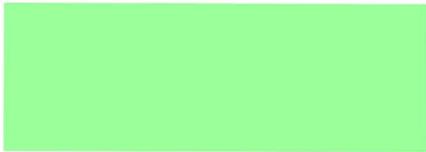




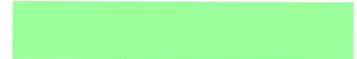
**U.S. Citizenship
and Immigration
Services**

(b)(6)



DATE: **JUN 25 2013**

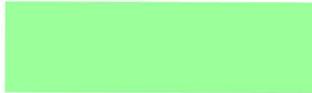
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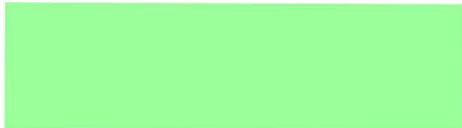
Petitioner:

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 engaged in the distribution of high-end window shades and window treatments. The beneficiary established the petitioner's parent company in Turkey and served as its President and Chief Executive Officer (CEO). The petitioner now seeks to employ the beneficiary in the United States as its General Operations Manager. 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, counsel for the petitioner submitted a statement which contained relevant information pertaining, in part, to the beneficiary's proposed employment with the petitioning entity and his former employment with the foreign entity. The petitioner also provided supporting evidence in the form of corporate, business, financial and tax documents pertaining to both the U.S. and foreign companies.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director issued a request for evidence (RFE) dated November 11, 2011 informing the petitioner of various deficiencies. The petitioner was instructed to provide a more detailed job description pertaining to the beneficiary's proposed employment listing the beneficiary's job duties and the specific percentage of time allocated to each of the duties. The petitioner was also asked to provide its organizational chart depicting the beneficiary's subordinates, superiors, their job titles, job duties, and respective educational levels. The director requested the same evidence to establish that the petitioner's foreign parent company employed the beneficiary in a qualifying managerial or executive capacity. Additionally, the director requested among other things, copies of the petitioner's quarterly tax returns, wage and earnings statements for its employees, and payroll documentation.

In response, the petitioner provided a description of the beneficiary's duties and a general plan to expand the petitioner's business by transitioning the foreign entity's manufacturing process from Turkey to the United States. The response also included corporate documents, the foreign employer's payroll information, and the petitioner's organizational chart but it did not provide the foreign employer's organizational chart or any of the information requested relating to the foreign employer's or petitioner's employees.

After considering the petitioner's response, the director denied the petitioner concluding that the petitioner failed to establish: (1) that the beneficiary's proposed employment with the U.S. entity would be within a qualifying managerial or executive capacity; (2) that the beneficiary's employment abroad was within a qualifying managerial or executive capacity; and (3) that it has a qualifying

relationship with the beneficiary's foreign employer. Specifically, the director found that the beneficiary's job descriptions were vague and provided little insight into the true nature of his day-to-day duties in his current or proposed positions. Further, the director stated that based on the petitioner's nature and size, the evidence does not establish that the entity possesses the organizational complexity to support an employee who performs primarily executive duties.

Finally, the director also concluded that the petitioner did not establish the existence of a qualifying relationship with the foreign employer; however, he did not provide an explanation to support the finding.

On appeal, counsel for the petitioner asserts that the weight of the evidence establishes that the beneficiary meets the statutory requirements of the requested classification but acknowledges the director's finding that the beneficiary's job description lacks specificity. Therefore, in support of the appeal, counsel submits a brief and a letter from the petitioner which includes an additional description of the beneficiary's duties.

The AAO finds that counsel's assertions are not persuasive and thus fail to overcome the director's adverse decision.

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 director first addressed whether the beneficiary would be employed with the petitioner in a primarily managerial or executive capacity.

