



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **MAY 20 2013**

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 with the field office or service center that originally decided your case by filing a 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 company engaged in the retail and wholesale of natural clothing and accessories, and 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.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary's proposed U.S. employment would be in a qualifying managerial or executive capacity.

On appeal, counsel disputes the director's findings and provides an appellate brief laying out the grounds for challenging the denial.

I. THE LAW

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 the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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 that 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. *See* 8 C.F.R. § 204.5(j)(5).

II. FACTS AND PROCEDURAL HISTORY

The sole issue addressed by the director is whether the petitioner submitted sufficient evidence to establish that the beneficiary would be employed in a primarily 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.

The petitioner indicated on the Form I-140, Immigrant Petition for Alien Worker, that it operates "clothing stores" with three employees and a gross annual income of \$2.4 million.¹ The petitioner claims to be a subsidiary of [REDACTED] located in France. The petitioner stated that it operates a store in [REDACTED] Florida and "is about to open a new store in the very thought after [REDACTED] Florida. The petitioner submitted a copy of the lease and letter from the landlord for the [REDACTED] location commencing November 1, 2003. The petitioner also submitted a copy of the lease for the new location in [REDACTED]

In a letter submitted in support of the initial petition, the petitioner stated that as president, the beneficiary will direct and coordinate the activities of the organization. The petitioner further stated that the beneficiary will perform the following duties: formulate and administer company policies; develop long range goals and objectives; review analysis of activities, costs, and operations; forecast data to determine company progress; confer with management and sales associates to review achievements and discuss changes; meet with distributors to enhance company market share; oversee hiring efforts; and manage and supervise over six employees and contractors including two store managers.

With respect to staffing, the petitioner stated that it employs one manager and two sales associates in the [REDACTED] location. The petitioner anticipated employing at least six workers with the addition of the [REDACTED] location. An organizational chart submitted with the petition shows the beneficiary as President, with two managers reporting to him, one position occupied and one to be filled. The chart indicates that each manager would supervise two sales associates, and that only the existing store is staffed.

The petitioner provided copies of its 2010 IRS Forms W-2, Wage and Tax Statement for five employees. Of the five employees, only the store manager of the existing location is identified on the organizational chart. The documents reflect that the store manager received a salary of \$9,959.87 in 2010, and the petitioner paid total wages of \$18,644. Although the petition was filed in January 2012, the petitioner did not submit any evidence of any wages paid to employees in 2011.

The director issued a Request for Evidence ("RFE"). The director requested that the petitioner provide, *inter alia*, evidence that the beneficiary will act in a qualifying capacity as a multinational manager. Specifically, the director requested the following: (1) the beneficiary's specific daily duties and the percentage of time spent on each duty; (2) an organizational chart for the petitioner including job titles, duties, and educational levels for each employee as well as whether the employee works full- or part-time; and (3) IRS Form W-2s, Wage and Tax Statement, for the relevant year for each employee.

¹ The petitioner's actual annual gross income in the most recent fiscal year, as stated in its 2011 IRS Form 1120, U.S. Corporation Income Tax Return, was \$201,938.

In response, the petitioner provided a position description for the beneficiary with breakdown of time spent on each category of duties as follows:

EXECUTIVE MANAGEMENT OF OPERATIONS:

(percentage of time spent: 40%)

- Establish and administer company policies;
- Develop long range goals and objective for the Company;
- Review analysis of activities, costs, and operations and forecast data to determine the progress of the Company towards stated goals and objectives in coordination with the company's accountant and financial advisors;
- Meeting and phone conferences with store manager [REDACTED] and the wholesales manager [REDACTED] to review achievements and discuss required changes and goals or objectives;
- Review and discuss financial situation of the company with the company's bank;
- Meetings and phone conferences with landlords regarding possible improvements of leased space and matters related to administration of the Leases;
- Meetings and phone conference with attorneys of the company regarding ongoing legal matters;

BUSINESS DEVELOPMENT

(percentage of time spent: 40%)

- Create and implement marketing strategy;
- Meetings and phone conference with top distributors in order to enhance the Company's market share in the U.S.;
- Research and contact potential distributors;
- Meeting with banks, financial advisors and accountants to forecast data and improve Company's results;

COMPANY MANAGEMENT

(percentage of time spent: 20%)

- Meeting with Ms. [REDACTED]
- Review and approval of financial reports;
- Review and approval of payment invoices;
- Signing of payroll checks;
- Oversee of [*sic*] company's search for and hiring of qualified employees;
- Review of emails and voicemail messages;
- Review of banking activity.

