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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: NOV 0 6 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 Virginia limited liability company that seeks to employ the beneficiary as its executive manager. 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 it will employ the beneficiary in a qualifying managerial or executive capacity.

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 delegates the petitioner's daily operational tasks to independent contractors. Although counsel marked Box B on the Form I-290B, indicating his intention to provide a brief and/or additional evidence within 30 days of filing the appeal, there is no evidence that the record has since been supplemented in accordance with counsel's original intent. Therefore, the AAO's decision will be based on the evidence that has been submitted thus far and the record will be considered complete as presently constituted.

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:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily--
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> (i) manages the organization, or a department, subdivision, function, or component of the organization;
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> (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
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> (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--
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> (i) directs the management of the organization or a major component or function of the organization;
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> (ii) establishes the goals and policies of the organization, component, or function;
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> (iii) exercises wide latitude in discretionary decision-making; and
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> (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

II. Procedural History

The record shows that the petitioner filed the Form I-140 on March 12, 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, corporate and bank documents, as well as a job description addressing the beneficiary's prospective employment with the U.S. petitioner. The petitioner stated on the Form I-140 that it has one employee.

After reviewing the petitioner's submissions, the director determined that the petition did not warrant approval. Accordingly, on April 16, 2013, the director issued a request for evidence (RFE) instructing the petitioner to provide, in part, a supplementary job description for the beneficiary's proposed employment. The director instructed the petitioner to list the beneficiary's specific daily job duties and to assign a time allocation indicating the portion of time the beneficiary would spend performing each of the proposed job duties. Additionally, the director asked for the submission of the petitioner's organizational chart depicting the beneficiary's subordinates and describing their respective job duties and educational credentials. The petitioner was instructed to indicate whether it uses contract labor and, if so, to provide evidence documenting the number of contractors used and the job duties they perform.

The petitioner's response to the RFE included a statement from counsel discussing the supporting exhibits being submitted with the RFE, job descriptions, the U.S. entity's organizational chart, and a series of email correspondences between the beneficiary and various business associates, including a company charged with distributing the petitioner's merchandise. In his response statement dated May 3, 2013, counsel claimed that the beneficiary's proposed employment would be within an executive capacity. In light of this claim, counsel proceeded to recite the statutory criteria listed under executive capacity and broadly discussed the decisions the beneficiary has made in terms of hiring and working with a distributor to assist with the selling of furniture that is manufactured abroad by the petitioner's foreign affiliate.

The director reviewed the petitioner's submissions and determined that the record lacked sufficient evidence to establish that the beneficiary, as the petitioner's sole employee, allocates his time to performing primarily managerial or executive tasks. Accordingly, the director issued a decision dated July 12, 2013 denying the petition.

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 it was able to employ the beneficiary in a qualifying capacity as of March 3, 2013, the date the Form I-140 was filed.

III. Analysis

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). The AAO will then consider this information in light of other relevant factors, including (but not limited to) job descriptions and size of the beneficiary's subordinate staff, the nature of the business conducted by the entity in question, and any other relevant facts that may contribute to a comprehensive understanding of the beneficiary's actual role within the organization of the petitioning U.S. employer.

In the present matter, the record shows that the petitioner originally submitted a job description that purported to list the beneficiary's job responsibilities and tasks in his proposed position. However, the description was devoid of specific information as to the daily tasks the beneficiary would be expected to carry out. The beneficiary's duties as described in the record include the following: (1) develop a strategic plan to grow the company and increase its profitability; (2) oversee operations for quality and efficiency; (3) plan strategies to maximize resources; (4) identify acquisition and merger opportunities; (5) approve policies and procedures, (6) review activity reports and financial statements; (7) revise corporate objectives; (8) contract an independent staff for needed services; (9) evaluate performance of executives; (10) represent the company at legislative sessions, committee meetings, and formal functions; (11) promote the company locally, regionally, and internationally; (12) present an annual report to the company's board of directors; (13) direct the company's planning and policy-making committees; and (14) oversee foreign operations.

