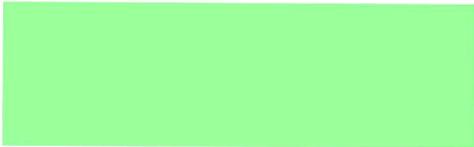


(b)(6)

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

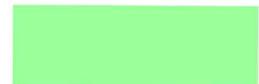


DATE:

JUN 04 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,

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

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 Texas corporation that seeks to employ the beneficiary in the United States 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 it would employ the beneficiary in a managerial or executive capacity. Specifically, the director determined that the record indicated the beneficiary was the petitioner's sole employee. However, the director further stated that even if the petitioner had established the employment of all three claimed employees the evidence was insufficient to establish that the beneficiary would be primarily managing the organization or supervising a staff that would relieve him of performing non-qualifying duties.

On appeal, counsel asserts that the director erred in finding the beneficiary is the petitioner's only employee and in finding that the beneficiary primarily performs the day-to-day tasks of the petitioning company. Counsel submits a brief and a letter offering a much more detailed description of the beneficiary's duties with the petitioner, a description of the general manager's duties, and a description of the C.P.A.'s role as an independent contractor with the company. Additionally, the petitioner provides wage and tax-related documents for the first quarter of 2012.

The AAO finds that counsel's assertions are not persuasive and thus fail to overcome the director's adverse decision. A comprehensive analysis of the AAO's findings is provided 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 sole issue addressed by the director was the beneficiary's employment capacity in his proposed position with the petitioning entity. The AAO gives primary consideration to the description of the beneficiary's proposed position and duties, as a detailed description of the beneficiary's actual daily tasks tends to 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 AAO also gives ample consideration to the job duties of the beneficiary's subordinate employees, the nature of the business, the employment and remuneration of employees, and any other facts that contribute to a comprehensive understanding of the beneficiary's actual role in a business.

In the present matter, the AAO finds that the petitioner has not established the beneficiary's qualifying employment in a managerial or executive capacity due to the lack of an available staff to relieve the beneficiary from performing primarily non-qualifying duties. According to the petitioner's evidence submitted in support of the petition and in response to the RFE, the beneficiary is president of a wholesale and retail pewter art crafts and serving ware business where he is "to manage the organization, supervise and control the work of my general manager, hire and fire personnel and exercise discretion over day-to-day operations of the company." However, the tax documentation and payroll evidence submitted by the petitioner does not establish the petitioner's staffing at the time the petition was filed.

The petitioner's Form I-140 indicated that the petitioner claimed three employees. The petitioner's 2011 organizational chart depicted three filled positions, the beneficiary as the president and two direct subordinates, the general manager, [REDACTED] and the C.P.A., [REDACTED] (further identified as "external"). The organizational chart also identified three vacant positions subordinate to the general manager: two sales persons and one sales manager.

The petitioner failed to support its claim that the three named individuals were actually employed by the petitioner at the time the petition was filed because it submitted no Federal or state quarterly returns for any quarters of 2011, no pay stubs, or any other evidence of payments for any employees during 2011. All of the petitioner's supporting evidence related to its staffing and business activities was from 2010. The petitioner submitted an IRS Form 7004 Application for Automatic Extension of Time to File Certain Business Income Tax, Information, and Other Returns for 2011 and on appeal, dated September 25, 2012, the petitioner submitted payroll evidence covering the first half of 2012 but the petitioner never provided any of the crucial pay documentation or tax documentation for 2011 or especially for the period covering the time of filing on December 22, 2011. 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)).

The director determined that the beneficiary was the sole employee who performed day-to-day functions and could not be employed in a qualifying executive capacity. The beneficiary's very brief duty description and the organizational chart suggest that the company has a general manager position and plans to hire salespeople and a sales manager. However, the evidence does not support that any of these positions were filled at the time the petition was filed thus raising the question of who, other than the beneficiary, would perform the non-qualifying duties necessary to the regular functioning of this business. 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Notably, the petitioner has failed to provide a consistent description of the nature and scope of the U.S. company's business activities. The Form I-140 filed by the petitioner states that this company operates a wholesale and retail business, which indicates it would reasonably require salespeople on staff. The petitioner also submitted a copy of its lease, which authorizes the use of the leased premises as a retail store. However, according to the petitioner's IRS Form 1120, U.S. Corporation Income Tax Return, this company provides a 'service' and claims to be an "unclassified establishment" meaning it cannot be classified in any industry. Finally, on appeal, counsel asserts that the business is a commodity provider which seeks to "locate competitive suppliers for the latest window components and installation accessories" to be sourced for the foreign company's business. The petitioner failed to resolve the inconsistencies as to nature of its business and its staffing requirements. 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).

On appeal, the petitioner, in asserting that it has sufficient personnel to relieve the beneficiary of performing tasks necessary to produce a product or perform a service, reiterates that the petitioner employs [REDACTED] and [REDACTED] and plans to soon hire additional employees in accordance with the submitted organizational chart. In support of the assertion, the petitioner provides pay stubs and tax documents for 2012; however, this evidence is not relevant to an analysis of the staffing levels at the time the petition was filed. 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'r 1971).

