

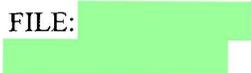
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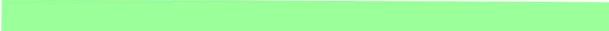
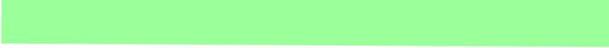
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

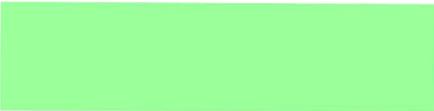


DATE: **MAY 07 2013** OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner is a California corporation that seeks to employ the beneficiary in the United States as its chief executive 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 April 13, 2012, which contained relevant information pertaining to the petitioner's eligibility. The petitioner discussed the beneficiary's foreign and proposed employment, the beneficiary's proffered wage, and the petitioner's qualifying relationship with the beneficiary's foreign employer. The petitioner also provided invoices and tax 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 June 20, 2012 informing the petitioner of various evidentiary deficiencies. The RFE included a request for more detailed job descriptions pertaining to the beneficiary's foreign and proposed employment listing the beneficiary's job duties with each entity, time allocations for each of the listed tasks, both entities' organizational charts depicting each company's staffing structure and the beneficiary's placement therein, and job descriptions of the beneficiary's supervisors and subordinates in each entity.

The petitioner complied with the director's requests, submitting a statement dated August 30, 2012 from the foreign entity describing the beneficiary's employment abroad and a statement dated September 10, 2012 from the petitioning entity describing the beneficiary's proposed employment. The petitioner also provided organizational charts depicting the beneficiary's prior position with the foreign entity and his current/proposed position with the U.S. entity, job descriptions and educational levels of the beneficiary's subordinates in each of his respective positions, and the petitioner's quarterly tax return and quarterly wage report for the 2012 second quarter during which the petition was filed.

After considering the petitioner's response, the director determined that the petitioner failed to establish that the beneficiary was employed abroad or that he would be employed with the U.S. entity in a qualifying managerial or executive capacity. The director therefore issued a decision dated September 21, 2012 denying the petition. With regard to the foreign employment, the director found that the evidence provided did not establish that the beneficiary's subordinates were supervisory, professional, or managerial employees, as neither subordinate appears to have obtained a baccalaureate degree. With regard to the beneficiary's proposed employment, the director pointed out that the petitioner did not meet its burden of establishing that it has sufficient support personnel to relieve the beneficiary from having to allocate his time primarily to non-qualifying tasks.

On appeal, the petitioner's prior counsel checked off option B at Part II of the Form I-290B, indicating that an appeal brief and/or additional evidence would be submitted within 30 days of the appeal. Counsel also provided a separate statement disputing the director's findings. To date, more than six months since the date the appeal was filed, the petitioner has provided no further evidence or information in support of the appeal. Therefore, the AAO will consider the record to be complete as presently constituted and a decision will be

issued based on the evidence before the AAO at this time. The AAO finds that the petitioner has failed to overcome the director's findings. All relevant submissions will be addressed 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.

When examining the executive or managerial capacity of the beneficiary, the AAO reviews the totality of the record, starting with the petitioner's description of the beneficiary's job duties. *See* 8 C.F.R. § 204.5(j)(5). A detailed job description is crucial, as the duties themselves will reveal the true nature of the beneficiary's foreign and proposed 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 will also consider other relevant factors, including (but not limited to) job descriptions of the beneficiary's subordinate employees, the nature of the business conducted by the entities in question, the size of the subordinate staff of the foreign and U.S. entities, and any other facts contributing to a comprehensive understanding of the beneficiary's actual roles in the two respective entities.

Applying the above criteria to the beneficiary's employment with the foreign entity, the AAO finds that the job description provided in the August 30, 2012 statement from the foreign entity's owner [REDACTED] was not sufficient to establish what specific tasks the beneficiary performed daily or that the beneficiary's time was primarily spent performing tasks of a qualifying nature. In assessing the beneficiary's Monday activities, it appears that the beneficiary allocated most of his day to conferring with the sales and purchase assistants in order to establish what they have been doing and to provide them with a list of things they would have to do. Thursday's and Friday's lists of activities indicate further employee supervisory duties as the beneficiary reviewed sales reports—a work product that the AAO assumes came from the beneficiary's sales assistants—and rewarding the staff.