Having reviewed the above list of "tasks," the AAO finds that a number of the statements the petitioner provided to describe the beneficiary's proposed employment were overly vague and included several elements that were inconsistent with the nature of the petitioner's business and the structure of its organizational hierarchy. For instance, the petitioner failed to explain the respective roles of mergers and acquisitions, attendance at legislative sessions and committee meetings, and directing committees within the company. In other words, what types of mergers and acquisitions would the petitioner seek out and how would such transactions further the petitioner's business objective, which is to create more revenue from the sale of furniture that is manufactured abroad by the petitioner's foreign affiliate? How would the petitioner's involvement and/or direct participation in the political legislative process fit the petitioner's current business needs and organizational structure? And lastly, what types of committees within the company could the beneficiary possibly oversee when he was the petitioner's sole employee at the time the petition was filed? These claims appear to have no relation to the business model that is described by means of the petitioner's organizational chart and business documents, which indicate that the petitioner seeks to expose its furniture to a larger market share thus resulting in greater furniture sales and more profitability. 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)). Here, the petitioner has not provided any evidence to demonstrate that mergers and acquisitions, participation in the legislative process, and directing company-wide committee hearings are plausible actions that the beneficiary would carry out within his proposed position with the U.S. entity.

Additionally, a considerable portion of the listed duties are overly vague and fail to convey a meaningful understanding of the specific actions the beneficiary would undertake in reaching his broadly-stated business objectives. For instance, the petitioner claimed that the beneficiary would develop a strategic plan to make the company more profitable. However, short of finding more avenues to sell the petitioner's products, it is unclear how the beneficiary would reach this objective. Given that the act of sales is an operational task, the

beneficiary's involvement in undertaking such a task would not be deemed as time spent performing tasks within a qualifying capacity. The petitioner also claimed that the beneficiary would oversee company operations and plan strategies to maximize resources. However, the petitioner did not provide any tasks related to company oversight, nor did the petitioner specify which resources the beneficiary would seek to maximize or the specific means by which he planned to attain this general goal.

While the petitioner went on to state that the beneficiary would approve company operational procedures, policies, and standards, this statement appears to be inconsistent with a company where the beneficiary is the company's sole employee. By its very nature, the act of approving something strongly indicates that someone other than the beneficiary would be charged with creating or bringing about the policies and procedures that the beneficiary would have to approve. Similarly, the petitioner's claim that the beneficiary would evaluate the performance of executives also lacks credibility, given that the petitioner did not employ an executive staff at the time the petition was filed. Again, the record contains no evidence to support the beneficiary's role in these various capacities, which imply that the petitioner employs a staff that extends beyond the beneficiary himself.

Lastly, the beneficiary's role in promoting the company on a local, regional, and national scale and presenting the board with an annual report, which the beneficiary would presumably formulate, indicate the performance of sales and administrative tasks, which would not be deemed as qualifying.

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 his former employment with the foreign entity were 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).

In the present matter, despite the fact that the director issued an RFE specifically expressing the need for additional information regarding the beneficiary's job description, including a list of the beneficiary's specific daily job duties and the percentage of time the beneficiary planned to allocate to each item on the list, the petitioner responded with a replica of the same deficient job description that was originally provided, thus effectively declining to provide the requested additional evidence. Additionally, the petitioner provided a statement dated May 3, 2013 asserting that the beneficiary would assume any "responsibilities as needed to ensure proper corporate function" and further noted that the percentage of time the beneficiary planned to spend on each of his assigned tasks could not be quantified. However, the petitioner's 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). Here, the petitioner not only failed to provide the requested time allocations, but also broadly indicated that the beneficiary would carry out any tasks necessary to ensure the U.S. entity's continued operation, thus indicating that the beneficiary would likely be required to perform non-qualifying tasks to meet the petitioner's needs. Without the requested information specifying how the beneficiary would allocate his time, the AAO is precluded from being able to determine how much of the beneficiary's time would be allocated to qualifying tasks versus tasks deemed as non-qualifying. Moreover, without further information about the beneficiary's specific daily tasks, the AAO cannot overlook the above-described deficiencies, which

indicate that the information the petitioner provided does not offer an accurate depiction of the beneficiary's proposed employment and is therefore unreliable in assisting the AAO to assess the beneficiary's managerial or executive capacity.

