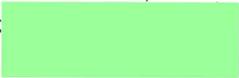


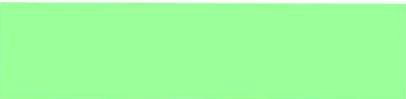


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAR 09 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:

SELF-REPRESENTED

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

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 Florida corporation that is engaged in information technology consulting and development, and seeks to employ the beneficiary as its president/CEO. 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 May 15, 2012, 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 within a qualifying managerial or executive capacity.

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.

The issue that will be addressed in this proceeding calls for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the petitioner submitted sufficient evidence to establish that the beneficiary would be employed in the United States in a qualifying 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.

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).

Ultimately, the truth is to be determined not by the quantity of evidence alone but by its quality. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). If USCIS fails to believe the facts avowed in the petition are true, then those assertions may be rejected. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Upon review of the petition and evidence, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

Due to the overly general and vague list of job duties, the AAO is unable to gain a meaningful understanding of how much time the beneficiary will spend performing qualifying tasks versus those that would be deemed non-qualifying.

In a support letter, dated March 24, 2011, the petitioner stated that the beneficiary is "responsible for the day-to-day operations of [the petitioner], exercising a wide latitude of discretionary decision-making powers in directing daily operations and planning business strategies." The petitioner also stated that the beneficiary will "strive to continue expanding the business in the United States and will be responsible for the execution of new contracts with various U.S. companies."

In response to the request for evidence, the petitioner also added that the beneficiary will spend 15 percent of his time in "financial planning and analysis;" and 10 percent of his time devoted to meeting with clients;" and 20 percent of his time in "research of trends and development within the business segments that [the petitioner] innovates products and services for." However, it is unclear which specific tasks actually fall within all of these very broad categories. Merely using the term "managing" the operations to describe the beneficiary's function does not establish that the supervisory tasks the beneficiary will perform are of a qualifying nature. In addition, the petitioner does not indicate any employees in the financial or budgeting department or market research department to help with the financial objectives and market research goals. 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 petitioner also stated that the beneficiary will spend 30 percent of his time "coordinating the creation of software and technology developed by [redacted] offices in Tallinn, Estonia." The petitioner provided a letter from the beneficiary stating that the beneficiary is the director of [redacted] and supervises an office manager, a programmer and a partner at [redacted] located in Estonia. However, the petitioner did not provide any corroborating evidence that [redacted] is working with the petitioner such as a contract, invoices or purchase agreements between [redacted] and the petitioner. In addition, the petitioner did not provide any evidence that [redacted] is an established company in Estonia, or that it actually employs individuals, or what type of services or products created by this office. The petitioner provided a document entitled, "Stock Swap Agreement," dated June 30, 2009, whereby the beneficiary's foreign employer, "desires to trade to [redacted] 100 shares of [the petitioner's] common stock." This agreement alone is not sufficient evidence of a relationship between the petitioner and [redacted]. The petitioner did not provide a new stock certificate or a stock ledger for the petitioner to indicate that the new parent company is [redacted]. Again, 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 at 165.

Furthermore, the petitioner stated that the beneficiary will spend 25 percent of his time "meeting with [redacted] coordinating business development initiatives within the corporations that [the petitioner] creates and incubates." The petitioner stated that [redacted] is the senior management consultant and spends 100 percent of his time "managing the ongoing relationship between [the petitioner] and its entity [redacted]." The petitioner also stated that [redacted] is the director of business development and spends 80 percent of his time on "sales functions" and 20 percent of his time in "procedure development." The petitioner also provided a letter from [redacted] that stated he is "currently placed as an executive at [redacted]." The job descriptions for these two contractors are very vague and general and do not provide a clear explanation of the duties they perform for the petitioner. In addition, the petitioner did not provide a contract indicating that it employs the two contractors as independent contractors, or any tax documentation such as a Form 1098. The petitioner also failed to provide sufficient evidence of the hours put in by these two contractors. In addition, [redacted] provided letters stating that they are working for [redacted], a company founded by the petitioner. However, the petitioner did not provide any evidence that it has developed and established new companies or is affiliated with [redacted]. Furthermore, it appears that the consultants are working for another company and are not in fact assisting with any of the operations for the petitioner. 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 does not provide sufficient evidence that the petitioner employs individuals to assist with negotiations and contracts, finances, budgeting, market research and development. Thus, it appears that the beneficiary is performing the duties inherent in operating a business such as sales, marketing, and finances. An employee who "primarily" performs the tasks necessary to produce a product or provide a service 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).

