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 18 2013 OFFICE: TEXAS SERVICE CENTER

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,

for 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 limited liability that seeks to employ the beneficiary as its president and 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 based on the following two adverse conclusions: (1) the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity; and (2) the petitioner failed to establish that it had the ability to pay the beneficiary's proffered wage at the time the petition was filed.

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.

Additionally, with regard to the petitioner's ability to pay, the regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The

petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

With regard to the petitioner's initial filing requirements, the regulations at 8 C.F.R. § 204.5(j)(3)(i) state that the petitioner must provide the following evidence in support of the petition in order to establish eligibility:

(A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or

(B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;

(C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and

(D) The prospective United States employer has been doing business for at least one year.

II. Procedural History

The record shows that the petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on February 26, 2013, claiming six employees and a gross annual income of $94,304. The petitioner submitted supporting evidence, which included various tax and business documents, the petitioner's office lease and company formation documents establishing the petitioner's business presence in the State of Georgia, and organizational charts pertaining to the beneficiary's former and prospective employers. The petitioner provided a copy of the beneficiary's IRS Form W-2 Wage and Tax Statement, indicating that he received a salary of $36,000 in 2012. The petitioner also provided a supporting statement dated February 18, 2013 discussing the business conducted by the beneficiary's former employer, the nature of the qualifying relationship between the petitioner and the former employer, and job descriptions addressing the beneficiary's former employment with the foreign entity and the proposed employment with the U.S. petitioner.

With respect to the beneficiary's proposed employment, the petitioner's statement contains a percentage breakdown, which discusses the job duties and responsibilities that account for 90% of the beneficiary's time. The petitioner indicated that the beneficiary would allocate his time as follows: 50% to business and development, which would include managing existing accounts through account executives, managing business expansion, conducting market research, attending trade fairs, networking with existing clients, reviewing company finances, and formulating business development strategies; 25% to managing the sales staff, which would entail educating the staff about the petitioner's product line, training them on how to deal

with customers, communicating with customers to ensure their satisfaction, devising and implementing sales incentives, and reviewing staff performance; 10% to overall corporate policy, which would require setting policies, providing management and direction, and consulting with the foreign entity daily; and 5% to administrative tasks, such as overseeing orders with the foreign entity, monitoring shipments in progress, and communicating with banking, accounting, and legal professionals. The petitioner further asserted that despite its small size, its needs would be most effectively addressed with "a senior executive with broad discretion in place to run the company and make all the important decisions pertaining to [the] future." The petitioner's organizational chart shows the beneficiary at the top of a staffing hierarchy that consists of five sales representatives who have been assigned to different regions. The petitioner indicated that one sales representative also serves as operations manager and performs duties associated with receiving and delivery, packaging, inventory, loading and unloading, verify, and verifying packing slips with purchase invoices. According to the submitted IRS Forms W-2, three of the sales representatives reside in New York, one resides in Minnesota, and the operations manager/sales representative and the beneficiary work in the petitioner's Georgia office.

After reviewing the petitioner's initial evidence, the director determined that the petition did not warrant approval. Accordingly, on April 11, 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 provide a definitive statement describing the beneficiary's proposed job duties as well as the job descriptions, position titles, and educational credentials of the beneficiary's subordinates. The RFE also included a request for the beneficiary's most recent pay stub.

The petitioner responded to the RFE by providing the beneficiary's pay stubs, which accounted for his monthly salary for January and February 2013. Each pay stub showed that the beneficiary received a monthly salary of $3,000 in gross earnings. The petitioner also provided a statement dated May 20, 2013, which contained a job description that was identical to the one contained within the petitioner's original supporting statement. The petitioner provided no additional information describing the beneficiary's daily tasks and thus offered no further insight to support the claim that the beneficiary would be employed in a qualifying managerial or executive capacity. The petitioner also resubmitted its organizational chart and employee job descriptions and educational credentials, all of which were identical in content to the documents that were originally provided in support of the petition.

The director reviewed the newly submitted evidence and determined that the petitioner failed to establish eligibility for the immigration benefit sought. Specifically, the director determined that the record lacked sufficient evidence to establish that the petitioner had the ability to pay the beneficiary's proffered wage at the time of filing or that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. Accordingly, the director issued a decision dated July 15, 2013 denying the petition. The director noted that given the petitioner's organizational composition, which primarily includes part-time personnel, it was more likely than not that the beneficiary would be required to allocate his time to primarily non-managerial tasks associated with the day-to-day operation of the business.

