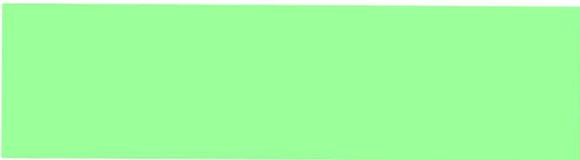




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: NOV 05 2013

OFFICE: TEXAS SERVICE CENTER

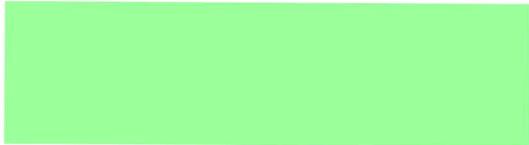
FILE: 

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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner is a Georgia corporation that seeks to employ the beneficiary as its director of U.S. operations. 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 based on a finding that the petitioner failed to establish that it will employ the beneficiary in a qualifying managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director placed undue emphasis on the size of the petitioning company in determining that the beneficiary would not be employed in a qualifying capacity. Counsel further contends that the director failed to address other relevant evidence submitted to establish that the beneficiary will be employed in a qualifying managerial capacity.

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 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:

- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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;

Finally, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

II. Procedural History

The record shows that the petitioner filed the Form I-140 on April 16, 2013 and submitted a number of supporting documents in an effort to establish eligibility for the above stated immigration benefit. The petitioner's submissions included various tax and financial documents as well as a business plan, which included an organizational chart and a discussion of the beneficiary's position with the U.S. entity. The petitioner discussed the beneficiary's role in the initial business set-up and went on to describe the beneficiary's more recent role in obtaining new customers to increase revenue and grow the business. The petitioner's organizational chart depicts the beneficiary as the director of U.S. operations, subordinate to the CEO of the petitioner and its parent entity, which is located and doing business in France. The chart further shows the following as the beneficiary's immediate subordinates: head of an [REDACTED] development team; a validation and program management team comprised of one employee and two subcontractors; a consulting accountant; and an [REDACTED] team lead with a three-person support staff located in France.

The petitioner indicated that the beneficiary would allocate his time to five areas of responsibility. Specifically, the petitioner stated that 30% of his time would be spent managing the U.S. team, who carry out project management and software validation for customers based in the United States. The petitioner indicated that the beneficiary would allocate another 25% of his time to each of the next two areas - managing five major programs for the petitioner's customers worldwide and managing and directing product development activities. Finally, the petitioner stated that the beneficiary would allocate 10% of his time to reporting to the company's CEO on a quarterly basis and reporting to the board of directors on a biannual basis and the remaining 10% of his time to managing the U.S. operations.

With regard to the first area of responsibility - management of a team who perform project management and software validation - the petitioner focused on the beneficiary's prior efforts in seeking out qualified contractors, whom the petitioner hired in April 2012 on a part-time basis and "as of August . . . employed one person full time[.]" The petitioner also discussed the beneficiary's responsibility to hire a U.S.-based developer and a test engineer in 2012, indicating that the beneficiary spent considerable time seeking out qualified candidates to comprise a team which he now manages through meetings and communications via conference calling, Skype, and email. In its discussion of the beneficiary's management role with regard to the petitioner's worldwide customers, the petitioner indicated that the beneficiary participates with his team in gathering customer requirements and follows up by engaging in customer negotiations and acting as the main coordinator between the customer and the petitioner's team in terms of formulating a schedule and finalizing a plan of deliverables for individual projects. The beneficiary is and would be directly responsible for interfacing with customers' management teams, including [REDACTED] senior technical, marketing and product managers. In terms of managing product development, the petitioner referred to local U.S.-based engineers and subcontractors as well as a team of four employees in France, who would be led by an [REDACTED] engineer, who is also based in France.

With regard to the beneficiary's reporting requirements, the petitioner specified the subjects the beneficiary would address in his quarterly and biannual presentations to the CEO and board of directors, respectively. Finally, the petitioner discussed the beneficiary's role in managing U.S. operations, which would include developing a team and strategy to expand operations, defining staffing requirements and hiring candidates with the appropriate skill set, carrying out banking responsibilities, approving expenditures, and ensuring that an outside accountant is retained to provide bookkeeping and tax filing services.

After reviewing the petitioner's submissions, the director determined that the petition did not warrant approval. Accordingly, on May 15, 2013, the director issued a request for evidence (RFE) instructing the petitioner to provide detailed job descriptions for the beneficiary and his support staff. The director observed that while the petitioner indicated that there are two employees who are subordinate to the beneficiary, there is no evidence of their respective job titles or job duties. The director asked the petitioner to list each person's specific daily job duties along with an estimate of the percentage of time that would be allocated to each task. The director also asked for evidence of wages paid to any in-house or contract-based labor whom the petitioner employed during the relevant time period.