The petitioner provided a new organizational chart, showing the beneficiary as President and a total subordinate staff of seven employees. Reporting to the beneficiary are two Store Managers, the same manager from the prior organizational chart and a manager for the new location. The chart shows a new position of Wholesales Manager also reporting to the beneficiary. Reporting to each of the two Store Managers are two sales associates. The petitioner also provided the IRS Form W-4, Employee's Withholding Allowance Certificate and USCIS Form I-9, Employment Eligibility Verification for each of the employees. Only one USCIS Form I-9, for a sales associate, was fully

completed and properly signed by both the employer and employee and includes a start date. Two of the Forms I-9, for [REDACTED] identify the employer as '[REDACTED]' rather as the petitioning company, '[REDACTED]'

The petitioner did not provide any IRS Forms W-2 for the 2011 tax year. Instead, the petitioner referenced the 2010 IRS Forms W-2 submitted with the initial petition.. The petitioner also did not provide the requested information regarding the subordinates' duties, educational credentials, and whether each position was full- or part-time. The petitioner's IRS Form 1120, U.S. Corporation Income Tax Return for 2011 indicates that the company paid \$19,063 in salaries and wages in 2011.

The director ultimately denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive position. In denying the petition, the director stated that the record does not establish that the beneficiary will primarily perform managerial or executive duties. Further, the director found insufficient evidence that the petitioner can support a qualifying managerial or executive position.

On appeal, counsel asserts that evidence of record is sufficient to determine that the beneficiary will be acting in a primarily executive position. Specifically, counsel states that both retail locations have managers and therefore the beneficiary will not be engaged in the day-to-day management of the stores.

III. DISCUSSION

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

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).

The beneficiary's job description submitted in support of the initial petition was overly general and vague, and therefore 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. For instance, the petitioner stated that the beneficiary will review analysis of activities, costs and operations; formulate and administer company policies; and confer with management and sales associates to review achievements and discuss required changes. These duties provided little or no insight into what the beneficiary primarily does on a day-to-day basis or how he carries out his objectives as President. 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Thus, while several of the duties broadly described by the petitioner would generally fall under the definitions of managerial or executive capacity, the lack of specificity found in the beneficiary's job description, raises questions as to the beneficiary's actual proposed responsibilities. Overall, the position descriptions alone are insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity.

In addition, a number of the beneficiary's job duties in response to the RFE appear to relate to supervision and management of employees who were hired after the filing of the petition. Specifically, the beneficiary will engage in multiple meetings and phone conferences with the newly hired store manager and wholesale manager. 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).

Furthermore, a number of the beneficiary's job duties in response to the RFE appear to be repetitive, such as reviewing financial reports; meeting with banks, financial advisors, and accountants to forecast data; review and discuss the financial situation of the company with the company's bank; and review analysis of activities, costs, and operations and forecast data with the company's accountant and financial advisors. Without a clear delineation of duties, the AAO is unable to determine what tasks the beneficiary performs on a day to day basis.

Finally, the beneficiary's job description in response to the RFE, while more detailed, includes several non-qualifying duties such as create and implement a marketing strategy; research and contact potential distributors; and attending meetings and phone conferences with distributors. While the petitioner claims that it has hired a wholesale manager, it appears that the beneficiary is directly responsible for non-qualifying duties associated with this aspect of the business. 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).

On appeal, counsel claims that the beneficiary is relieved of non-qualifying duties by the two store managers. A review of the record does not support the claim that that the petitioner's subordinate managers, as shown on the organizational chart, are available to relieve him of such duties. First, the

petitioner failed to submit both the job duties, educational credentials, and full or part-time status for the beneficiary's subordinates as requested in the director's RFE. 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).

Without the requested job descriptions and work status, the AAO is unable to determine that the petitioner employs individuals to assist with the store operations. It appears that the beneficiary will have to participate in purchasing duties, doing inventory, receiving shipments, making displays, etc., as well as doing administrative and financial-type duties, reconciling receipts, making bank deposits, and opening and closing the store. Thus, it appears that the beneficiary will be performing the duties inherent in operating a business such as sales, marketing, finances and inventory. 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)).

Furthermore, the petitioner's documents submitted in response to the RFE do not substantiate a finding that the petitioner employs any employees to relieve the beneficiary of non-qualifying functions. The petition was filed in January 2012; however, the petitioner declined to provide evidence of wages paid to employees in 2011 or in the first quarter of 2012, instead choosing to twice submit its IRS Forms W-2 for 2010. The AAO is unable to verify the petitioner's claim that the company had three employees as of the date of filing.

In lieu of submitting the requested IRS Forms W-2 for the relevant year, the petitioner provided copies of IRS Forms W-4 and incomplete USCIS Forms I-9 for employees, all but one of which appears to have been hired on or after January 1, 2012. Any USCIS Forms I-9 presented by a petitioner must be accompanied by other evidence to show that these employees have commenced work activities. Forms I-9 verify, at best, that a business has made an effort to ascertain whether particular individuals are authorized to work; they do not verify that those individuals have actually begun working. *See Matter of Ho*, 22 I&N Dec. 206, 212 (Assoc. Comm'r 1998). In the absence of such evidence as pay stubs and payroll records, the petitioner has not established that it employs a subordinate staff that would relieve the beneficiary from performing non-qualifying duties.