Additionally, the director assessed the petitioner's ability to pay the beneficiary's proffered annual wage of $36,000 based on an evaluation of the petitioner's 2011 and 2012 tax returns. However, the director failed to take into account the beneficiary's most recent wage slips, which the petitioner submitted with the RFE

response and which serve as *prima facie* evidence of the petitioner's ability to pay. Instead, the director placed undue focus on the petitioner's tax returns from 2011 and 2012, which are irrelevant to the issue of the petitioner's ability to pay commencing in February 2013, when the Form I-140 was filed. The regulation at 8 C.F.R. § 204.5(g)(2) expressly states that the ability to pay must be established as of the priority date, i.e., the date the petition is filed. As the petition in the present matter was not filed in 2011 or in 2012, the petitioner is not required to establish its ability to pay during those years. Nevertheless, the record shows that the petitioner paid the beneficiary $36,000 in 2012 and was continuing to pay him a monthly wage of $3,000 at the time of filing. Accordingly, the director's conclusion that the petitioner failed to establish the ability to pay is hereby withdrawn. The primary focus in this decision will be whether the petitioner established that it will employ the beneficiary in a qualifying managerial or executive capacity.

On appeal, counsel disputes the director's decision and asserts that the director failed to consider "all of the evidence submitted" or the nature the petitioner's business. 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 The record indicates that the petitioner did not file a brief or supplemental evidence within the allowed timeframe. Therefore, the record will be considered complete as presently constituted.

III. Analysis

As indicated above, the primary issue in this proceeding requires a review of the facts pertaining to the beneficiary's proposed employment within the petitioning entity. Specifically, the AAO will review the record to determine whether the petitioner offered sufficient evidence to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

In general, when examining the executive or managerial capacity of a given position, 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 beneficiary's job description can then be considered in light of other relevant factors, including (but not limited to) support personnel in terms of the number of support staff available at the time of filing and their respective job descriptions, 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.

As required by section 101(a)(44)(C) of the Act, 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. 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).

In the present matter, the record shows that the petitioner originally submitted a percentage breakdown of the duties and responsibilities that would require 90% of the beneficiary's time. It is unclear why the petitioner accounted for only 90% of the beneficiary's time. Regardless, the job description the petitioner submitted was vague and failed to provide sufficient specific information needed to establish what types of tasks the beneficiary would perform on a daily basis. For instance, the petitioner claimed that the beneficiary would allocate 50% of his time to managing accounts through account executives, expanding the petitioner's business, and conducting market research. There is no indication that any portion of this initial 50% of the beneficiary's time would involve tasks that fall within the criteria of managerial or executive capacity as those terms are defined sections 101(a)(44)(A) and (B) of the Act. The record indicates that the beneficiary's subordinate staff is entirely comprised of non-professional and non-supervisory employees. Thus, any time the beneficiary would spend managing accounts through oversight of account executives (who are identified as sales representatives in the petitioner's employee list and organizational chart) would be deemed as time spent carrying out non-qualifying tasks.

The petitioner further failed to establish that the beneficiary's responsibility for "expansion of the company's business" would require him to perform duties within a managerial or executive capacity. USCIS takes into account the nature of the petitioner's business, which in this case is heavily focused on selling the petitioner's products to a broader range of customers. It appears, however, that expansion would require the beneficiary to seek out new business opportunities with existing and prospective clients by networking and attending trade shows, which indicate that the beneficiary would carry out tasks that are necessary to carry out sales services for the petitioning entity.

The petitioner indicates that the beneficiary's "business growth & development" responsibilities include conducting market research. Further the petitioner does not indicate that it has any employees who would market the products that the petitioner seeks to sell. This absence of a marketing staff coupled with the fact that the beneficiary would conduct market research indicates that the petitioner would be unable to relieve the beneficiary from having to carry out its marketing functions, which would further add to the time the beneficiary allocate to non-managerial duties. Further, the petitioner indicates that the beneficiary's duties include "keeping abreast of U.S. import figures and Pakistani export figures" another research-oriented duty that has not been established as a qualifying managerial or executive function.

