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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



U.S. Citizenship
and Immigration
Services



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OFFICE: TEXAS SERVICE CENTER

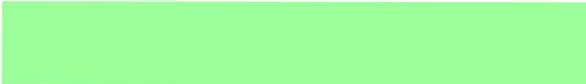
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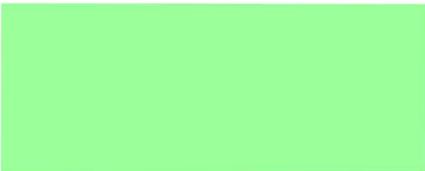
Petitioner:

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 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 New York corporation engaged in the import and wholesale distribution of clothing. The petitioner states that it is a subsidiary of [REDACTED] located in China. The petitioner seeks to employ the beneficiary as its general 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, finding that the petitioner had failed to establish that the beneficiary will be employed in an executive or managerial capacity in the United States. The director also concluded that the petitioner had failed to establish that beneficiary had been employed abroad in a managerial or executive capacity for at least one of the three years preceding the beneficiary's entry into the United States as an L-1A nonimmigrant intracompany transferee.

On appeal, counsel contends that the petitioner will employ the beneficiary in a qualifying managerial or executive capacity and asserts that the director mischaracterized the nature of his job duties. The petitioner submits additional information regarding the beneficiary's proposed duties and the company's personnel structure in support of the appeal.

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 Issues on Appeal

A. U.S. employment in a managerial or executive capacity

The first issue to be addressed is whether the petitioner has established that it will employ the beneficiary in a qualifying managerial or executive capacity.

In denying the petition, the director stated that the petitioner had submitted a vague duty description for the beneficiary's proposed position that failed to establish what he would be doing on a day-to-day basis. The director also noted that the petitioner had failed to submit IRS Forms 941, Employer's Quarterly Federal Tax Return, for 2012, as requested by the director, as evidence of its staffing levels. In sum, the director concluded that the petitioner had failed to demonstrate that the beneficiary would allocate a majority of his time to executive or managerial duties.

On appeal, counsel submits an additional support letter from the petitioner and asserts that the letter provides sufficient detail regarding the beneficiary's duties in the United States. Counsel contends that the beneficiary is not involved in the provision of goods or services, but that he oversees departments with managers devoted to the day-to-day operational duties of the business. Counsel states that the supporting evidence demonstrates that the beneficiary will devote a majority of his time to operational and policy management and supervision of subordinate professionals with advanced degrees.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established 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 a support letter submitted with the petition, the petitioner explained the beneficiary's duties as general manager as follows:

From 2009 to the present, [the beneficiary] has been working with [the petitioner] as a General Manager to manage this new subsidiary office. During his service, [the beneficiary] has fulfilled his duties as a General Manager to our satisfaction, which is in the key executive capacity within the New York subsidiary company.

[The beneficiary's] major job responsibilities fulfilled in the past year in New York include setting up and managing the New York office. He had full responsibility for the following:

1. Opened and managed the operations of the New York subsidiary;
2. Supervised and controlled the work of other supervisory and managerial staff;
3. Authorized to hire and fire personnel and other personnel actions such as promotion and leave;
4. Developed and directed operational guidelines and procedures;
5. Formulated new business goals, to bring together departments of the company to work on each business plan;
6. Supervised their work, setting standards for the work and general guidelines for each assignment which must be followed and executed by departments of the company;
7. Coordinated the various teams to assure that each business plan is implemented adequately and on schedule;
8. Supervised the implementation and management of the policy and policy of developing new business market in the United States, Canada, Europe and South America;
9. Developed organization and distribution systems;
10. Set marketing goals for improvement products and marketing of American products into China;
11. Used past experience to establish managerial and sale systems similar to the present company in China.

Additionally, the petitioner submitted an organizational chart indicating that the beneficiary reports to a "president/vice president" and oversees six departments, including: (1) an administration department staffed by a secretary; (2) an accounting department staffed by a manager and subordinate bookkeeper; (3) a shipping department staffed by one supervisor and one clerk; (4) a marketing and sales department staffed by one manager, three local sales representatives and two out-of-state sales representatives; (5) a retail store department staffed by one supervisor and two salesmen; and (6) a customer service department staffed by one customer service representative and one technical support specialist. The petitioner also submitted duty descriptions for each position, but did not specifically identify any employees by name. The organizational chart identifies a total of 18 positions.

The director issued a request for evidence (RFE) in which he advised the petitioner that the position descriptions submitted at the time of filing were vague and therefore insufficient to establish the beneficiary's eligibility as a manager or executive. The director instructed the petitioner to submit a definitive statement describing the beneficiary's duties, including the position title, all specific daily duties, and the percentage of time spent on each duty. Further, the director requested that the petitioner submit a complete organizational chart showing the number of subordinate managers/supervisors or other employees reporting to the beneficiary, including their job titles, duty descriptions and education levels. The director also requested that the petitioner submit IRS Forms W-2, Wage and Tax Statement, IRS Forms 941, Employer's Quarterly Federal Tax Return, for each quarter of 2012, and if applicable IRS Forms 1099, to corroborate the employment of the individuals identified in the organizational chart.

