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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: NOV 06 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 (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, Nebraska Service Center, denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a limited liability company organized in the State of Ohio that is engaged in software development, licensing, and related consulting services. The petitioner states that it is an affiliate of located in Russia. The petitioner seeks to employ the beneficiary as its chief executive officer (CEO). 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, finding that the petitioner had not established that the beneficiary will be employed in an executive or managerial capacity in the United States.

On appeal, counsel asserts that the petitioner has established by a preponderance of the evidence that the beneficiary primarily performs executive or managerial duties, noting that the director's conclusion was in error given the evidence submitted.

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--
>
> (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.

II. The Issue on Appeal

The sole issue to be addressed is whether the petitioner has established that the beneficiary will be employed in a qualifying managerial or executive capacity in the United States.

In denying the petition on this basis, the director noted that the petitioner had submitted a vague description of duties for the beneficiary in his capacity as chief executive officer of the petitioner. Further, the director stated that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary's subordinates were managers, supervisors or professionals.

On appeal, counsel contends that the beneficiary's duties in the United States were sufficiently detailed, and asserts that the beneficiary is not primarily performing operational tasks but directing management and establishing goals and policies of the organization. Counsel states that the director erred by declining to consider the petitioner's future hiring plans. Further, counsel asserts that the director erroneously concluded that the beneficiary's subordinates are not professionals and had no basis for determining that these subordinate positions do not require a baccalaureate degree. Counsel states that based upon the detailed duty descriptions provided for each subordinate, their levels of education, and the salaries paid to the subordinates, the petitioner has established that the beneficiary supervises professionals. Finally, counsel contends that the director placed undue emphasis on the size of the petitioning company and failed to examine the totality of the record, including the size and scope of the overseas operations.

In sum, counsel asserts that the petitioner has established by a preponderance of the evidence that it will employ the beneficiary in a qualifying managerial and executive capacity.

As referenced by counsel, the "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the

applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (discussing "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established by a preponderance of the evidence that it will employ the beneficiary in a qualifying managerial or executive capacity.

In order to determine whether the beneficiary would be employed in a qualifying executive or managerial capacity, U.S. Citizenship and Immigration Services (USCIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the RFE, the director requested that the petitioner provide a very detailed description of the beneficiary's proposed duties in the United States, including an estimate of the percentage of time the beneficiary would dedicate to each specific duty. In response, the petitioner provided the following explanation of the beneficiary's duties in his capacity as CEO, including percentages of time spent on each duty category as follows:

- Determine corporate strategy versus customers, competitors and threat of substitute products (10% of his time).
  - Sets goals and targets for General Manager for managing Sales Managers and for managing sales
  - Directs networking with key partners in United States
  - Sets goals and targets about penetrating new market and niches
  - Determines key parameters for custom development projects
  - Sets and manages ways to build relationships and contracts for Trading View Product

- Direct and coordinate company's financial and budget activities to fund operations, maximize investments, and increase efficiency (20% of the time).
  - Sets goals for General Manager about retail sales levels and custom products

- Analyze operations to evaluate performance of a company and st[a]ff (20% of the time)
  - Receives sales reports from General Manager and analyzes productivity of the company

- Direct, plan, and implement policies, objectives, and activities of organizations or businesses to ensure continuing operations, to maximize returns on investments, and to increase productivity (10% of the time).

- Develops with General Manager general sales strategy to optimize and improve sales processes
- Determines company's general sales policy
- Determines company's sales policy regarding custom development projects

- Approve contracts and agreements with clients, distributors, and other organizational entities (10% of the time).
  - Approves key parts in the most important contracts
  - Contacts key persons from other companies when necessary

- Review reports submitted by staff members to recommend approval or to suggest changes (10% of the time)
  - Analyzes reports made by General Manager
  - Conducts meetings with General Manager and Sales Managers

- Appoint department heads or managers and assign or delegate responsibilities to them (10% of the time)
  - Sets and delegates tasks for General Manager and Sales Managers
  - Personally controls execution of key projects

- Direct human resources activities, including the selection of directors and other high level staff (10% of the time)
  - Approves selection of staff members and hiring as represented by General Manager
  - Sets company's HR policy.

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).

On appeal, counsel asserts that the beneficiary's proposed duties in the United States, as described above, are sufficiently detailed to establish that he performs primarily executive tasks. Counsel's assertion is not persuasive. In fact, the duties submitted by the petitioner in response to the director's request for a "very detailed" description of duties were little different than those submitted at the time of filing, which the director had already reviewed and found to be insufficient. 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 duties offered by the petitioner, such as setting goals and targets for the general manager, directing networking with key partners, determining key parameters for custom development projects, setting and managing ways to build relationships, determining the company's

sales policy, and setting and delegating tasks, are overly vague and provide little probative value as to the beneficiary's actual day-to-day activities. The petitioner does not specifically describe the purported goals or targets set, sales policies established, or specific tasks delegated. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature. Overall, 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).