The petitioner also stated in a letter that it "operates as an internet technology incubator, which in turn has founded and created multiple businesses in the USA over the past several years, creating over \$1 million per month in aggregate revenues, and more than 60 full time employees domestically." Again, the petitioner did not provide any corroborating evidence that the petitioner established these companies and/or whether the new companies are still affiliated to the petitioner. Again, 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 at 165.

The petitioner also provided four consulting agreements or purchase agreements between the petitioner and other companies. In the agreements, it states that the petitioner will provide consulting in areas of "management, sales, operations, software programming, advice, counsel and any other assistance;" and information technology activities such as running company websites. However, the petitioner failed to provide any information on which employees will actually be providing the consulting services discussed in these agreements. The beneficiary is the only employee of the petitioner and the two contractors stated that they are based in another company; thus, it is unclear who will provide the day-to-day information technology consulting services the petitioner must provide from these contracts.

On appeal, counsel for the petitioner asserts that the beneficiary primarily performs executive and managerial duties, however, the petitioner did not submit any documentation to confirm this assertion. 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).

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 instant petition cannot be approved.

Beyond the decision of the director, the record lacks substantive job descriptions establishing what job duties the beneficiary performed during his employment abroad. In addition, the petition lacks any evidence of the company abroad. The petitioner provided an organizational chart for the foreign company but failed to provide any corroborating evidence to show that these employees are actually working for the foreign company and failed to provide a job description for each employee. 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Beyond the decision of the director, the petitioner failed to establish that it has the ability to pay the beneficiary's proffered wage. In response to the request for evidence, the petitioner stated that it does

not pay the beneficiary a salary but pays for all of his expenses. However, there is no evidence that the expenses paid to the beneficiary reach the amount of the proffered wage. In addition, the petitioner stated that the foreign company will pay part of the beneficiary's salary if need be; however, the foreign company is not the petitioning entity in this proceeding, and USCIS must examine whether the prospective United States employer maintains the ability to pay the proffered wage. Thus, the petitioner did not provide sufficient evidence to establish that the petitioner has the ability to pay the beneficiary's proffered wage.

Beyond the decision of the director, the petitioner did not submit sufficient evidence to establish that it has a qualifying relationship with the beneficiary's foreign employer. 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").

As general evidence of a petitioner's claimed qualifying relationship, the articles of incorporation alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The stock certificates, corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. See *Matter of Siemens Medical Systems, Inc.*, supra. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

In the instant petition, the petitioner submitted a stock certificate indicating that the beneficiary's foreign employer in Canada owns 100 percent of the petitioner. However, in response to the request for evidence, the petitioner submitted a document entitled, "Stock Swap Agreement," that states the company in Canada will transfer all of the stocks it owns of the petitioner to [REDACTED], a company in Estonia. However, this document is not enough documentation to prove a qualifying relationship. As stated above, the petitioner must also disclose stock certificates, stock ledgers, corporate bylaws, the minutes of relevant annual shareholder meetings and agreements. 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 AAO acknowledges that USCIS has previously approved an L-1A petition filed by the petitioner on behalf of the instant beneficiary. 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; *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103. 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).

Despite the previously approved petition, 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. Each petition filing is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). 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). Based on the lack of required evidence of eligibility in the current record, the AAO finds that the director was justified in departing from the previous nonimmigrant petition approval by denying the instant petition.

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). Therefore, based on the additional grounds of ineligibility discussed above, this petition cannot be approved.

The petition will be denied 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.