



U.S. Citizenship  
and Immigration  
Services

(b)(6)

[Redacted]

DATE: OCT 07 2013 OFFICE: TEXAS SERVICE CENTER FILE: [Redacted]

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:

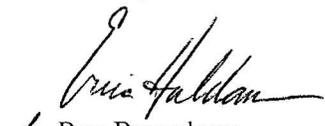
[Redacted]

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 immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, a New Jersey corporation, is engaged in the import and export of high quality special cables. The petitioner states that it is a subsidiary of [REDACTED] located in Italy. It seeks to employ the beneficiary as its president and chief executive officer (CEO). Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition, finding that the petitioner had not established that it will employ the beneficiary in a managerial or executive capacity.

On appeal, counsel asserts the petitioner has submitted sufficient evidence to establish that the beneficiary will be employed in a managerial capacity as defined at section 101(a)(44)(A) of the Act.

### 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.

Finally, 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. Section 101(a)(44)(C) of the Act.

## II. The Issue on Appeal

The sole issue addressed by the director was whether the petitioner established that the beneficiary would be employed in a qualifying managerial or executive capacity in the United States.

In denying the petition, the director noted the petitioner's failure to respond to a request for evidence (RFE) which asked the petitioner to submit job duty descriptions and education levels for the beneficiary's subordinates, information on whether the subordinates were full or part-time employees, and, if applicable, evidence of payments to contractors. The director also observed that the petitioner had only two employees as of the date of the filing of the petition, stating that the initial evidence suggested that it was more likely than not that the beneficiary was primarily performing non-qualifying operational duties rather than qualifying managerial duties.

On appeal, counsel asserts that the beneficiary's role with the petitioner is "sufficiently managerial" to qualify the beneficiary for the benefit sought. Counsel states that the beneficiary oversees the operational management of the petitioner. Counsel points to financial documentation submitted on the record, specifically wages paid by the petitioner to a subordinate employee to whom the beneficiary delegates non-qualifying operational duties. Further, counsel notes evidence in financial statements indicating that the petitioner paid \$50,000 in professional fees to accountants and an attorney in 2011 and \$75,000 in such fees in 2012. Counsel asserts that these payments to professionals establish that the beneficiary is not performing operational tasks, but overseeing professional employees performing essential functions of the business. Counsel states that the beneficiary devotes 100% of his time to performing managerial duties and that the director placed undue emphasis on the fact that he will supervise only one full-time subordinate employee.

Counsel's assertions are not persuasive. 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, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In response to the director's RFE, the petitioner provided a sufficiently detailed statement describing the beneficiary's job duties, including percentages of time spent by the beneficiary on various tasks. However,

when examining the managerial or executive capacity of a beneficiary, USCIS reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. Despite the petitioner's submission of a detailed duty description for the beneficiary's position, the evidence as a whole does not support a conclusion that the beneficiary will primarily perform the stated managerial duties.

In support of the petition, the petitioner stated that it had two employees, the beneficiary and a subordinate employee for whom no job title or job description was provided. The petitioner submitted evidence that the petitioner had earned \$1,079,093 in revenue in 2011, that it conducted substantial business in specialty cables in the United States, and that it had recently signed a lease for a 10,000 square foot warehouse for this purpose. The petitioner indicated that it anticipates hiring a warehouse manager, an imports manager, a logistics specialist and an inventory manager.

Due to the lack of information regarding the beneficiary's subordinates, the director asked in the RFE that the petitioner submit an organizational chart showing the number of subordinate managers and supervisors or other employees reporting directly to the beneficiary along with job titles, job duty descriptions, education levels and whether such employees worked full- or part-time. Additionally, the director also requested, if applicable, evidence of the company's use of contractors, including the number and types of contractors providing services, their duties, and evidence of payments made.

In response, the petitioner stated that it employed two outside sales representatives and two inside sales representatives reporting to the beneficiary as of the date of its response to the RFE. In addition, the petitioner stated that it contracted the services of [REDACTED] for warehousing, logistics and intermodal transport of its imported inventory. The petitioner submitted an organizational chart reflecting its staffing as of the date of filing, which indicates that the beneficiary had one subordinate, a corporate secretary, who oversaw eleven contractors devoted to warehouse and logistics operations provided by The [REDACTED]. The petitioner provided a letter from [REDACTED] stating that it had provided warehousing and logistics services for the petitioner from sometime in 2011 until November 2012 "when the petitioner leased its own warehouse space and began operating its own logistics procedures." The petitioner did not provide duty descriptions or education levels for its asserted full-time employees, or submit evidence of wages paid to contractors, as was requested by the director. With respect to the inside and outside sales representatives, the petitioner did not provide evidence of when they were hired, or specify whether they are employees or contractors.

The petitioner originally stated in support of the petition that it had two employees, but in response to the director's RFE the petitioner alternatively stated that it had two full-time employees, the beneficiary and the corporate secretary, and that it had hired four sales representatives. On appeal, counsel now emphasizes that the petitioner paid \$50,000 in accounting and legal fees in 2011, and \$75,000 in 2012, and contends that these payments establish that the beneficiary oversees professional subordinates.

