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

(b)(6)

DATE: NOV 21 2013 OFFICE: NEBRASKA 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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a travel services company incorporated in California that claims to be a branch of , the beneficiary's former employer located in the United Kingdom. The petitioner is seeking to employ the beneficiary as its president. 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 on April 9, 2013 concluding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. Specifically, the director found that the beneficiary is responsible for many of the day-to-day activities for the business and that the record indicates that a majority of the beneficiary's duties would be non-qualifying.

On appeal, counsel disputes the director's findings and submits a legal brief asserting that the evidence submitted establishes the beneficiary's eligibility for the requested immigrant classification.

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
>
> (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;

(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. Employment in a Managerial or Executive Capacity

The sole issue addressed by the director is whether the petitioner established that it will employ the beneficiary in a qualifying managerial or executive capacity.

1. Facts

In support of the Form I-140, Immigrant Petition for Alien Worker, the petitioner submitted documents including a letter dated June 19, 2012, describing the petitioner's qualifying relationship with the foreign employer and the beneficiary's continuing duties abroad and proposed duties for the U.S. petitioner. The petitioner asserts that the beneficiary is the president and managing director for both the foreign employer and the U.S. petitioner. Both companies provide travel services for the film and media industry.

On the Form I-140, the petitioner stated that the beneficiary's duties will include: "Negotiating with airlines and hotels for high volume contract rates, promoting services to film production and studio executives, overseeing full service travel business dedicated exclusively to film production studios, development of new branches through the U.S." In its accompanying letter, the petitioner provided a general description of the beneficiary's duties, in part, stating that the beneficiary would "cultivate business relationships, meet with studio executives on a regular basis and be available to accommodate their often immediate needs, common for the entertainment industry." The petitioner stated that the company is staffed by three employees, including the beneficiary, a travel coordinator/office manager, and a travel consultant. The petitioner noted that it intends to add employees as the business grows.

On September 25, 2012, the director issued a request for additional evidence (RFE) instructing the petitioner to provide, in part, the following: (1) a detailed description of the beneficiary's proposed duties, including specific day-to-day tasks and the percentage of time to be dedicated to each task; (2) a detailed organizational chart reflecting the structure of the company as of the date of filing; and (3) names and detailed job descriptions for the beneficiary's subordinate employees.

In a response letter dated October 24, 2012, the petitioner explained that while employed in the U.S., the beneficiary would continue to work for the foreign employer when needed, typically

between the hours of 2:00 a.m. and 8:00 a.m. The petitioner stated that the beneficiary's anticipated work schedule for U.S. activities would be 9:00 a.m. to 8:00 p.m. with required availability on the weekends and any other time, as needed, to deal with "urgent logistical challenges and travel emergencies which oftentimes can only be handled by [the beneficiary]." The petitioner stated that the beneficiary's typical day-to-day duties would include the following:

1. Face-to-face meetings with existing and new Production Company clients based in Hollywood for budgeting their movies' international and national travel considerations [Percentage: 30%]

2. Negotiating special promotional rates with airlines and executing airlines contracts for the travel needs of Production companies. In obtaining IATA-ARC for [the petitioner] in the US, [the beneficiary] has a significant business advantage to be able to negotiate with Airlines in the U.K. and U.S. and was able to set up an account with more than 80 Airlines, especially with major airlines like Lufthansa, United Airlines, Virgin Atlantic, Singapore Airlines, Cathay Pacific, South African Airways, and Emirates Airlines which cover most of film production shooting locations presently. He also negotiates with airlines in the U.S. to increase the company's commissions once we establish a new production office and start booking flights. [Percentage: 20%]

3. Employee search and interviewing for increasing the local staffing as demand has increased dramatically. [Percentage: 5%]

4. Meeting daily, weekly, and monthly with the US Travel Coordinator & Sales office for their marketing feedback; analyzing sales and setting goals. [Percentage: 15%]

5. Negotiating with hotels based in L.A. for special promotional rates for production companies bringing European Producers, Directors, and actors to L.A. while visiting the local Studios. [Percentage: 10%]

6. Negotiating with private jet companies based in the U.S. for special promotional rates to accommodate the production companies for scouting new shooting locations. [Percentage: 5%]

7. Meeting with [the petitioner's] L.A. accountants, going over the L.A. office's monthly and quarterly Management Account expenses, and budgeting the company's quarterly expenses. [Percentage: 5%]

8. Directing the L.A. office team with managing flight waiting lists when problems arise for booked flights and the Production Company can't accommodate their entire crew on flights or with complicated reservations packages. [Percentage: 5%]

9. Flying to Production locations, negotiating with local suppliers, including hotels, car rental companies and limousine service to reduce the price for the production company while scouting for new shooting locations. [Percentage: 5%]

In order to be able to manage travel services for 26 Film Production Companies at the same time, [the beneficiary] needs to be available at all times of the day and night in order to provide the attention demanded by the entertainment client.