In response to the director's RFE, the petitioner provided the following additional explanation of the beneficiary's proposed duties in the United States:

[The beneficiary's] major job responsibilities fulfilled in the past year in New York included both setting up and managing the New York office. Now that the subsidiary is set-up, he will focus on management duties. He will have full responsibility for the following:

1. Manage the operation of the New York subsidiary- 100%, made up of the following duties:
2. Supervise and control the work of other supervisory and managerial staff (50%);
3. Oversee hiring and firing of personnel and other personnel actions such as promotion and leave (10%);
4. Develop and direct operation guidelines and procedures (10%);
5. Formulate new business goals, to bring together departments of the company to work on each business plan (10%);
6. Supervise work of departments, setting standards for the work and general guidelines for each assignment which must be followed and executed (5%);
7. Coordinate the various teams to ensure that each business plan is implemented adequately and on schedule (5%);
8. Continue to supervise the implementation of management of the policy and policy of developing new business market in the United States (2.5%);
9. Develop organization and distribution systems (2.5%);
10. Continue to set marketing goals for improvement products and marketing of American products into China (5%).

The petitioner also identified the names of the employees within the petitioner's organizational chart, but failed to submit any of the requested tax documentation to corroborate that the employees are actually on its

payroll or paid as contractors. The petitioner also failed to indicate whether the individuals named are employees or contractors or whether they work full-time or part-time.

On appeal, the petitioner provides additional details regarding the beneficiary's duties within each of the ten areas of responsibility as set forth above. The petitioner further explains the second responsibility outlined, stating that the beneficiary will "work directly with each department head in setting standards for their work, and setting goals for their teams." With respect to the third category above, the petitioner asserts that the hiring and firing of personnel would be done by the various department heads, but with ultimate oversight from the beneficiary. The petitioner additionally emphasizes that the beneficiary would be involved with general reporting and would be given "general overviews so that he knows who the VIP supplier and clients are," so the beneficiary can "cultivate and maintain those VIP relationships that are most important to the company."

The petitioner also submits an updated organizational chart in which the names of four of the six "department heads" are different than those submitted in response to the director's RFE. The petitioner further submits copies of 2013 IRS Forms 1099 for five of the six department heads depicted in the updated organizational chart. The petitioner also provides copies of educational credentials for these same five employees. However, none of these individuals were identified as employees of the company at the time the petitioner responded to the RFE. The petitioner's vice president states that "although we have 15+ positions with our company, about half are part-time, and many are independent contractors who work full time."

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).

Although the beneficiary has provided additional explanations with respect to each of the beneficiary's areas of responsibility on appeal, these further assertions provide little meaningful insight into the beneficiary's actual daily duties. 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 supervising department heads and setting their goals, signing off on promotions and leave authorizations, signing off on the hiring and firing decisions of his department managers, developing guidelines for the various departments, cultivating and maintaining "VIP relationships," and formulating new business goals are overly vague and provide little probative value as to the beneficiary's day-to-day activities. The duties, and the record generally, include no specific examples or documentation to support the beneficiary's vaguely described duties. Further, the petitioner does not specifically describe goals that were set for his department heads, guidelines that were formulated for his managerial subordinates, specific hiring and firing decisions that were made, "VIP clients cultivated and maintained," or new business goals implemented. It is reasonable to expect that the petitioner would provide

some specifics regarding the beneficiary's past actions and accomplishments in his capacity as general manager, since he is asserted as having worked in this capacity since 2009. 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 the present matter, the petitioner was requested by the director to submit tax documentation to corroborate the company's claims regarding its staffing levels and organizational structure. The petitioner failed to provide this documentation in response to the director. On appeal, the petitioner submits 2013 IRS Forms 1099 for five individuals who were not claimed as employees prior to the denial of the petition. Further, the petitioner failed to submit any evidence of payments made to employees or contractors as of the date the petition was filed in September 2012, or at any point in 2012. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The 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).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the IRS Forms 1099 submitted on appeal. Regardless, the Forms 1099 submitted on appeal are for 2013 and therefore are not relevant to a determination of the petitioner's eligibility as of the date of filing. The 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 petitioner's failure to submit any documentary evidence of its staffing levels as of the date of filing leaves the petitioner's claim that the beneficiary supervises six subordinate department managers and ten additional subordinates unsupported. Further, the petitioner has not provided any explanation for the significant turnover of its subordinate department managers. The record contains no information regarding

who was actually working for the company at the time of filing and the petitioner's original organizational chart and employee list failed to identify any employees by name. The petitioner provided the names of 14 subordinate employees at the time it responded to the RFE in May 2013. As of August 2013, the petitioner has identified different individuals holding the positions of secretary, accounting manager, bookkeeper, marketing and sales manager, retail store supervisor and customer services manager. The only educational credential and tax documentation submitted on appeal relates to these newly claimed employees; however, there is no evidence that any of them worked for the company as of the date of filing.