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the company's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

In response to the RFE, the petitioner submitted an organizational chart indicating that the beneficiary had three subordinates, including a general manager, a lead sales manager, and a sales manager. Counsel contends on appeal that these employees are professionals, as each employee holds a bachelor's degree required for their respective positions. Further, the petitioner provided adequate duty descriptions and payroll information relevant to these subordinates. In short, although the petitioner's personnel levels were limited, the petitioner established that it employed three full-time employees at the time of filing. However, the director concluded that the petitioner did not have sufficient subordinates to relieve him from primarily performing day-to-day operational tasks. Upon review of the totality of the evidence, including the evidence submitted on appeal, the AAO concurs with the director's conclusion.

While the evidence establishes that the petitioner had three employees at the time of filing in June 2012, the evidence submitted in response to the RFE, specifically an employee history summary report prepared by the payroll company for the period ending September 23, 2010, indicates that the sales manager was no longer employed by the petitioner on August 29, 2012. The petitioner's IRS Form 941, Employer's Quarterly Federal Tax Return, for the third quarter of 2012 confirms that the petitioner had only two employees as of September 2012. Nevertheless, the petitioner included this employee on its revised organizational chart submitted in response to the RFE in November 2012, without acknowledging that he is no longer with the company. The petitioner initially submitted an organizational chart depicting four occupied positions and four open positions, indicating an intention to expand the company's operations. These prospective positions included a sales manager, a marketing department head, a copywriter and a "PR/SEO/SMO Manager." However, the petitioner paid significantly less in wages in 2012 as compared to 2011 and had only three employees, including the beneficiary, at the end of 2012.

On appeal, counsel submits evidence that establishes that the general manager left the company in February 2013, and the petitioner now has only one full-time employee, the former lead sales manager, and one recently-hired part-time software developer. Federal regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed or when the visa is issued by a United States consulate. 8 C.F.R. § 245.1(a), 22 C.F.R. § 42.41. The petitioner bears the ultimate

burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

In short, the record indicates that the petitioner no longer employs the general manager, an employee prominently emphasized in the beneficiary's duty description as dictating policies and goals to subordinates for the beneficiary. The petitioner did not submit an updated duty description for the beneficiary, despite the fact that his duties would reasonably change in the absence of the general manager. As such, the petitioner has not established how the beneficiary will be relieved from performing non-qualifying duties. Given the ambiguity, lack of personnel, and other evidence presented on the record, such as various contracts to provide software licenses and services to clients, the AAO finds it more likely than not that the beneficiary is and will be primarily engaged in sales and service activities, particularly given that there is only one other sales representative in the petitioner's organization. Indeed, the beneficiary is described on the record as an "authorized representative" to various clients, suggesting he is engaged in the direct provision of goods and services to clients. 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Counsel emphasizes on appeal that the director overlooked the fact that the petitioner is the "sales arm" of a larger multinational organization. The record establishes that the foreign entity has a larger staff and a more complex structure relative to the U.S. company. However, the petitioner is also described in the record as the "corporate headquarters" for the group and the proposed organizational chart indicates that all sales and marketing personnel are to be U.S.-based. While there is a single marketing position in the foreign organization, this employee, identified as the "Chief Marketing Officer," does not appear in the foreign entity's payroll records. Therefore, the petitioner has not established who, other than the beneficiary and his U.S. staff of one to two sales employees, is available to market and sell the petitioner's products and services. The beneficiary may in fact continue to oversee the technical and software development operations of the foreign entity, but the record does not establish that the foreign entity's personnel contribute to the marketing and sales functions performed by the U.S. office or relieve the beneficiary from performing such functions.

Pursuant to section 101(a)(44)(C) of the Act, a company's size alone may not be the determining factor in denying a visa to a multinational manager or executive. However, 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. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. *See Systronics*, 153 F. Supp. 2d at 15. Given the evidence submitted, the AAO does not doubt that the petitioner conducts continuous business in the United States. However, this substantial level of operations paired with the lack of personnel leaves question as to whether the beneficiary could be primarily relieved from performing day-to-day operational tasks, since there are no employees identified as performing administrative tasks such as bill payment, invoicing, service provision, and other such administrative duties. While the AAO acknowledges counsel's claim that the

beneficiary supervises professional subordinates, the petitioner has not established that he performs primarily managerial duties or that the petitioner's professional staff relieves him from performing non-qualifying duties.

Lastly, counsel also asserts that USCIS erred in not considering the petitioner's future hiring plans in determining whether beneficiary will act in a managerial or executive capacity. As noted, the petitioner's U.S. organizational chart indicated that the petitioner planned on hiring four other employees, including a head of the marketing department, a copywriter, another sales manager, and a PR/SEO/SMO manager. However, the AAO need not, and will not, consider the petitioner's future hiring plans. At the time of filing, the petitioner had been operating in the United States since September 2010 and had not yet developed as necessary to support the beneficiary in a managerial or executive capacity. The petitioner must establish that it has sufficient personnel at the time of the filing of the petition to support the beneficiary in a qualifying managerial or executive capacity. However, the petitioner has not met this burden, particularly in light of the evidence submitted on appeal that demonstrates that the petitioner's staffing levels have decreased since the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

In conclusion, the petitioner has submitted an overly vague duty description relevant to the beneficiary's proposed duties in the United States and provided evidence indicating that the petitioner does not have sufficient personnel to relieve the beneficiary from primarily performing non-qualifying day-to-day operational duties. As such, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity. Accordingly, the appeal will be dismissed.

III. Conclusion

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.