In sum, the petitioner has provided insufficient evidence regarding the beneficiary's subordinates and thereby failed to adequately support its claim that the beneficiary performs primarily managerial duties. First, as noted above, the director specifically requested duty descriptions and education levels for the petitioner's full-time employees, and evidence of payments made to any contract employees. However, the petitioner did not submit this documentation in response to the director and now submits on appeal only a duty description for the petitioner's sole full-time employee, the corporate secretary. The petitioner was put on notice of this required evidence and given a reasonable opportunity to provide it before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it, in part, on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

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 aforementioned evidence of legal and accounting fees paid 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 sufficiency of the evidence submitted on appeal.

Additionally, the evidence submitted with respect to the petitioner's organizational structure includes material discrepancies which leaves question as to whether the petitioner has sufficient subordinate employees to allow him to primarily perform managerial duties. First, despite asserting in response to the RFE that it had recently hired four sales representatives, the petitioner makes no mention of these claimed sales representatives on appeal. Instead, the petitioner emphasizes that it utilizes the services of legal and accounting professionals, workers who were not mentioned in the petitioner's response to the RFE. Further, the petitioner asserts that the beneficiary delegates all non-qualifying operational duties to the corporate secretary. However, on appeal, counsel indicates that the amounts paid in professional fees in 2011 and 2012 do not include payments to contractors who are claimed to report to the corporate secretary, and no fees paid to operational contractors are reflected in the submitted tax or accounting documentation. 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. 582, 591-92 (BIA 1988).

The petitioner does not demonstrate that it has sufficient operational employees as necessary to operate the business, including its 10,000 square foot leased warehouse, and allow the beneficiary to primarily perform managerial duties. As noted, the letter submitted from The [REDACTED] states that their services terminated in November 2012, approximately two months after the filing of the petition, and that these services would thereafter be handled directly by the petitioner. The petitioner submits no explanations or

evidence to address the further employment of subordinate operational employees. The petitioner has not submitted direct evidence of payments made to contractors, or contracts with contractors, to establish that it has sufficient operational employees to carry out the routine functions of the business. The record demonstrates that the petitioner has one full-time employee, the corporate secretary. However, the petitioner has not sufficiently described this employee's duties and has not established how this employee will relieve the beneficiary from performing non-qualifying duties. 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)).

Additionally, despite asserting that the beneficiary devotes 100% of his time to managerial duties, there is evidence in the record which indicates that the beneficiary performs duties outside the scope of those included in his position description. For example, the beneficiary's name appears as a contact on various customer purchase orders, thus suggesting that he is directly involved in sales. Further, the petitioner states that the beneficiary's duties include directing management, establishing corporate goals and policies, delegating duties and assignments, formulating and implementing plans for expanding the company's client base, and formulating concepts and strategic initiatives to promote and increase sales. However, the petitioner has not demonstrated that it has managers or other subordinates to whom the beneficiary would delegate assignments or who would carry out the plans and strategies discussed in his job description. 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).

Counsel correctly observes that 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.

On appeal, counsel also asserts that the petitioner acts in a managerial capacity through his management of the corporate secretary and through his management of contracted professionals such as accountants and attorneys. The statutory definition of "managerial capacity" allows for both "personnel managers" and "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. 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. In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

The petitioner has not submitted sufficient evidence to demonstrate that the beneficiary will be employed as a personnel manager. As previously noted, the petitioner acknowledges that it has only one full-time employee. Although the record suggests that the petitioner may have formerly employed contract employees to perform warehousing duties, the letter from [REDACTED] specifically states that these services were terminated once the petitioner leased its own facilities and the petitioner submits no evidence that it currently employs other subordinate employees to handle day-to-day operations. As such, the beneficiary's lone subordinate, the corporate secretary, has no subordinates of his own and cannot be deemed a supervisor or manager. Further, the petitioner provided no educational credentials for the corporate secretary as required to establish the beneficiary as a professional consistent with the Act.

While contract attorneys and accountants the petitioner engaged to perform services may be professionals, the petitioner has submitted no evidence, beyond a vague line item towards "professional fees" in unaudited financial statements, to establish that the beneficiary is primarily engaged in supervising these referenced accountants and attorneys. Further, it has not been established that these independent accountants and attorneys qualify as subordinates to the beneficiary, as typically such professionals are not under the full direction and control of a client's manager. Again, the petitioner has not submitted sufficient supporting evidence to establish whether these professionals are sufficiently engaged to be considered subordinates to the beneficiary, or how such employees would relieve the beneficiary from performing the day-to-day duties of the petitioner's import and distribution business. Therefore, the petitioner has not submitted sufficient evidence to establish that the beneficiary will oversee subordinate managers, supervisors, or professionals as necessary to qualify as a personnel manager.

Counsel also generally asserts that the beneficiary may qualify as a function manager by stating that the beneficiary oversees an essential function of the organization. Counsel refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and

executive capacity for L-1 classification even though he was the sole employee. First, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Regardless, the petitioner has not demonstrated that the beneficiary will be employed as a function manager as defined by the Act. 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 *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 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. Indeed, as noted herein, the evidence presented establishes that it is more likely than not that the beneficiary performs non-qualifying operational duties. Also, the petitioner has not clearly asserted the beneficiary as a function manager or specified the essential function he manages.

In conclusion, the petitioner has submitted insufficient and contradictory evidence regarding its organizational structure, and thus has failed to establish that it will employ the beneficiary in a qualifying managerial or executive capacity. For this reason, the appeal must be dismissed.

### III. Conclusion:

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.