

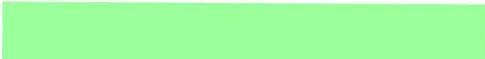


U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **SEP 19 2013** OFFICE: NEBRASKA 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 Director, Nebraska Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a California limited liability company self-described as a retail store and restaurant. It claims to be an affiliate of [REDACTED], the beneficiary's previous employer. The petitioner seeks to employ the beneficiary as its president, chief executive officer and 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.

The director denied the petition concluding that the petitioner failed to establish that it will employ the beneficiary in a qualifying managerial or executive capacity. The director further observed that the petitioner had submitted "scant" evidence in support of its claim that the foreign entity employed the beneficiary in 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.

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 the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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

that 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. *See* 8 C.F.R. § 204.5(j)(5).

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 ISSUES ON APPEAL

The primary issue addressed by the director is whether the petitioner established that the beneficiary would be employed in a primarily managerial or executive capacity. The director also addressed whether the petitioner submitted sufficient evidence to establish that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity.

### A. U.S. Employment in a Managerial or Executive Capacity

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on July 31, 2012. The petitioner indicated that it operates a retail store and restaurant with ten employees and a gross annual income of \$1,684,344. The petitioner states that it wishes to employ the beneficiary as its President/CEO/General Manager. The petitioner stated that it acquired [REDACTED] in April 2012 and that it currently operates two businesses. Based on the supporting evidence of business activities, these businesses are [REDACTED] and [REDACTED]."

The petitioner provided what appears to be a combined job description for both the U.S. and the foreign position. The petitioner stated that the beneficiary's role would involve the following: responsibility for overall operation and success of the organization; conceive, plan, and implement strategic and operational goals; direct and coordinate financial and budget activities; analyze operations to evaluate company performance; direct, plan, and implement policies, objectives, and activities of the organization; prepare budgets for approval; negotiate or approve contracts; direct human resources activities; and appoint department heads or managers. The petitioner also provided a breakdown of the duties the beneficiary was expected to perform during the first year of operations, thus suggesting that the submitted description was perhaps originally prepared for submission with a "new office" nonimmigrant petition pursuant to 8 C.F.R. § 214.2(l)(3)(v). The petitioner indicated that the beneficiary would initially allocate: 40 percent of his time to financial responsibilities; 40 percent of his time to operational responsibilities, including inventory management, premises management, and personnel management; and 20 percent of his time to regulatory responsibilities related to taxes and licensing.

The petitioner also provided position descriptions for the positions of Procurement Manager, Finance Manager, Marketing Manager, and Customer Service Manager. The petitioner indicated that the descriptions apply to employees of both the petitioner and the foreign entity. However, it did not provide a copy of its organizational chart or otherwise describe the staffing of the company or its two separate businesses.

The director issued a request for evidence ("RFE"). The director requested that the petitioner provide, *inter alia*, evidence that the beneficiary will act in a qualifying capacity as a multinational executive or manager. Specifically, the director requested the following: (1) a more detailed description of the beneficiary's duties including the percentage of time spent on each duty; (2) an organizational chart for the petitioner including job titles and duty for each employee reflecting the staffing at the time the petition was filed; and (3) information regarding the scope and nature of all relevant companies' operations and the context of the beneficiary's position relative to those operations.

In response, the petitioner re-submitted the same description of the beneficiary's duties, along with an organizational chart. The chart depicts the beneficiary as CEO & General Manager, and indicates that his direct reports are the restaurant manager for [REDACTED] and the store manager for [REDACTED]. According to the organizational chart, the store manager supervises three store clerks while the restaurant manager supervises a customer service manager, a marketing manager, and an operations manager, who, in turn, supervise "Subordinate & Floor Staff."

The petitioner provided position descriptions for the restaurant manager and store manager, and also re-submitted position descriptions for the procurement manager, financial manager, marketing manager and customer service manager positions, although not all of these positions appear on the petitioner's organizational chart.

The petitioner provided a 2012 year-end payroll summary for [REDACTED], which indicated that the petitioner paid a total of \$42,679.35 in salaries and wages to six employees. Individually, the employees earned hourly wages ranging from \$8.25 to \$8.75 and gross pay of \$602.25, \$1,620.12, \$4,162.32, \$8,638.92, \$10,397.61, and \$17,258.13. The petitioner also submitted a copy of the first page of its IRS Form 1120, U.S. Corporation Income Tax Return for 2012, on which it reported no salary or wage expenses.

In addition, the petitioner provided a copy of its IRS Form 941 Employer's Quarterly Federal Tax Return for [REDACTED] doing business as "[REDACTED]" for the third quarter of 2012. According to the Form 941, 16 employees received total wages of \$83,826.

The director ultimately denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive position. In denying the petition, the director found that the petitioner failed to provide a complete response to the request for evidence. Specifically, the petitioner failed to provide a more detailed description of the beneficiary's duties. Furthermore, the director observed that the petitioner failed to identify any employees by name on the organizational chart other than the beneficiary, thus making it unclear how many employees are actually working for the company.

On appeal, counsel for the petitioner states that the director's decision "does not specifically state a narrow or pointed reason for denial." Counsel claims that the evidence of record is sufficient to support a conclusion that the beneficiary will be employed in a managerial or executive capacity, despite the fact that no other employees were named on the organizational chart.

Upon review of the petition and evidence, the petitioner has not established that the beneficiary would be employed in a 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). That being said, however, 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 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).

