



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUN 06 2013 OFFICE: TEXAS SERVICE CENTER

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 AAO inappropriately applied the law in reaching its 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 motion 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 any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

f Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The U.S. petitioner was incorporated in the State of Texas on May 27, 1994. The petitioner states on the Form I-140, Immigrant Petition for Alien Worker, that its type of business is "automobile parts and service" and that it employs four personnel. The petitioner reported a gross annual income of \$317,952 when the petition was filed. It 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.

On November 8, 2012, the director denied the petition determining that the petitioner failed to establish that it will employ the beneficiary in a managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the evidence of record is sufficient to satisfy the petitioner's burden of proof.

I. The Law

To establish eligibility for the employment-based immigrant visa classification, the petitioner must meet the criteria outlined in section 203(b) of the Act. 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. Such a statement must clearly describe the duties to be performed by the alien. 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.

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. The Issue on Appeal

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

In an undated letter submitted in support of the petition, the petitioner indicated that it imports, sells, and refurbishes high quality engines for foreign vehicles. The petitioner stated that it caters to auto trade customers as the preferred engine supplier for major auto dealerships in the greater San Antonio area as well as throughout the state and as far as Canada. The petitioner noted that it also provides services to retail customers including professional engine and transmission installation and major, minor, and general repairs. With regard to the proffered position, the petitioner stated "[i]n connection with [the petitioner's] continuing business and procurement activities, the company requires the managerial services [of the beneficiary] on a full-time, permanent basis." The petitioner indicated that the beneficiary as president will perform the following:

- Primarily manage operations and procurement function of the company using his contacts internationally to obtain the necessary inventory to run the business;
- Establish annual organization goals and the strategic business plans to achieve those goals;
- Oversee the application of the company's business plans;
- Directly supervise and control the work of subordinate supervisors/managers in the company as well [as] staff;
- Function at a senior level and exercise discretionary authority over the day-to-day operations of same including personnel actions such as hiring and firing.

[Bullet points added.]

The petitioner stated that the above responsibilities are essential to the petitioner's ongoing business activities. The petitioner further delineated the beneficiary's job duties as:

- Direct and coordinate financial and annual budget activities to fund operations, maximize investments. (10%)
- Confer with managers to, coordinate activities, or resolve problems including managing departmental managers/supervisors of Sales and Administration and Technical Operations. (15%)
- Analyze operations to evaluate performance of a company or its staff in meeting objectives or to determine areas of potential cost reduction, program improvement, or policy change including directing customer relationships. (20%)
- Direct, plan, or implement policies, objectives, or activities of organizations or businesses to ensure continuing operations, to maximize returns on investments, or to increase sales of motors and motor parts. (10%)
- Negotiate or approve contracts or agreements with suppliers, distributors, and customers including international contracts for engine components in South Africa and abroad for the purpose of procuring foreign engines and parts. (20%)
- Review reports/suggestions submitted by management to recommend approval or to suggest changes. (10%)

- Appoint managers and assign or delegate responsibilities to them. (10%)
- Direct human resources activities. (5%)

The record also included the petitioner's organizational chart depicting the beneficiary as president over the sales/administration branch and the operations branch of the organization. The sales and administration branch included one employee identified as the administrative, sales, and marketing manager in a position over the organization's accounting and tax consultant. The operations branch included two identified employees, a workshop and warehouse manager who is depicted as over the head technician. Although the organizational chart indicated that additional office staff will be appointed and references the employment of auto technicians, the record did not include information supporting the petitioner's current employment of additional personnel.

Upon review of the limited evidence in the record, the director issued a request for evidence (RFE) instructing the petitioner to submit additional evidence establishing that it will employ the beneficiary in a managerial or executive capacity.

In response the petitioner claimed that the beneficiary will primarily perform duties in a managerial capacity. The petitioner indicated that the beneficiary will supervise managers and staff, and will have authority to hire and fire or recommend and exercise discretion over the day-to-day operations of their activities. The petitioner further noted that the beneficiary will manage the essential commercial accounts of the company, will manage critical customer relationships, and will function at a senior level with respect to the client development functions. The petitioner also stated that the beneficiary will exercise discretionary authority over the day-to-day operations of the same functions, including providing input on personnel actions. The petitioner also referenced a letter signed by a representative of the Small Business Development Center which offered the opinion that the Better Business Bureau had given the petitioner an A+ rating solely due to the beneficiary's business acumen. The petitioner asserted that it has sufficient staff to perform its day-to-day operations and that the beneficiary is not serving in the capacity of a mechanic or sales person, but rather is directing and running the corporation.

The record also included the petitioner's Internal Revenue Service (IRS) Form 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2011 showing the petitioner employed three personnel during the quarter. The three employees were identified as the beneficiary, the workshop/warehouse manager, and the head technician.

Upon review of the totality of the record, the director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the evidence submitted overwhelmingly supports the conclusion that the beneficiary's responsibilities satisfy the criteria of a functional manager.

III. Analysis

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

managerial capacity of the beneficiary, United States Citizenship and Immigration Services (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.

