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: OCT 2 2 2013 OFFICE: TEXAS SERVICE CENTER FILE:

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 preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Texas corporation that seeks to employ the beneficiary as its sales manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The record shows that the petitioner filed the Form I-140 on July 2, 2012 and submitted a number of supporting documents in an effort to establish eligibility for the above stated immigration benefit. The petitioner's submissions included separate statements pertaining to the beneficiary's former and proposed employment as well as corporate, financial, and business documents.

After reviewing the petitioner's submissions, the director determined that the petition did not warrant approval. Accordingly, on December 28, 2012, the director issued a request for evidence (RFE) instructing the petitioner to provide supplementary job descriptions for both positions, listing the beneficiary's specific daily job duties with each entity and the amount of time that was and would be allocated to the duties listed. The director also instructed the petitioner to provide both entities' organizational charts and advised the petitioner that if employee supervision is not an aspect of the beneficiary's proposed employment it should specify the essential function the beneficiary would manage. Finally, the director instructed the petitioner to state the job titles and to provide job descriptions, IRS Form W-2 Wage and Tax statements, and educational levels of any subordinate employees or contractors who performed services for the petitioner and to indicate whether the subordinate(s) is/are employed on a part- or full-time basis.

The record shows that the petitioner's response was received in March 2013. The response included job descriptions, organizational charts, employee Form W-2 statements, and the foreign entity's company review of documents from July 2003 listing operational information, including the company's personnel and each individual's years of service.

The director reviewed the petitioner's response and supporting documents and determined that the petitioner failed to establish that the beneficiary was employed abroad or that he would be employed in the United States in a qualifying managerial or executive capacity. In addressing the beneficiary's proposed employment, the director took into account the beneficiary's job description and the petitioner's organizational structure, concluding that the beneficiary would not be relieved from having to allocate his time primarily to the performance of non-qualifying operational tasks. The director addressed the beneficiary's former employment with the foreign entity, finding that the beneficiary's job description is inconsistent with the foreign entity's organizational hierarchy, which shows various managerial levels and depicts the beneficiary in a supervisory role overseeing one senior and one junior engineer. The director noted that the petitioner failed to provide the requested evidence of educational credentials for the beneficiary's subordinates. The director's last finding was based on the beneficiary's current H-1B

nonimmigrant visa status, which the director found to be inconsistent with the claim that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

On appeal, counsel submits an appellate brief in which he disputes the director's adverse findings. Counsel asserts that the director failed to consider the portion of the statutory provisions that allows for an individual who assumes the role of a function manager, which does not require the beneficiary to oversee subordinate employees. Counsel also contends that there is no statutory provision requiring that the beneficiary's subordinates must be full-time employees. Counsel further states that while the beneficiary performs some non-qualifying tasks, such tasks do not account for the primary portion of the beneficiary's time. With regard to the beneficiary's former employment abroad, counsel asserts that the beneficiary performed primarily managerial job duties and further states that the director did not previously request the petitioner to provide evidence of educational credentials belonging to the beneficiary's subordinates and therefore the petitioner should not be penalized for not having submitted evidence that had not been requested. Lastly, counsel challenges the director's reliance on the beneficiary's H-1B nonimmigrant status as an indicator that the beneficiary's former employment abroad was not in a managerial or executive capacity.

After reviewing the relevant statutory and regulatory provisions, the AAO finds that the beneficiary's current H-1B nonimmigrant status is not relevant to a determination as to whether he was employed abroad in a qualifying managerial or executive capacity. While it is true that a beneficiary who is admitted to the United States for a purpose other than to be employed by the petitioning entity may not meet the foreign employment requirement, particularly if that beneficiary is not employed by the petitioning entity at the time the petition is filed, the record in the present matter clearly indicates that from the time of the beneficiary's admission to the United States he has continuously maintained employment with the U.S. petitioner. *See* section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. §§ 204.5(j)(3)(i)(A) and (B). It is therefore unclear what relation, if any, the beneficiary's current H-1B nonimmigrant classification may have to the beneficiary's former employment abroad. Accordingly, the AAO hereby withdraws the director's comments as they pertain to the beneficiary's current nonimmigrant status.