In reviewing the beneficiary's employment capacity, the AAO gives primary consideration to the petitioner's description of the beneficiary's proposed position, 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 petitioner's 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 that it will employ the beneficiary in a qualifying managerial or executive capacity. The petitioner's duty description does not clearly describe the duties to be performed by the beneficiary or indicate whether such duties are either in an executive or managerial capacity. For example, counsel for the petitioner stated that the beneficiary will be "formulating policies for the company" and "he will be making the decisions with respect to administrative and managerial personnel" Counsel also described the beneficiary's role and duties as follows:

[The beneficiary's] activity will be to plan, direct and coordinate the setup for the United States manufacturing facility, which would involve negotiation for and procurement of actual space at locations within the United States, and he will also be directing the appropriate people in the ergonomic layout of the manufacturing facility.

The director provided the petitioner an opportunity to develop the job description and provide specific duties with a percentage breakdown of time allocated to each of the duties but the petitioner failed to adequately respond. Rather, the petitioner reiterated the duty description already provided by counsel in the original petition and also noted, among other things, that in 2010 the beneficiary "successfully negotiated to become a vendor for several major distributors within the United States."

On appeal, the petitioner provides another general description of the beneficiary's proposed responsibilities as president for the petitioner. The petitioner lists broad duties which include managerial, administrative and operational tasks, but does not quantify the time the beneficiary

spends on each type of duty. This failure of documentation is important because the beneficiary is responsible for operational tasks such as contract negotiations. Aside from anecdotal examples of how the beneficiary might perform on a regular basis or, in a particular scenario, the record contains no specific daily tasks and no breakdown of time to account for the beneficiary's day. 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).

On appeal the petitioner also states "the best specific example of my role as an executive is the decision-making leading to the genesis of the US entity that is the very subject of this visa petition." These very general explanations stating how the beneficiary would be responsible for a variety of business decisions and hiring requirements are inadequate. 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 his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

According to the Form I-140, the beneficiary "will be coming to the USA to oversee the transfer of manufacturing activity from Turkey to USA, resulting in creation of approximately 24 jobs within the first year." However, the petitioner has not established that it currently has the staffing necessary to relieve the beneficiary from performing non-qualifying tasks associated with the petitioning company in its current operating status. The petitioner was established in December 2008 as a subsidiary to the foreign entity to market and distribute the foreign entity's products throughout the United States. The petitioner now seeks to expand its business by establishing manufacturing capabilities, but it has not yet done so. Eventually, the petitioner expects the foreign entity to move its entire operation to the United States.

On appeal, the beneficiary states that he "will be serving as President over a subordinate staff that closely mimics the organizational structure of the Turkish entity as it is presently configured." Further, the petitioner explains the planned structure would relieve the beneficiary from performing the day-to-day duties required to operate the business. The petitioner's proposed organizational chart depicts the beneficiary as the President and CEO. The rest of the chart includes position titles but no named employees. According to the chart, both a vice president (VP) and a chief financial officer (CFO) would report directly to the beneficiary while a purchasing manager and a production manager would report to the CFO. Reporting to the production manager, initially, would be 20-22 manufacturing personnel. This chart reflects the petitioner's proposed structure upon establishment of a manufacturing facility in the United States. The petitioner failed to provide an organizational chart to reflect its current structure. 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 petitioner stated on its Form I-140 that it currently has three employees, but there is no evidence to support this claim. In the RFE, the director requested an organizational chart depicting the staffing of the U.S. company, including names, position titles, job duties and educational levels for all current employees. The director also requested evidence: of the petitioner's use of contract labor, if applicable; copies of IRS Forms W-2, Wage and Tax Statement, and IRS Form 941, Employer's Quarterly Federal Tax Return; and copies of the petitioner's payroll records for 2011. The petitioner's response included only the proposed organizational chart which failed to identify any currently staffed positions. The petitioner did not provide any evidence of wages paid to employees or otherwise acknowledge the director's requests, and thus has not supported its claim that it currently has three employees. 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).

The petitioner did include a copy of its IRS Forms 1120, U.S. Corporation Income Tax Return, for the 2010 tax year, which reflects that the petitioner paid no salaries or wages. The petitioner's response to the RFE failed to document that the petitioner had any employees at the time the petition was filed. 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).