Additionally, the petitioner has not submitted supporting documentation to establish that it has any permanent employees, including IRS Forms W-2 or IRS Forms 941 for 2012 requested by the director. Also, no supporting documentation was submitted to demonstrate that the petitioner employs ten additional employees subordinate to the departmental managers as specified in the most recent organizational chart submitted on appeal. Again, the 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). Also, 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)).

In fact, the petitioner's bank accounts indicate that it has not made any payroll payments to any employees and a healthcare invoice submitted on the record from June 2012 indicates that the beneficiary is the only employee covered under the health plan, further supporting a conclusion that the petitioner does not employ the sixteen employees set forth in its most recent organizational chart. Additionally, the most recent IRS Form 1120 U.S. Corporation Income Tax Return submitted, for the tax year ended on November 30, 2011, states that the petitioner paid \$100,014 in "salaries, wages & contractor fees" during the previous year, a level of wages not in concert with the employment of a vice president, six department heads, ten other subordinate employees, and the beneficiary at a salary of \$72,000 per year. The petitioner fails to rectify this apparent discrepancy with supporting tax documentation from 2011 or 2012. Indeed, the petitioner's business plan from 2012 is entirely prospective as to the establishment of the petitioner's business, despite its previous assertions that the beneficiary has been acting in a managerial or executive capacity with the petitioner since entering the United States on an L-1 nonimmigrant visa in 2009. 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. 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. at 591-92.

On appeal, the petitioner provided educational credentials for five of the beneficiary's six claimed managerial subordinates. The submitted documentation reflects that these individuals hold the following degrees: (1) the company's secretary has a master of science degree in finance, (2) the accounting manager has a master of science degree in business administration, (3) the bookkeeper has a master of sciences degree

in mathematics and computer science, (4) the sales and marketing manager has a bachelor of sciences degree in accounting, and (5) the retail store manager has a bachelor's degree in fine arts. Based on this submitted evidence, the petitioner asserts that the beneficiary supervises and controls professional and managerial subordinates.

As previously stated herein, none of these employees identified on appeal were claimed to be employed by the petitioner prior to the denial of the petition. In fact, the petitioner indicated that different employees held each of these positions at the time it responded to the RFE, just three months prior to the filing of the appeal. Even if this office were to accept that the petitioner currently employs the asserted managerial and professional subordinates claimed on appeal, the petitioner cannot rely on these employees to establish that the beneficiary was overseeing managerial and professional subordinates at the time of filing. As the petitioner failed to document its actual organizational structure or staffing at the time of filing, it cannot support a claim that the beneficiary supervised subordinate managers, supervisors or professionals. Again, 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). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

In conclusion, the petitioner has failed to submit the required detailed description of the beneficiary's position and it provided insufficient evidence to support a conclusion that it employs sufficient employees to support the beneficiary in an executive or managerial capacity. For this reason, the appeal will be dismissed.

B. Managerial or executive capacity with the foreign employer

The next issue to be addressed is whether the petitioner has established that the beneficiary was employed abroad in a qualifying managerial or executive capacity for at least one year in the three years preceding his admission to the United States as a nonimmigrant in 2009.

Again, 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 concluding that the petitioner had failed to demonstrate that the beneficiary was employed by its foreign parent company in a qualifying executive or managerial capacity, the director noted the vague nature of the position description submitted in response to the director's RFE. In the RFE, the director had requested that the petitioner submit a definitive statement from the foreign employer describing the beneficiary's title, all of his job duties, and the percentage of time he spent on each specific task. In response to the RFE, the petitioner provided the following explanation of the beneficiary's duties in his former capacity as the foreign entity's general manager:

[The beneficiary's] daily duties were:

- Overseeing the daily operations of the office (40%)
- Supervision and/assignment of other managers and department heads (20%)
- Meeting with department heads to receive updates and stay apprised of company matters (20%)
- Oversaw hiring and/or promotion and firing of other managerial positions and/or department heads, and generally oversaw other hires/fires (i.e. not interviewing directly, but receiving feedback from other managers (10%)
- Made final decisions on matter pertinent to company functions (10%)

On appeal, the petitioner does not contest the director's finding that the petitioner had not established that the beneficiary was employed in a managerial or executive capacity. The AAO, therefore, considers this issue to be abandoned. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO). The AAO will not disturb the decision of the director as it concurs that the duties provided for the beneficiary's position with the foreign entity are overly vague and provide little probative value as to the beneficiary's what the beneficiary actually did on a day-to-day basis as the company's general manager. Again, 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. 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. at 1108.

As such, the petitioner has not established that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity. For this additional reason, the appeal must be dismissed.

III. 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.