The petitioner's response to the RFE included an organizational chart that focused on the beneficiary's proposed position with the U.S. entity and restated information that was originally provided in the previously-submitted organizational chart. The petitioner also provided a statement from its CEO, [REDACTED] who stated that the beneficiary has engaged in contract negotiation, which resulted in contracts that contributed to significant growth in the petitioner's annual revenues. Mr. [REDACTED] discussed a current contract that the beneficiary is working on finalizing with [REDACTED] and listed the five key projects that the beneficiary is currently managing in his position with the U.S. entity. Mr. [REDACTED] further stated that the beneficiary has the authority to hire and fire as well as train staff with regard to the petitioner's products and procedures, outline the staff's tasks and objectives, and manage daily operations, including addressing customer concerns and issues that are raised by the test engineers. Mr. [REDACTED] named the one full-time software developer, one part-time technical engineer, and two part-time subcontractors whom the beneficiary is claimed to be overseeing in the United States as well as a team of four engineers in France who carry out tasks for the [REDACTED] programs.

Additionally, the petitioner provided a percentage breakdown that is similar in content to the breakdown that was previously provided in support of the Form I-140. Like the previously submitted breakdown, the latest version divided the beneficiary's assignment into five main areas of responsibility, each of which was assigned its own time constraint. However, it is noted that the petitioner did not assign time constraints to the individual job duties, despite the director's RFE instructions, which expressly asked the petitioner to indicate how much time the beneficiary would spend carrying out each of his assigned tasks. 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).

Lastly, the petitioner provided evidence of wages paid to its full-time and part-time employees, as well as invoices that were issued by a CPA for payroll and tax services and by one consultant who provided test execution services on the petitioner's software.

The director reviewed the petitioner's submissions and determined that the record lacked sufficient evidence to establish that an entity that is comprised of only three full-time employees - the president/CEO, the beneficiary in his proposed position as operations manager, and a software developer - is capable of relieving the beneficiary from having to allocate his time primarily to the performance of non-qualifying tasks. Accordingly, the director issued a decision dated July 24, 2013 denying the petition.

On appeal, counsel disputes the director's decision, asserting that the director erroneously based the denial on a single issue, which focused exclusively on the size of the petitioning entity. Counsel claims that the beneficiary performs managerial job duties within the U.S. entity, within the parent entity abroad, and at the client companies' respective locations.

III. Analysis

As indicated above, the primary issue in this matter is the beneficiary's proposed employment with the petitioning entity. Namely, the AAO will examine the record to determine whether the petitioner has provided sufficient evidence to establish that the beneficiary's proposed position would be within a qualifying managerial or executive capacity. In order to establish eligibility, the petitioner must establish that was able to employ the beneficiary in a qualifying capacity as of April 16, 2013, the date the Form I-140 was filed.

In general, when examining the executive or managerial capacity of the beneficiary position with the foreign or U.S. employer, the AAO reviews the totality of the record, starting first 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). Although counsel is correct in stating that the size of the petitioning entity should not be the sole focus of a determination regarding the petitioner's eligibility, the petitioner's size can and should be considered, as it will assist U.S. Citizenship and Immigration Services (USCIS) in gauging the extent to which the petitioner is able to relieve the beneficiary from having to carry out the company's daily operational tasks that are deemed as non-qualifying. 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).

Thus, while the petitioner's job description is clearly a key consideration in determining the beneficiary's employment capacity, the AAO must go beyond the petitioner's claims to examine the supporting evidence, which should explain just how the petitioner would maintain its daily operations if the beneficiary were to primarily spend his or her time carrying out tasks that are within a qualifying managerial or executive capacity. It would be unreasonable for a petitioner to claim that the beneficiary would be employed in a

qualifying capacity if the petitioner does not have the resources to relieve the beneficiary from having to spend his or her time carrying out the operational tasks that are necessary for the petitioner to maintain normal daily function.

In the present matter, neither the beneficiary's job description nor the petitioner's organizational composition lead the AAO to conclude that the beneficiary would more likely than not allocate his time primarily to tasks that are within a qualifying managerial or executive capacity.