Additionally, in light of the educational credentials of the petitioner's sales representatives, which indicate that the beneficiary's entire support staff is comprised of non-professional employees, the petitioner's claim that the beneficiary would allocate an additional 25% of his time to the management of such a staff further indicates that the beneficiary would not be relieved from having to allocate his time primarily to the performance of the petitioner's daily operational and first-line supervisory tasks.

While it is clear that the petitioner employs part-time sales representatives with responsibility for customer sales in specific geographic areas, the list of the petitioner's non-qualifying tasks is not merely limited to the tasks carried out by the sales personnel. Rather, the record indicates that the beneficiary would partake in

some marketing-related activities to the extent that he would be required to conduct market research to seek out new business opportunities by marketing the petitioner's products to a broader client base. Furthermore, the petitioner's organizational chart does not identify an administrative or clerical staff, thus indicating that in addition to the non-qualifying tasks that have already been mentioned, the beneficiary may perform other non-qualifying tasks, such as answering phones, issuing invoices, following up on orders with the petitioner's parent company and handling accounts. As the petitioner has not identified anyone within the petitioner's organization who was available to provide those services at the time the petition was filed, the petitioner has not established that the beneficiary would be relieved from performing administrative and operational duties required for the day-to-day operation of the business.

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 would perform are only incidental to the proposed position. 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). Merely establishing that the beneficiary performs tasks at a professional level is not sufficient unless those tasks rise to the level of managerial or executive capacity.

In the present matter, the petitioner provided a job description that was insufficient to establish that the beneficiary would perform primarily managerial or executive duties. The director specifically requested a more detailed description and a more specific breakdown of how the beneficiary allocates his time among qualifying and non-qualifying duties, but the petitioner opted to re-submit the same description that had already been reviewed by the director and found to be deficient. 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).

Nevertheless, upon review of the provided description, the nature of the petitioner's business, and the provided organizational chart, the record does not establish that the petitioner has the organizational complexity to relieve the beneficiary from having to allocate his time primarily to the performance of non-qualifying tasks. Moreover, given the considerable time the beneficiary would allocate to the management of a non-professional staff and the performance of certain marketing and other non-managerial tasks, the beneficiary would be unable to allocate his time primarily to tasks that are within a qualifying managerial or executive capacity. Accordingly, the petition cannot be approved.

IV. Qualifying Relationship

Additionally, while not previously addressed in the director's decision, the record indicates that the petitioner may not have a qualifying relationship with the beneficiary's foreign employer as claimed. As previously indicated, the regulation at 8 C.F.R. § 204.5(j)(3)(i)(C) requires the petitioner to establish that it has a qualifying relationship with the beneficiary's foreign employer.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; *see also Matter of*

Siemens Medical Systems, Inc., 19 I&N Dec. 362 (Assoc. Comm. 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In the present matter, the petitioner provided inconsistent evidence to establish its ownership. A review of the petitioner's operating agreement, which was dated September 16, 2009, indicates that capital contributions were originally made by the foreign entity, the beneficiary, and in the amounts of $650, $250, and $100, respectively, thus indicating that these three individuals were the petitioner's original owners. However, the membership certificates, Nos. 1-3, which the petitioner provided to corroborate the information in the operating agreement were not signed, thus indicating that these documents not properly executed and did not effectively convey ownership to the respective parties. Additionally, while the record further shows that sold his purported ownership interest to the beneficiary, this sale would indicate that the beneficiary is now owner of 35% of the petitioning entity and that the foreign entity maintains 65% ownership. This information is not consistent with the percentage breakdowns that were claimed in the petitioner's three consecutive tax returns.

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). While the difference in the actual breakdown would not alter the basis of the petitioner's qualifying relationship claim in that the foreign entity would remain the majority owner, the fact that the petitioner provided information that is inconsistent leads the AAO to question the reliability of the petitioner's supporting evidence. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id* at 591.

The fact that the petitioner provided inconsistent information establishing the specific ownership breakdown and submitted unsigned membership certificates that were improperly executed leads the AAO to doubt the reliability of the supporting evidence, which is necessary to establish the existence of a qualifying relationship.

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.

V. 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.