

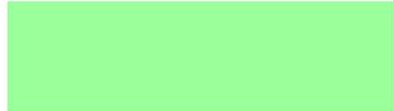


U.S. Citizenship
and Immigration
Services

(b)(6)



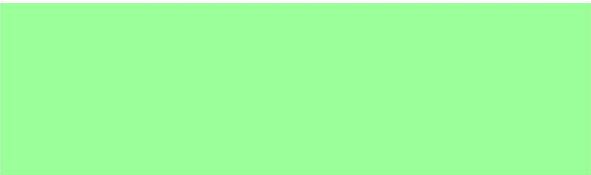
DATE: **NOV 21 2013** OFFICE: TEXAS SERVICE CENTER



IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 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 New York corporation engaged in wholesale and retail sales that 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.

On June 18, 2013, the director denied the petition concluding that the petitioner failed to establish that the beneficiary's proposed employment would be within a qualifying managerial or executive capacity.

On appeal, counsel disputes the director's findings and provides an appellate brief laying out the grounds for challenging the denial. Counsel contends that the beneficiary manages an essential function of the petitioning company.

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

In examining the executive or managerial capacity of the beneficiary, USCIS 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). In addition, USCIS reviews the totality of the record, which includes not only the beneficiary's job description, but also the nature of the petitioner's business, the employment and remuneration of 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.

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).

Upon review of the petition and evidence, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity.

At the time of filing, the petitioner provided a general description of the beneficiary's responsibilities along with an estimate of the number of hours he would allocate to each broad area of responsibility on a weekly basis. Due to the overly general information, the AAO is unable to gain a meaningful understanding of how much time the beneficiary will spend performing qualifying tasks versus those that would be deemed non-qualifying. For instance, the petitioner indicated that the beneficiary will spend twelve to fourteen hours per week in "developing sales and marketing policies including pricing and product selection based on input received from the supervisors and staff." In addition, the beneficiary will spend four to six hours to "review and assess information systems, public relations and advertising needs, and to approve updated and modifications." However, the organizational chart did not identify any employees who actually produce the advertising and promotion programs; thus, indicating that the beneficiary may have been the one to carry out these operational functions, which are clearly outside the parameters of what would be deemed as being within a managerial or executive capacity.

The beneficiary's sole subordinate within the petitioning company is a sales and service representative who earns \$12,000 per year. The petitioner stated that this employee "communicates directly with customers and potential customers, provides information on prices and products available, advises on delivery schedules, places and tracks orders with suppliers and coordinates fulfillment of orders to customers, thus performing the basic sales, service and fulfillment functions in the company."

The petitioner indicated that the beneficiary will spend ten to twelve hours per week engaged in the "review, planning and approval of arrangements and contracts for purchases and supply and shipping, insurance and customs services for the diamond and jewelry trade, to establish and maintain proper and efficient business operations." Preparing contracts and handling aspects of shipping and customs for the company are non-qualifying duties. Since these duties were not listed in the subordinate employee's job duties, it appears that the beneficiary is the sole employee in charge of the above duties.

The petitioner also stated that the beneficiary allocates eight to ten hours per week to "review of financial, budget, credit and collection information and reports from our accountants, and establishing credit policies and determining financial needs and strategies of the various businesses." As the petitioner, which had over \$3.5 million in sales in 2012, does not employ any subordinate staff responsible for finance or accounting matters, and it did not provide evidence that it employs accountants, it appears that the beneficiary is the sole employee handling the company's day-to-day financial operations such as invoices, budgets, and bookkeeping.

Finally, the beneficiary will spend six hours a week to prepare "personnel performance reviews, compensation and benefits decisions." More specifically, a review of the petitioner's personnel structure indicates that the petitioner may not have the necessary human resources to relieve the beneficiary from having to primarily carry out its non-qualifying tasks. While the AAO acknowledges that no beneficiary is required to allocate 100% of his time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to his 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. at 604. In the present matter, the petitioner has failed to establish that at the time of filing the petition it was able to employ the beneficiary in a qualifying capacity.

In a request for evidence (RFE), the director advised the petitioner that the job description provided at the time of filing was vague and did not provide sufficient information regarding the beneficiary's actual day-to-day duties. The director requested a definitive description of the beneficiary's position, including all specific daily duties and the percentage of time he would allocate to each task. In response, the petitioner re-submitted the same duty description that had already been reviewed by the director and found to be insufficient to establish the beneficiary's eligibility for the benefit sought. Any 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).

The petitioner also stated that it is the sole shareholder of two other enterprises which operate a convenience store and a Subway franchise, respectively. The petitioner explained that the beneficiary will oversee the two subsidiary companies and supervise seven additional employees. However, the petitioner must still establish that it can support the beneficiary in a qualifying managerial or executive capacity. The petitioner operates a wholesale diamond business with over

\$3.5 million in sales and only one subordinate employee. As discussed, the petitioner has not provided a duty description sufficient to establish that the beneficiary performs primarily managerial or executive duties, and the record does not establish that the his sole subordinate relieves the beneficiary from performing operational and administrative tasks associated with the petitioner's diamond trading business.

Even if the AAO considered the beneficiary's supervision of subordinate employees in the subsidiary companies, the general information provided regarding the beneficiary's duties suggests that he allocates the majority of his time to the petitioner's business, and not to the oversight of the retail stores. The petitioner has not provided the beneficiary's specific duties performed with respect to the Subway franchise or convenience store. Moreover, the record does not support a finding that the subsidiary companies employ full-time managers. The convenience store paid only \$28,600 in wages in 2012, while the company operating the Subway franchise paid \$46,800. The petitioner has not explained how retail businesses which are open for seven days per week are able to operate with only three to four employees. Further, the evidence shows that two of the four employees of the Subway earn less than \$8,000 per year, while all three employees of the convenience store earn no more than \$10,000. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

In the present matter, the totality of the record does not support a conclusion that the beneficiary's claimed subordinates in the subsidiary companies are supervisors, managers, or professionals. Instead, the record indicates that subordinates perform the actual day-to-day tasks of operating a retail store and a Subway shop. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial under the statutory definitions.

Finally, the AAO acknowledges counsel's contention on appeal that the beneficiary's position is an essential function within the petitioner's organization. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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).

In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. As noted above, the petitioner provided a brief and vague job description that did not articulate how the beneficiary is managing an essential function. In the RFE, the director provided the petitioner with an opportunity to "specify what essential function within the organization" the beneficiary will manage, if applicable, and the petitioner's response did not include a claim that the beneficiary manages an essential function. Only on appeal did counsel for the petitioner claim that the beneficiary manages an essential function by managing the "business enterprise as a whole including the subsidiaries." As noted above, the beneficiary's job description does not establish that the beneficiary is primarily performing in a managerial capacity.

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 petitioner'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 petitioner's 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 case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

As discussed above, the petitioner has not identified sufficient employees within the petitioner's organization who would relieve the beneficiary from performing routine duties inherent to operating the petitioner's diamond trading business. Further, the record does not establish that the claimed subsidiary companies are adequately staffed. The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate his position to that of a "function manager" as contemplated by the governing statute and regulations. The petitioner has not established that the beneficiary's duties are primarily managerial in nature, and thus he cannot be considered a "function manager."

Other than stating that the proposed position will be responsible for managing an unidentified essential function, counsel provides no explanation or evidence in support of his claim that the beneficiary would qualify as a function manager pursuant to section 101(a)(44)(A)(ii) of the Act. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See §

101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). 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.

Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as general manager and one subordinate employee. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

In summary, the petitioner has failed to provide sufficient evidence to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity and based on this finding, the instant petition cannot be approved.

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.