First, turning to the job descriptions contained in the record, it appears that the beneficiary would allocate an undisclosed amount of time to the performance of non-qualifying tasks, including engaging in contractual negotiations with the petitioner's potential customers, training newly hired employees, interfacing with customers to gather and negotiate program requirements as well as providing the customer with finalized plans for each project, reporting to the CEO and the board of directors regularly to provide updates and customers' status, carrying out certain banking tasks, and other supporting operational tasks, which may also fall within the category of non-qualifying job duties.

While 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 during employment will be 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). Although the director attempted to obtain the necessary information regarding the beneficiary's time allocations by asking the petitioner to assign time constraints to individual job duties, the record shows that the petitioner did not comply with these specific instructions and instead allocated time constraints to the beneficiary's five key business responsibilities each of which was accompanied by a list of qualifying and non-qualifying tasks the beneficiary would perform to meet his main business objectives. However, without a percentage of time assigned each individual task, the AAO has no way of ascertaining just how much time the beneficiary planned to allocate to tasks of a qualifying nature.

Beyond the beneficiary's job description, the director properly considered the petitioner's organizational structure. In the present matter, the record shows clear evidence that at the time of filing the petitioner had one part-time and one full-time employee and retained the services of one accountant and one software tester on a contractual hourly basis. Although the petitioner claims that it retained the services of [REDACTED] and [REDACTED] to carry out test execution services for the petitioner's software, the petitioner only submitted invoices naming Jess Oswald as the provider of these services. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner also failed to provide evidence showing that the individuals who are currently working at the petitioner's foreign affiliate in France function to relieve the beneficiary from having to allocate his time to non-qualifying tasks in his proposed position with the petitioning U.S. entity. Moreover, it is unclear how the

foreign-based employees of the petitioner's foreign affiliate, an entity that is entirely separate from the petitioner itself, are relevant to the issue of the beneficiary's employment capacity in his proposed position as director of U.S. operations. The AAO finds it similarly problematic to deem as relevant the job duties performed by the employees of the petitioner's client companies. While it is likely that the beneficiary has to communicate with the employees of a client company in order to ensure that the petitioner is able to fulfill its contractual obligations, it is unclear how the beneficiary's interfacing with those employees is representative of a qualifying managerial or executive task. Rather, such communications and interactions with the employees of the petitioner's client companies more closely resemble tasks that are necessary to provide the services that the petitioner markets and contracts to sell to its customers. As previously noted, any time that the beneficiary spends performing these and other service-oriented tasks would not be deemed as time spent within a qualifying managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act.

Finally, the AAO observes that the petitioner has not provided evidence to establish who markets the petitioner's services, who seeks out the clients to purchase these services, and who carries out the office administrative tasks, like answering office phones, issuing invoices to customers, and making payments on invoices issued to the petitioner for services rendered to outside contractors. Given that the petitioner has not provided evidence to show that it has employees or outside contractors to provide these operational tasks, which are required for the petitioner to function properly, the AAO cannot exclude the possibility that the beneficiary himself would be responsible for these and other non-qualifying office tasks. While the AAO has made note of the additional contracts that will contribute to the petitioner's growing revenue and are likely to result in additional support staff to carry out more of the petitioner's operational tasks, the petitioner's eligibility must be based on the facts and circumstances that existed at the time the petition was filed; 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. 1971).

Despite the beneficiary's placement within the petitioner's organizational hierarchy and the discretionary authority the beneficiary maintains over the petitioner's staff, the petitioner has failed to provide sufficient evidence to establish that at the time of filing it was more likely than not that the beneficiary would have been relieved from having to allocate his time primarily to the performance of non-qualifying operational tasks. Therefore, it cannot be concluded that the beneficiary would be employed in a qualifying managerial or executive capacity and on the basis of this determination the instant petition cannot be approved.

Additionally, while not previously addressed in the director's decision, the AAO finds that there is conflicting information in the record, which precludes a finding that the beneficiary was employed abroad in a qualifying managerial or executive capacity. Namely, in reviewing the supporting statement dated March 26, 2013, which the petitioner originally provided in support of the Form I-140, the AAO observes that the beneficiary's position abroad was claimed to be that of a pre-sales manager. However, a review of the Form G-325A, Biographic Information, which the beneficiary submitted in support of his concurrently-filed I-485 Application to Adjust Status, indicates that the beneficiary was employed in France as a pre-sale engineer. The claim submitted in the petitioner's March 2013 supporting statement is not consistent with the information the beneficiary himself provided in the Form G-325A with regard to the position held by the beneficiary directly prior to his transfer to work for the U.S. 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). Furthermore, based on the overall lack of information pertaining to the beneficiary's position and job duties during his employment with the petitioner's foreign parent entity, the evidence of record does not establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. 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 ground 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, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.