The petitioner explained that the beneficiary had been traveling back and forth from Turkey to the United States "just about every month, to negotiate with customers." Thus it appears that the beneficiary would be the sole employee, at least initially, upon approval of the petition. Given the lack of personnel in the petitioner's organization at the time of filing, the AAO questions how the petitioner intends to relieve the beneficiary from having to allocate the primary portion of his time to performing non-qualifying tasks. While the record reflects that the petitioner is doing business and is engaged in selling the parent company's products to U.S. retailers, based on the evidence submitted, it appears that the beneficiary himself is single-handedly operating the company while dividing his time between Turkey and the United States. The petitioner has not identified any sales, marketing or administrative staff currently working for the company or indicated that such staff would be hired in the near future.

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. 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.*

The petitioner described some future employee positions and the anticipated development of the business but it provided only a tentative organizational chart, along with an unsupported explanation that the management and personnel structure would eventually mirror the parent company once operations were transferred to the United States. The petitioner explained that the beneficiary was negotiating contracts and performing marketing for the petitioner within the United States yet he appears to have no staff available to perform any of the daily requirements necessary to keep the business operational. While the AAO acknowledges that 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).

While the AAO does not doubt that the beneficiary will exercise discretion over the petitioning entity and has the appropriate level of authority as the president of the company, the petitioner has failed to show that his actual day-to-day duties will be primarily managerial or executive in nature based on the company's current structure. 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). Accordingly, the appeal will be dismissed.

The second issue addressed is whether the petitioner established that the beneficiary was employed by the foreign entity in a managerial or executive capacity.

The AAO affirms the director's finding that the petitioner did not establish that the beneficiary performed in a primarily managerial or executive capacity while employed with the foreign entity. In response to the director's RFE, the petitioner provided a vague and generalized explanation of the beneficiary's duties stating that he directed the management of the organization, established the goals and policies of the company and exercised wide latitude and discretionary decision-making. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The petitioner also noted that it employed 34 individuals who were "involved in the design, manufacturing, and packing" of window treatment products for distribution in Turkey and internationally. On appeal, the petitioner explained that the beneficiary was responsible for the management of the foreign entity, establishing organizational goals and policies and directing his subordinates in the procurement of raw materials, hardware, factory space and laborers. The petitioner asserts that the beneficiary directed the company but delegated activities required to maintain company operations. However, the petitioner failed to provide a description of any actual duties or tasks and the allocation of time spent on those duties as requested by the director. 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).

Although the petitioner established the foreign entity's employment of 34 individuals through payroll documentation, the petitioner did not provide the foreign entity's organizational chart or any other documentation in response to the RFE to establish the nature of the employees' positions or their job duties and educational requirements. While the petitioner refers to the beneficiary's interaction with a vice president and "his marketing people," the petitioner provided no additional information about any of the foreign entity's employees to establish that the beneficiary was free to primarily perform in a managerial or executive capacity. 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)). Again, any 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).

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). While the AAO does not doubt that the beneficiary possesses the appropriate level of authority over the foreign company, the petitioner has not provided a detailed description of his duties or evidence of the structure of the foreign entity sufficient to establish that the beneficiary allocates the majority of his time to qualifying duties.

Accordingly, the petitioner had not established that the foreign entity employed the beneficiary in a primarily managerial or executive capacity, as required by section 203(b)(1)(C) of the Act. For this additional reason, the appeal will be dismissed.

The third and final issue addressed by the director is whether the petitioner established that it has a qualifying relationship with the foreign entity. Upon review of the director's decision, the AAO notes that the director reached a conclusion that the petitioner failed to establish a qualifying relationship without discussing any of the evidence submitted by the petitioner to establish the

ownership and control of the U.S. and foreign entities. Upon review of the record, it appears that the director included this determination in error. The petitioner has submitted sufficient evidence to establish that the foreign entity is the petitioner's majority shareholder and has thus established a qualifying parent-subsiary relationship between the two companies. The director's determination with respect to this issue only will be withdrawn.

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.