In addition, the petitioner's IRS Form 1120, U.S. Corporate Income Tax Return, for 2011 shows only \$19,063 in wages paid. Assuming *arguendo* that the two claimed sales clerks at the existing location are part-time, the \$19,063 in salaries paid is not enough to support one full-time store manager and two part-time sales clerks, the positions that were claimed to be filled at the time of filing. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

In response to the RFE, the petitioner also provided an organizational chart which showed the beneficiary supervising two store managers, a wholesale manager and four sales associates. According to the chart, the staff more than doubled from the number of employees claimed at the time of filing. 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 beneficiary's proposed position is president of a company, which, at the time of the filing claimed to operate one store with three employees whose employment has not been verified through submission of evidence of wages paid to them. The petitioner has not demonstrated that the beneficiary, as a personnel manager, will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. *See* section 101(a)(44)(A)(ii) of the Act. Furthermore, the petitioner has not established that it will employ a staff that will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial duties. Further, regardless of the beneficiary's position title, the record is not persuasive that the beneficiary will function at a senior level within an organizational hierarchy.

On appeal, counsel contends that the beneficiary will be employed 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. 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.*

Counsel asserts that the beneficiary will be employed in an executive capacity because he directs the management of the petitioner's two stores through the store managers; he establishes goals and policies for implementation by the store managers; and he exercises broad discretion in decision-making as the holder of the highest position in the company. Counsel's assertions are not persuasive. As discussed above, the petitioner has not corroborated the employment of the store managers or employees to carry out the day-to-day operations of the stores, and was not, in fact, operating two stores at the time the petition was filed. While the beneficiary may possess the appropriate level of authority, the evidence of record does not support a finding that he would be relieved from involvement in the day-to-day operations of the company.

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.

IV. QUALIFYING RELATIONSHIP

Beyond the decision of the director, the petitioner failed 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").

The petitioner indicates that the beneficiary's foreign employer [REDACTED] owns a 50% interest in the U.S. company. The petitioner initially submitted: a copy of its Articles of Incorporation which indicate that the company was established in 2003 and is authorized to issue 1,000 shares of common stock; a copy of the most recent Annual Report filed with the Florida Secretary of State in March 2011, which identifies the company's officers as [REDACTED] (president) and [REDACTED] (vice president); and a stock purchase agreement, bill of sale, and closing statement indicating the transfer of shares from [REDACTED] on January 1, 2011. The AAO notes that the Stock Purchase Agreement indicates that Ms. [REDACTED] is the owner of 100 shares and agreed to sell 50 shares to the foreign entity, while the Bill of Sale and Closing Statement indicate that Ms. [REDACTED] sold 500 shares of the company.

The director subsequently requested that the petitioner submit additional evidence of the qualifying relationship, including copies of all stock certificates, stock ledger, proof of stock purchase, meeting minutes and other documentation to establish ownership and control. In response to the RFE, the petitioner re-submitted the same documents provided at the time of filing, along with a copy of a check for \$75,000 made out to the petitioner, drawn from the personal Bank of America account owned by the beneficiary and his spouse, [REDACTED]. The check is dated December 6, 2011. The petitioner provided a partial copy of an on-line Bank of America statement for an unidentified account which indicates that a deposit of \$75,000 was made by ATM on December 20, 2011. In a letter accompanying the petitioner's response, counsel emphasized that "under Florida Law corporations are not legally required to issue stock certificates or stock ledger."

The petitioner's response to the RFE also included a copy of its IRS Form 1120 for 2011, which indicates at Schedule K that [REDACTED] owns 100% of the company's stock. The tax return indicates that the value of the issued stock is \$1,000 and does not indicate any additional paid-in capital.

There are several deficiencies and inconsistencies in the petitioner's evidence which prevent a finding that the petitioner and foreign entity have a qualifying relationship. First, the stock purchase agreement and bill of sale do not consistently identify the number of shares owned by [REDACTED] or the number of shares she purportedly sold to the foreign entity. Second, while the documents supporting the claimed stock transfer indicate that the foreign entity, [REDACTED], purchased the shares from [REDACTED] on or about January 1, 2011, the evidence of payment for this stock purchase indicates that the beneficiary and/or his spouse purchased the shares from the petitioning company in December 2011. Finally, the ownership information provided on the petitioner's IRS Form 1120 for 2011 suggests that the transfer of stock never took place at all. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Based on the above, the petitioner has not established that it has a qualifying relationship with the foreign entity. For this additional reason, the petition cannot be approved.

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.