Additionally, the record contains an organizational chart, which the petitioner provided in an effort to establish that it has an adequate support staff to relieve the beneficiary from having to allocate his time primarily to the petitioner's daily operational, i.e., non-qualifying tasks. Specifically, the chart indicates that the petitioner: (1) contracts an attorney and an accountant to provide legal and accounting services; (2) maintains an office service agreement with or the provision of office space, office equipment, and a professional receptionist; and (3) has forged a business relationship with a furniture distributor to assist with the sales of the product offered by the petitioner's foreign affiliate. Notwithstanding the evidence provided regarding these business relationships, the record does not establish that the beneficiary would be relieved from having to allocate his time primarily to the performance of non-qualifying tasks.

First, with regard to the petitioner's agreement with while the terms of the agreement indicate that would provide the petitioner with office space, specified office equipment, and a full-time receptionist, the record contains no information as to the specific services the receptionist provides. Although counsel offers a list of tasks that he claims are assigned to the receptionist provided by there is no evidence in the record that corroborates counsel's assertions. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The fact that information pertaining to the receptionist's responsibilities was not explicitly provided in the petitioner's agreement with Metro Offices leaves open the possibility that the beneficiary himself would have to carry out certain non-qualifying office tasks. Without sufficient information of the job duties assigned to the petitioner's contracted employees, the AAO is unable to determine the extent of the beneficiary's direct involvement in the operational tasks that would be deemed to be outside the realm of a qualifying managerial or executive capacity.

Second, looking to information provided in a statement dated January 12, 2013 from the petitioner's furniture distributor, the beneficiary's involvement includes providing customer support, sales guidance, and marketing-related services, and attending meetings with key customers. Given that the petitioner's description of the beneficiary's proposed employment was insufficient for the reasons discussed above, and lacked an account of the beneficiary's specific daily tasks, it is unclear what portion of the beneficiary's time would be allocated to the performance of these non-qualifying tasks, none of which were included in the job description. Furthermore, in assessing the nature of the petitioner's business and in reviewing the services that are currently provided by the furniture distributor, there is significant information missing as to which party is responsible for the logistics that allow for the processing of furniture orders and delivery of the merchandise that has been purchased. Specifically, the evidence of record does not specify which party handles the placing of the product orders, which party arranges for the delivery of the purchased products, or who would be responsible for accounts receivable when the distributor, or some other purchaser, does not issue timely compensation for the purchased merchandise. Without evidence establishing that the beneficiary would not allocate considerable portions of his time to these and possibly other non-qualifying tasks, the AAO cannot determine that he would be engaged in primarily managerial or executive duties.

Finally, while counsel's challenge of the director's decision is based primarily on the assumption that the director focused his analysis entirely on the petitioner's organizational composition, the above analysis includes an in-depth and comprehensive discussion that takes into account the beneficiary's job description, the nature of the business conducted by the petitioner, and the petitioner's staffing. Although the beneficiary's job description is a foremost concern when seeking to assess the managerial or executive capacity of a given position, the issue of the petitioner's organizational hierarchy and support staff is highly relevant and was given proper consideration in the director's decision. Even in instances where an adequate job description is provided, the petitioner must be able to provide evidence to establish that the beneficiary has the support staff necessary, whether by means of in-house employees or contract-based labor, to carry out the non-qualifying administrative and operations tasks required for the petitioner's ongoing business activities.

In the present matter, the petitioner failed to provide an adequate description of the beneficiary's proposed tasks. In addition, it failed to provide evidence to establish that at the time the petition was filed the petitioner had the capability of relieving the beneficiary from having to devote his time primarily to the performance of non-qualifying tasks. Given the considerable lack of sufficient supporting evidence, the AAO cannot conclude that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. Accordingly, the appeal will be dismissed.

IV. Conclusion

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. 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.