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

(b)(6)

DATE: MAR 1 2 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 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 Jersey corporation that seeks to employ the beneficiary in the United States as its Chief Operations Officer. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

In support of the Form I-140 the petitioner submitted a statement dated June 6, 2011, which contained information pertaining, in part, to the petitioner's ownership and the beneficiary's employment with the petitioning entity. The petitioner also provided evidence in the form of corporate, business, and financial documents pertaining to both entities.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a request for evidence (RFE) dated October 26, 2011 informing the petitioner of various evidentiary deficiencies. The petitioner was instructed to provide a more detailed job description pertaining to the beneficiary's proposed employment, complete with a list of the beneficiary's proposed job duties and their time allocations as well as the petitioner's organizational chart depicting the beneficiary's subordinates, their job titles, job duties, and respective educational levels. The director also requested evidence establishing the petitioner's ownership and the existence of a qualifying relationship between the petitioner and the beneficiary's employer abroad.

The petitioner responded, providing the requested organizational chart, supplemental job descriptions, and various corporate and financial documents.

After considering the petitioner's response, the director determined that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer or that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The director determined that the petitioner failed to provide evidence establishing who owns the foreign entity. With regard to the beneficiary's proposed employment, the director commented on the petitioner's limited staffing, finding it unlikely that the petitioner was equipped to relieve the beneficiary from having to primarily focus his time on non-qualifying tasks.

The petitioner has now appealed the director's decision, supplementing the record with a number of additional documents, which establish that owner of the petitioning entity, is the same individual who owns the foreign entity where the beneficiary was employed abroad. The AAO therefore finds that the petitioner has overcome the first ground cited for denial.

Counsel also disputes the director's second ground for denial, asserting that the beneficiary's subordinates are compensated greater than minimum wage salaries and further stating that all employees were employed on a full-time basis at the time the petition was filed. Counsel points out that the petitioner has since expanded its U.S. operation by adding a second store location.

The AAO finds that counsel's assertions are not persuasive in establishing that at the time the petition was filed the petitioner was prepared to employ the beneficiary in a position that would primarily be comprised of

qualifying managerial- or executive-level job duties. An 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.

Turning to the main issue in this proceeding—the beneficiary's employment capacity in his proposed position with the petitioning entity—the AAO first considers the petitioner's description of the beneficiary's proposed position, as the beneficiary's actual daily tasks 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 goes on to conduct an analysis of the record, which includes giving consideration to the job duties of the beneficiary's subordinate employees, the nature of the petitioner's business, the complexity of the petitioner's organizational hierarchy, the number of employees the petitioner had at the time of filing, and any other facts that contribute to a comprehensive understanding of the beneficiary's actual role in the business.

The AAO finds that the percentage breakdown that describes the proposed employment allocates a considerable portion of the beneficiary's time to non-specific tasks whose managerial or executive nature cannot be established. For instance, the percentage breakdown indicates that the beneficiary will spend 27% of his time overseeing activities that relate to purchasing and selecting products for sale. Due to the vague nature of this statement, it is unclear whether such oversight would require the beneficiary to actually partake in the purchasing of goods. While the petitioner indicates that there is an element of discretionary authority involved in the purchasing process to the extent that the beneficiary would select the goods to be purchased, actually engaging in the purchase of goods and communicating with suppliers (which would consume an additional 5% of the beneficiary's time) would be deemed daily operational tasks and thus would not fit the definition of managerial or executive capacity. The AAO also finds that negotiating with freight companies regarding terms and conditions of shipping is likewise not a managerial or executive task. Additionally, while there is a managerial aspect to managing consumer demands, it is unclear what specific role the beneficiary partakes in the inventory control, warehousing, and receiving process and how involved the beneficiary would be in directly carrying out these processes.

Lastly, in reviewing the general statements that preceded the beneficiary's percentage breakdown in the RFE response, it appears that in his attempt to expand the petitioner's business to different markets, the beneficiary would be responsible for conducting marketing research and cost comparisons in order to stay aware of market trends and competitors in the industry. The petitioner did not specifically allocate any time constraints to these marketing tasks, thus precluding the AAO from being able to gauge how much more of the beneficiary's time would be spent carrying out non-qualifying job duties.

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).

As previously indicated, an analysis of the petitioner's staffing is required to gain a comprehensive understanding of the beneficiary's role within the petitioning entity's organization. In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003).

In the organizational chart provided in the response to the RFE, the petitioner identified one supervisor and one sales representative at each of its two store locations in the United States as well as four managerial positions working out of the foreign entity in India. The employees and activities of the foreign entity are not relevant for the purpose of determining the beneficiary's employment capacity with the U.S. petitioner, as it is unclear how the employees of a separate entity would play an active role in relieving the beneficiary from having to perform non-qualifying tasks. As the petitioner's organizational chart did not identify any administrative or clerical positions, it is unclear who, other than the beneficiary, would be available to carry out simple office and bookkeeping tasks that are inherent to a retail sales business. Furthermore, with regard to the petitioner's claim that it has an online business presence and sells merchandise via the internet, it is unclear who, other than the beneficiary himself, would assume the responsibility for these sales-related activities.

In summary, the AAO finds that the petitioner provided a job description indicating that a significant portion of the beneficiary's time would be allocated to the petitioner's daily operational tasks. The record also fails to establish that the petitioning entity has reached a level of complexity where it requires an employee who would primarily perform tasks within a qualifying managerial or executive capacity or that it has the capability of relieving the beneficiary from having to allocate his time primarily to the organization's non-qualifying operational tasks. In light of these findings, the AAO cannot conclude that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. On the basis of this conclusion, the instant petition cannot be approved.

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.