Further, the petitioner provided an organizational chart and a list of its employees and their duty descriptions. The petitioner's organizational chart placed the beneficiary at the top of the hierarchy as managing director – president. The undated chart indicated that three employees would directly report to the beneficiary: travel and sales coordinator and manager, travel and sales coordinator, and senior travel consultant and accountant, Notably, the petitioner also indicated that is no longer with the company and is a new employee. Therefore, the individuals employed at the time the petition was filed were and the beneficiary. The chart also includes a vacancy for a new business development manager position.

In the employee list attached to the organizational chart, the petitioner stated that the beneficiary works seven days per week, meets with new and existing clients, begins travel negotiations once a client agrees to a location, manages the company's overall operations, and oversees the company's financial health. According to the duty description, works full time as a senior travel consultant who "deals" with travel contacts, "checks" on reports and booked services, and performs duties which support the accounting department. Notably, there is no indication that the petitioner has a separate accounting department. The remaining employee, was identified as a travel coordinator in the sales and marketing department rather than as a manager as previously indicated by the petitioner.

The petitioner provided a copy of its IRS Form 941, Employer's Quarterly Federal Tax Return for the first quarter of 2012, which corroborated that the petitioner had three employees as of March 2012. The petitioner provided no additional Forms 941 for 2012 and did not indicate when left the company. The petitioner did submit a business plan that anticipated the employment of five individuals in 2012 but the record shows only three employees as of June 2012 when the petition was filed.

After reviewing the petitioner's evidence the director concluded that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. The director stated that the beneficiary would be personally responsible for many of the day-to-day activities and that the record indicated that the preponderance of the beneficiary's duties will be directly providing the services of the business. Further, the director found that the petitioner had not shown that the beneficiary would be supervising a subordinate staff of professional, managerial, or supervisory personnel who would relieve him from performing non-qualifying duties.

On appeal, the petitioner cites to unpublished AAO decisions and correctly asserts that the petitioner can establish eligibility if it demonstrates that more than half of the beneficiary's time is allocated to qualifying managerial or executive duties. The petitioner also asserts that the beneficiary's duties are essential to the company and may not be performed by lower level employees in the United States or the United Kingdom. The petitioner disagrees with the director's characterization as to what amounts to "providing the services of the business."

Specifically, the petitioner asserts that the actual services of the business are performed by the two additional employees and include making reservations, checking reports and handling other travel related issues. According to the petitioner, any non-qualifying duties performed by the beneficiary are "only incidental to the managerial position." The petitioner acknowledges the small size of the business but requests consideration of the organization's reasonable needs in light of its overall purpose and stage of development.

Additionally, in support of the appeal, the petitioner submits a statement from the beneficiary dated May 9, 2013 in which he further explains his duties.

2. Analysis

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity.

In examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Published case law clearly supports the pivotal role of a clearly defined job description, as the actual duties themselves 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); *see also* 8 C.F.R. § 204.5(j)(5). USCIS reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the petitioner's business, the employment and remuneration of other employees, as well as the job descriptions of the beneficiary's subordinates, if any, and any other facts contributing to a complete understanding of a beneficiary's actual role within a given entity.

In this matter, the beneficiary's proposed position in the petitioner's travel services business will involve his significant participation in the day-to-day operation of the business. For example, the beneficiary will spend 30% of his time meeting with both new and existing clients and 35% of his time negotiating rates and commissions for air travel and hotels and executing contracts, all non-qualifying duties. There are some tasks that are qualifying such as the 5% of time spent on employee search and interviewing, 15% on meetings with employees to analyze sales and set goals, and 5% to review expenses and the budget but these tasks do not account for a majority of the beneficiary's time. The beneficiary's proposed duty description supports a finding that a majority of the beneficiary's time will be spent performing non-qualifying duties. Notably, the petitioner states that the beneficiary would be responsible for most of the day-to-day operations of the business. The petitioner further stated that "[the beneficiary] needs to be available at all times of the

day and night in order to provide the attention demanded by the entertainment client" and that the company's level of service requires the constant input of the beneficiary and he must be "involved in all levels of the operation to assure the clients that they are being given full first class service." The petitioner explained that the beneficiary works 84 or more hours per week and "must also be available weekends and at any time needed for Production Companies with urgent logistical challenges and travel emergencies" that can be handled only by the beneficiary. The petitioner's other employees work standard office hours and are responsible for reviewing reports and "dealing" with hotels, airlines, and other travel related entities, although the specifics and the extent of their duties are not entirely clear based on the petitioner's description.