As the director observed, 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 petitioner in this matter identifies the proffered position as primarily a managerial position. However, as the petitioner labels the proffered position "president" we also consider whether the duties and responsibilities of the proffered position demonstrate employment in an executive capacity.

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 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.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act. If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Section 101(a)(44)(A)(iii) of the Act.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the

function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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 Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)).

The petitioner initially provided a broad overview of the beneficiary's duties. The petitioner stated that the beneficiary will establish goals and the business plans to achieve the goals, oversee the application of the business plans, and function at a senior level and exercise discretionary authority over the day-to-day operations. However, these broadly-cast business objectives fail to inform as to the beneficiary's actual duties within the organization. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava, supra*.

The few tasks more concretely described by the petitioner suggest that the beneficiary is actively participating in the performance of non-qualifying duties. Duties such as using contacts to obtain inventory and negotiating or approving contracts with suppliers, distributors, and customers to procure foreign engines and parts are the duties of an individual performing the petitioner's procurement function. Other tasks relate to the duties of a first-line supervisor over non-professional employees and thus are non-qualifying duties. In this matter, the record does not support the petitioner's claim that it employs individuals in managerial or supervisory roles. 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 director requested brief positions descriptions for all employees subordinate to the beneficiary, the petitioner did not describe the duties of the workshop/warehouse manager. As such, we cannot conclude that this individual primarily supervises or manages the "head technician." In addition, the record does not demonstrate that such a position is a professional position. The petitioner has not provided documentary evidence that it continues to employ the individual in the position of administrative/sales/marketing manager, as this individual does not appear on the petitioner's latest filed IRS Form 941. Moreover, the petitioner has not described the duties of the administrative/sales/marketing manager; thus, the record does not support a finding that this individual, even if employed, primarily performs supervisory or managerial tasks or that the position itself requires an individual with a bachelor's degree to perform the tasks. 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).

Accordingly, the petitioner has not provided sufficient evidence to demonstrate that it has a subordinate level of managerial employees for the beneficiary to direct, thus allowing the beneficiary to focus primarily on the broad goals and policies of the organization rather than the day-to-day

operations of the business. Similarly, the record does not demonstrate that the beneficiary will primarily supervise and control the work of supervisory, professional, or managerial employees. Therefore, the record does not include sufficient evidence to establish that the beneficiary primarily performs in the capacity of an executive or of a personnel manager as those terms are defined in the statute.

The petitioner, in response to the director's RFE, claimed that the beneficiary will primarily perform duties in a managerial capacity. Although the petitioner reiterated that the beneficiary will supervise managers and staff and will have the attendant responsibilities of a personnel manager, the petitioner also indicated that the beneficiary will manage the petitioner's essential functions. The petitioner identified the essential functions as the commercial accounts of the company, its critical customer relationships and client development.

We note that in the petitioner's description of the beneficiary's duties, the petitioner indicated that the beneficiary will spend ten percent of his time directing and coordinating the financial and annual budget activities to fund operations and maximize investments. The petitioner also indicated that the beneficiary would spend 20 percent of his time negotiating or approving contracts with suppliers, distributors and customers procuring foreign engines and parts. However, other than an outside accountant who prepared the petitioner's tax returns the petitioner did not provide evidence that it employed anyone to perform the financial duties of the petitioner. Thus, there is insufficient evidence to demonstrate that the outside accountant relieved the beneficiary from performing the operational tasks associated with budgetary and everyday banking and financial tasks. Likewise, the petitioner did not identify anyone who would perform the duties associated with developing and maintaining client relationships other than the beneficiary. We recognize that the beneficiary is not serving in the capacity of a mechanic but the record does not support the petitioner's claim that the beneficiary is not involved in sales, procurement, and the day-to-day operational tasks necessary to procure and sell engines and parts. The beneficiary's business acumen in performing the essential tasks to operate the business, while undoubtedly valuable to the company, is not synonymous with an individual managing an essential function(s).

A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, 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. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Upon review of the totality of the record including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, and the nature of the petitioner's business, the petitioner has not established that the beneficiary's actual duties incorporate primarily executive or managerial functions. Although the petitioner may have plans to further expand its business, the record before the director failed to establish that the company currently has a reasonable need for the beneficiary to perform duties that are primarily in a managerial or executive capacity as those terms are defined in

the statute. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

The AAO acknowledges that USCIS previously approved an L-1A nonimmigrant petition filed on behalf of the beneficiary, a classification which also requires the petitioner to establish the beneficiary's duties comprise primarily managerial or executive tasks. It must be noted, however, 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, supra*. 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).

Moreover, in making a determination 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). In the present matter, the director reviewed the record of proceeding and concluded that the petitioner had not established the beneficiary would be employed in a primarily managerial or executive position. In both the request for evidence and the final denial, the director articulated the objective statutory and regulatory requirements and applied them to the case at hand. If the previous nonimmigrant petition(s) was approved based on the same evidence as submitted in this matter, the previous approval(s) would constitute gross error on the part of the director. Despite any number of previously approved petitions, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act.

IV. Conclusion

The petition will be denied and the appeal dismissed for the above stated reason. 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 the petitioner has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.