To the extent that a significant portion of the beneficiary's job involved overseeing the work of two sales and purchase assistants, it is important for the petitioner to provide sufficient information to establish that these subordinates were supervisory, professional, or managerial employees. Although the statement from Mr. [REDACTED] indicates that one of the subordinates attended a university for three years, no evidence is provided that such attendance actually resulted in a baccalaureate degree. With regard to the beneficiary's other subordinate, who graduated from a "secondary school," there is no evidence that such an achievement is

equivalent to receiving a baccalaureate degree, nor is there any indication that such a degree was actually required for the position of sales and purchase assistant.¹ Although a review of the foreign entity's organizational chart indicates that there was a team of lower-level employees who performed dying, printing, and stitching tasks, the chart is not clear as to who supervised the work of these individuals, as the administrative manager and both sales and purchase assistants are shown as potential supervisors. The AAO further notes that in reviewing the job descriptions of the sales and purchase assistants, neither individual was assigned any tasks associated with the supervision of other employees. The AAO therefore cannot conclude that the two individuals whom the beneficiary supervised were supervisory, professional, or managerial employees.

Additionally, turning back to the beneficiary's job description with the foreign entity, the breakdown indicates that the beneficiary spent 40% of his time on Wednesday meeting clients, 25% of his time on Thursday helping to carry out human resources tasks, and 50% of his time on Tuesday and 30% of his time on Friday reporting to superiors within the company. These tasks are not those of a multinational manager or executive, but rather are indicative of tasks necessary to provide services.

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 performed or would perform were/are only incidental to the position in question. 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).

The record shows that the beneficiary allocated significant portions of his time to overseeing non-supervisory and non-professional employees and performing non-qualifying job duties. Therefore, the AAO cannot conclude that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

Turning to the beneficiary's proposed employment with the petitioning entity, the AAO finds that the job description offered in response to the RFE contains insufficient information with regard to certain aspects of the job. For instance, the petitioner indicated that 10% of the beneficiary's time would be allocated to evaluating projections for future profitability and another 10% would be allocated to analyzing trends in gemological prices. It is unclear, however, how either task can be deemed as being within a managerial or executive capacity. The petitioner has failed to clarify, for example, the extent of the beneficiary's involvement in obtaining information upon which his projections of future profitability would be based. With

¹ In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

regard to product pricing, it appears that market research would be required in order to determine the pricing trends, thus indicating that the beneficiary would have to carry out certain operational tasks in order to meet the overall responsibility of determining the trends for gemological pricing.

Furthermore, although the petitioner allocated a considerable portion of the beneficiary's time—35%—to "sourcing funding for expansion," no explanation was provided as to what the underlying tasks are for this broad job responsibility. The lack of specific information precludes the AAO from being able to determine that "sourcing funding for expansion" involves the performance of qualifying tasks in a managerial or executive capacity.

An examination of the petitioner's staffing shows that the personnel structure that the petitioner depicts in its organizational chart is not supported by the evidence on record. When comparing the information provided in the chart with the petitioner's quarterly wage report for the 2012 second quarter, the latter document shows that the petitioner employed no more than six employees in April 2012 when the petition was filed. This number is not consistent with the petitioner's organizational chart, which lists a total of twelve positions. The organizational chart and quarterly wage report are consistent with regard to the individuals who filled the following positions: CEO, general manager, shipping/receiving, designer, and the mid-west marketing manager. Although the chart also lists employees in the positions of store manager, sales representative, marketing representative, and three seasonal store clerks, none of the employees listed as filling these positions were named in the petitioner's quarterly wage report.

The individual whom the organizational chart identified as the shipping/receiving employee was shown as having received a salary that was not commensurate with that of a full-time employee; and [REDACTED] whom the quarterly wage report identified as someone who earned \$2,225.10 during the same quarter, was not found in the petitioner's organizational chart. The AAO further notes that the petitioner indicated that it had a total of seven employees at the time of filing—a number that cannot be verified by any of the supporting documents the petitioner submitted thus far. 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).

In looking at the months following the filing of the Form I-140, the petitioner's quarterly wage report shows that the petitioner's number of employees went down to four in May 2012 and back up to five in June 2012. Thus both months following the filing of the Form I-140 showed that there was a reduction in personnel and there is no evidence to show that the petitioner had seven employees at the time of filing as claimed in the Form I-140.

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)). Furthermore, 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. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The petitioner's staffing is an indicator of the extent to which the petitioner would be able to relieve the beneficiary from having to focus the primary portion of his time on the performance of non-qualifying operational tasks. While staffing alone will not serve as a basis upon which to deny a petition, this factor can and should be considered.

When taking into account the petitioner's waning staffing size alongside the beneficiary's insufficient job description, the AAO cannot conclude that the petitioner has provided sufficient evidence to establish that the petitioner was ready and able to employ the beneficiary in a qualifying managerial or executive capacity at the time the petition was filed.

Although on appeal counsel expressed his disagreement with the director's findings, the above discussion explains why the petitioner's submissions fail to meet the statutory and regulatory criteria for establishing that the beneficiary was employed abroad and that he would be employed in the United States in a qualifying managerial or executive capacity. Based on the conclusion that the petitioner did not provide sufficient evidence of the beneficiary's qualifying employment with the foreign and U.S. entities, the AAO cannot approve the instant petition.

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.