The remainder of this discussion will focus on whether the beneficiary was employed abroad, and will be employed in the United States, in a qualifying managerial or executive capacity.

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):
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> * * *
>
> (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.

In general, when examining the executive or managerial capacity of the beneficiary, 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 AAO will then consider this information in light of other relevant factors, including (but not limited to) job descriptions of the beneficiary's subordinate employees, the nature of the business conducted by the entity or entities in question, the size of an entity's subordinate staff, and any other facts contributing to a comprehensive understanding of the beneficiary's actual roles in the two respective entities.

Applying the above analysis to the beneficiary's proposed position with the U.S. entity, the beneficiary's job description indicates that a significant portion of the beneficiary's time would be allocated to non-qualifying tasks associated with customer service, sales, and human resources. Specifically, the petitioner indicated that the beneficiary's proposed position with the U.S. entity would entail developing and executing marketing strategies, visiting customer management, negotiating with factory suppliers, making sales calls, traveling to meet with customers to ensure customer satisfaction, preparing sales reports, reporting to senior managers regarding company progress, resolving problems with manufacturers, training personnel, and attending trade shows to represent the company. Although the petitioner assigned time allocations to broadly stated job responsibilities, rather than to specific job duties, the record contains sufficient information to determine that at least 55% (and possibly more) of the beneficiary's time would be allocated to these non-qualifying tasks. An employee who "primarily" performs the tasks necessary to produce a product or to provide services or other non-qualify tasks 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).

When the above information is further considered within the scope of the petitioner's organizational hierarchy, which shows that the only individuals who were available to assist the beneficiary with sales and marketing tasks at the time the petition was filed were two part-time employees, the record as a whole supports a conclusion that the beneficiary will allocate more than half of his time to non-qualifying tasks. In the present matter, the beneficiary's job description and the lack of an adequate support staff strongly indicate that the petitioner was unable to employ the beneficiary in a qualifying managerial or executive capacity at the time of filing. 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 fact that a petitioner is a small business will not preclude the beneficiary from qualifying for classification under section 203(b)(1)(C) of the Act. However, 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. As discussed, based on the petitioner's description of the beneficiary's position, he will allocate more than half of his time to non-qualifying duties, and for this reason, the petition cannot be approved.

Next, the AAO will examine to the beneficiary's former employment with the foreign entity. Looking first to the beneficiary's job description, the record shows that time constraints were assigned to three broad categories - 45% was assigned to marketing, administrative, and financial tasks; 35% was assigned to sales activities; and the remaining 20% was assigned to an untitled category that was comprised of ten job duties. Even though each area of responsibility included both qualifying and non-qualifying duties, the job description contains no indication as to the amount of time the beneficiary allocated to each task in order to allow the AAO to determine how much of the beneficiary's time was specifically allocated to managerial or executive duties. 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 performed during his former employment with the foreign entity were only incidental to the position in question. 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). Given that the petitioner chose not to assign time constraints to the beneficiary's assigned duties as expressly instructed in

the RFE, it cannot be determined that the beneficiary more likely than not devoted his time primarily to the performance of tasks within a qualifying capacity.

Additionally, while the foreign entity's organizational chart depicts a considerably more complex staffing structure compared to that of the petitioning company, an organizational chart by itself does not serve as supporting evidence of the foreign entity's staffing levels. Rather, the chart is a representation of the petitioner's claim depicting the foreign entity's organizational hierarchy and like any other claim, an organizational chart must be corroborated with evidence, such as payroll documents, which shows that the foreign entity actually employed the support staff that the chart depicted. The record in the present matter does not contain any such supporting evidence, thus leaving the AAO to evaluate the beneficiary's qualifying employment abroad within the scope of a deficient job description, which lacked the necessary time constraints assigned to specific tasks, and an uncorroborated organizational chart. 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)). Given these significant evidentiary deficiencies, the petitioner has not established that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity. For this additional reason, the appeal will be dismissed.

The appeal will be dismissed for the above stated reasons. 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.