The director based his decision partially on the size of the enterprise and the number of staff, but he 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, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At time of filing, the petitioner claimed to be a six-year-old wholesale and retail pewter goods company with a gross annual income of \$91,436.00. The company claimed to employ the beneficiary as president, plus a general manager and a C.P.A. The petitioner provided only a brief duty description for the beneficiary and no descriptions for the claimed subordinate employees. The AAO notes that one claimed employee appeared to be a professional accountant and the other had a managerial title. The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day operations of the company. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president, one managerial employee and an external accountant. Furthermore, as observed by the director, the petitioner did not document its employment of other staff at the time of filing, and it has not been established that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary alone. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

The AAO acknowledges that the petitioner has provided an expanded duty description for the beneficiary on appeal. This duty description includes areas of responsibility not previously mentioned, and is inconsistent with the petitioner's previous claim that the company operates a retail store selling pewter crafts. For example, the petitioner now indicates that the beneficiary will allocate 50% of his time to development of major manufacturing contracts and contacts, a duty that was not mentioned at the time of filing. On appeal, a petitioner cannot offer 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'r 1978). 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).

The petitioner maintains the burden of establishing that the beneficiary would more likely than not primarily perform tasks within a qualifying managerial or executive capacity. Given the deficiencies discussed above, the AAO finds that neither the beneficiary's job description nor the petitioner's organizational composition at the time of filing adequately establish that the petitioner would be able to relieve the beneficiary from having to allocate the primary portion of his time to non-qualifying operational tasks. Therefore, on the basis of this conclusion, the instant petition cannot be approved and the appeal will be dismissed.

Beyond the decision of the director, the petition also may not be approved because there is insufficient evidence of a qualifying relationship between the petitioner and the beneficiary's last employer abroad, [REDACTED]. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the

beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The petitioner claims that it is majority owned by the Mexican entity. Due to the many inconsistencies in the record, the petitioner has not supported this claim. The petitioner's Articles of Incorporation filed on July 1, 2005, identify the beneficiary and his wife as the only two directors. Further, the petitioner's IRS Forms 1120, U.S. Corporation Income Tax Return, for 2009 and 2010, indicate that the company is 100% owned by Mexican shareholders, but identify the beneficiary and his spouse as the only foreign shareholders with an ownership interest of 25% or greater. The petitioner failed to provide copies of its stock certificates, by-laws, meeting minutes, or a stock ledger to clarify ownership of the company.

The director issued a request for evidence ("RFE") on April 13, 2012, in which she requested "all stock certificates, stock ledger, proof of stock purchase . . . , meeting minutes, Articles of Incorporation, or other documentation that establishes ownership and control." In response the petitioner submitted a "Statement of Unanimous Written Consent To Action Taken in Lieu of the Annual Meeting of the Shareholders," dated January 2, 2012, which included a resolution for the sale and transfer of stock from [REDACTED]. According to this document, at the conclusion of this sale and transfer, the beneficiary owns 490 shares and [REDACTED] owns 510 shares. The document is signed by the beneficiary only. Not only is this resolution document signed by only one of two directors unreliable, but it suggests that the foreign company obtained majority ownership, if at all, after the filing date of this petition in December 2011.

The petitioner also submitted two undated stock certificates identified as numbers three and four. The stock certificates reflect the issuance of 510 shares to [REDACTED] and 490 shares to the beneficiary. The petitioner did not provide copies of certificate numbers one and two or a copy of its stock ledger and therefore it cannot be confirmed that [REDACTED] ever owned 510 shares of the company. The petitioner also failed to provide any evidence that the foreign entity actually paid for the purchase of the shares. 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).

Based on the limited evidence submitted, the petitioner's response to the RFE indicates that [REDACTED] and not the foreign entity, was the actual majority owner of the petitioning company at the time the petition was filed and therefore undermines its claim that the company has a qualifying relationship with [REDACTED]. The AAO notes that the foreign entity is owned in equal parts by two individuals and Ms. [REDACTED] is not one of its owners. Regardless, due to the inconsistencies and omissions in the evidence submitted, the petitioner has not submitted sufficient evidence of the petitioner's ownership and control for the AAO to draw any conclusions about the company's actual ownership. 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). Accordingly, the petitioner has not established

that it has a qualifying relationship with the beneficiary's foreign employer and the petition must be denied for this additional reason.

Another issue not addressed by the director is whether the beneficiary was employed by the foreign company for at least one year prior to gaining admission into the U.S. to work for the petitioner. The petitioner asserts that the beneficiary founded and became an employee of the foreign entity in 2000. However, the petitioner submitted a translation of a Mexican notarized public deed and articles of incorporation which reflect that [REDACTED] was established on October 16, 2006. The beneficiary indicates on the Form G-325, Biographic Information, accompanying his concurrently submitted adjustment of status application (Form I-485), that he has resided in the United States since June 2006. The beneficiary could not have met the one year employment requirement with a foreign company established in October 2006 if he has resided in the United States since June 2006. The petitioner failed to provide evidence clarifying the foreign company's incorporation date through registration documents with other government offices. Therefore, the record contains insufficient evidence to establish that the beneficiary worked for the foreign company for at least one year within the three years prior to his admission to the United States. 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). For this additional reason, the appeal will be dismissed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO reviews appeals on a *de novo* basis).

The AAO observes that USCIS has approved several L-1A classification nonimmigrant petitions filed by the petitioner on the beneficiary's behalf. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant I-129 L-1 petitions. See, e.g., *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *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). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. Cf. §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427. Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; see also 8 C.F.R. § 214.2(l)(14)(i) (requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

Further, nonimmigrant petition filings and immigrant petition filings are separate proceedings with separate records and a separate burden of proof. See 8 C.F.R. § 103.8(d). In making a determination

(b)(6)

Page 9

of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). For the reasons discussed above, the evidence in the current record of proceeding fails to establish that the beneficiary and petitioner are eligible for the benefit sought.

Accordingly, the petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 not been met.

ORDER: The appeal is dismissed.