Overall, the beneficiary's indispensable, significant, and continuous involvement in the day-to-day services and operations of the business' main function supports a conclusion that the beneficiary would be primarily performing those crucial tasks necessary to provide travel related services, all non-qualifying duties. The actual duties themselves 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). 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).

On appeal, counsel for the petitioner disagrees with the director's determination that the beneficiary is actually "providing the services of the business." Specifically, counsel asserts that the staff will provide the services of the business while the beneficiary will procure, secure, expand and negotiate for contracts that create the opportunity to provide those services. Nevertheless, counsel's assertions are inadequate and inconsistent with the earlier descriptions of the beneficiary's duties. 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). Moreover, 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).

The director also concluded, and the AAO agrees, that the record failed to establish that the beneficiary would be supervising a subordinate staff of professional, managerial, or supervisory personnel who would relieve him from performing non-qualifying duties. The statutory definition of "managerial capacity" allows for both "personnel managers" and a "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 204.5(j)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions.

Specifically, the record established that the petitioner employed three individuals when the petition was filed; the beneficiary, one office manager/travel consultant and a second travel consultant. The organizational chart submitted in response to the RFE altered the second employee's title to "senior travel consultant /accountant" but the duty description is inconsistent with this job title. While the petitioner indicates that both of the travel consultants had some travel industry training, neither had educational degrees that would establish them as professionals, nor did the petitioner claim that degrees were required in the positions in which they were employed. One employee held a "manager" title but her duty description did not establish that she actually managed or supervised the only remaining employee. Both employees appeared to report directly to the beneficiary. Therefore, the evidence of record does not establish that the petitioner's two remaining employees are professionals, managers or supervisors. If it is claimed that the beneficiary's duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

The petitioner asserts for the first time on appeal that the foreign company and the petitioning company create a global organization and therefore the director erred in failing to consider the combined staff in determining whether the beneficiary's proposed position would be in a managerial or executive capacity. However, the petitioner presented insufficient evidence to establish that the foreign company's employees relieve the beneficiary from performing non-qualifying duties associated with the U.S. company's day-to-day operations. The petitioner's initial letter accompanying the Form I-140 indicates that the petitioning company was incorporated as a separate legal entity in California and was staffed by three individuals with a plan to hire additional employees as the business expanded. The petitioner did not claim to supplement its U.S. workforce with employees from the foreign employer. Additionally, according to the beneficiary's curriculum vitae, the U.S. petitioner was established, in part, to provide support "outside the European work hours" suggesting that workers with the foreign employer could not meet the needs of the petitioning company. Both the foreign employer and the petitioning company are engaged in the same travel related services catering to the entertainment industry but nothing in the employee duty descriptions suggest that the foreign employer's employees are assisting the petitioner in its day-to-day duties sufficient to establish that the foreign employees should be considered as part of the petitioner's staff. 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 petitioner correctly asserts that the petitioner's small size should not, itself, be the determining factor in the director's decision. 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. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the director based his findings on the beneficiary's duties rather than the size of the petitioning company. Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

Accordingly, the petitioner has not established that the beneficiary would be employed for the petitioner in a primarily managerial or executive capacity, as required by section 203(b)(1)(C) of the Act, and the appeal will be dismissed.

B. Foreign employment in a managerial or executive capacity

Beyond the decision of the director, the record contains insufficient evidence to establish that the beneficiary worked for the foreign employer in a primarily managerial or executive capacity. According to the beneficiary's duty description, he spent 35% of his time engaged in negotiations with travel suppliers, 15% resolving operational problems and completing complicated reservations, and 10% of his time meeting with clients and suppliers. These non-qualifying tasks are consistent with the types of activities one would expect of an employee providing the actual services for a travel-related business. It appears that the beneficiary was performing the majority of these essential services in order to obtain and maintain company clients. While other employees may have been available to perform the services of the business to relieve the beneficiary from performing non-qualifying duties, the evidence does not support that conclusion. The actual duties themselves 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).

An employee who "primarily" performs the tasks necessary to produce a product or 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 Intn'l.,* 19 I&N Dec. 593, 604 (Comm'r 1988). Thus, the petitioner has not established that the beneficiary was primarily performing in a managerial or executive capacity while employed with foreign employer.

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).

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.