and evidence related to the majority of the claimed independent contractors used by the company, the petitioner has not established how the beneficiary is relieved from involvement in the day-to-day operations of the petitioning enterprise as the senior employee in a two-person company, or how the company's current organizational structure can support an executive position. The record establishes that the beneficiary exercises the appropriate level of discretionary authority over the company as its CEO, but fails to establish that her actual duties would be primarily executive or managerial in nature.

In summary, the petitioner has failed to provide sufficient evidence to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity and the petition cannot be approved.

The appeal will be dismissed 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.