The beneficiary's job descriptions submitted in support of the initial petition was overly general and vague, and therefore 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 stated that the beneficiary will be responsible for the overall operation and success of the organization; direct and coordinate the organization's financial and budget activities; and direct, plan, and implement policies and objectives. These duties provided little or no insight into what the beneficiary primarily does on a day-to-day basis or how he carries out his objectives as CEO. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will 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). In response to the RFE, the petitioner failed to provide a more detailed description of the petitioner's duties as requested. 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).

Beyond the required description of the beneficiary's job duties, U.S. Citizenship and Immigration Services (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. 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 managerial 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

In the present matter, the petitioner has failed to establish that there are any subordinate employees consistently available to relieve the beneficiary from performing non-qualifying duties. The petitioner failed to provide the names of the employees as requested by the director. Counsel for the petitioner claims that the petitioner has "high turnover" and thus it opted not to provide the names of employees. The director, however, specifically requested the names of the employees as of the date of filing. Again, 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).

Further, while the AAO acknowledges the reality of a high level of turnover among hourly employees in a restaurant or store, the petitioner also lists on its organizational chart a store manager, a restaurant manager, a customer service manager, a marketing manager and an operations manager. If the petitioner is experiencing a high level of turnover among these managerial or supervisory staff, as well as its hourly staff, it is unclear to whom the beneficiary is delegating the day-to-day tasks associated with operating and supervising the operations of a full-service diner and retail store. Notably, the petitioner claimed to have three subordinate managers working in its restaurant but does not indicate that it employs any cooks or kitchen staff. In addition, the AAO notes that the petitioner claimed only ten employees at the time of filing, but listed at least thirteen positions on its organizational chart. 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 proposed position of the beneficiary is a CEO of a company that operates a convenience store and restaurant, and which has an unknown number of employees other than the beneficiary. Based on its failure to provide evidence that it employed a store manager or a restaurant manager at the time of filing, the petitioner has not demonstrated that the beneficiary, as a personnel manager, will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. See section 101(a)(44)(A)(ii) of the Act. Furthermore, the petitioner has not established that it will employ sufficient staff to relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial duties. Regardless of the beneficiary's position title, the record is not persuasive that the beneficiary will function at a senior level within an organizational hierarchy.

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. 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 (9<sup>th</sup> Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Here, the petitioner did not provide sufficient information regarding its staffing and personnel structure to establish that it has a reasonable need for the beneficiary to perform primarily managerial or executive duties.

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 the instant petition cannot be approved.

#### B. Foreign Employment in a Managerial or Executive Capacity

The remaining issue to be addressed is whether the petitioner established that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity. The director observed that "the information provided regarding the beneficiary's employment abroad is very scant" and noted that the petitioner had failed

to provide a sufficient response to the director's request that the petitioner describe the beneficiary's foreign duties "in great detail" and provide the percentage of time he dedicated to each specific duty.

On appeal, counsel asserts that the petitioner did in fact submit the requested information in response to the RFE, and thus it is unclear why the evidence was considered to be "scant."

Upon review, the petitioner has not submitted sufficient evidence to establish that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity.

At the time of filing, the petitioner indicated that the foreign entity is engaged in the distribution of textiles, and that the beneficiary, as its CEO was "entrusted with the conception, planning, financing and execution of all the business activities" undertaken by the company." The petitioner submitted the same position description for the beneficiary's role with the foreign entity as it did for the U.S. entity. The petitioner also provided an organizational chart which indicated that the beneficiary supervised a general manager who, in turn, supervised a finance manager, a procurement manager, a marketing and sales manager, and a customer service manager. The next tier of employees included a total of four office assistants and four "outdoor" assistants. Finally, the petitioner indicated that the foreign entity used the services of five to seven temporary staff on an as-needed basis. In total, the petitioner identified fourteen (14) employees by name on the organizational chart, and provided position descriptions for the procurement manager, the finance manager, the marketing manager, and the customer service manager.

In the RFE, the director instructed the petitioner to describe the beneficiary's duties "in much greater detail," to explain the specific tasks the beneficiary performed, and to indicate the percentage of time the beneficiary allocated to specific duties. The director also requested that the petitioner submit information regarding the scope and nature of the foreign entity's operations and support its statements with documentary evidence.

In response, the petitioner re-submitted the same description of duties provided at the time of filing and re-asserted that the beneficiary's duties abroad were the "same/similar" as those he will perform in the United States. The deficiencies of this description have been addressed above and, as with the U.S. position, the AAO concurs with the director that the petitioner did not provide sufficient detail of the beneficiary's duties to establish that he was employed in a qualifying managerial or executive capacity. The petitioner also re-submitted the same organizational chart and position descriptions for four of the beneficiary's claimed subordinates abroad. The 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 provided what appear to be payroll ledgers and invoices in a foreign language, but did not include English-language translations of these documents. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Further, all of the foreign-language documents are dated in 2012 and do not provide relevant information regarding the scope of the organization during the beneficiary's relevant period of employment abroad (2007 to 2010). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

Overall, the petitioner has submitted a position description that merely paraphrases the statutory definitions of managerial and executive capacity and submitted an organizational chart which is uncorroborated by any payroll evidence for the relevant time period. Further, while the petitioner submitted position descriptions for four claimed "managers" subordinate to the beneficiary in the foreign entity, the duties assigned to them were not entirely credible. For example, the petitioner stated that the "marketing manager" is "actively working with Research and Development, Product and Technical Development, and Quality Assurance," but none of these positions or departments is identified on the foreign entity's organizational chart. The petitioner indicates that the foreign entity's "customer service manager" is responsible for "providing help desk resources and technical advice"; "disseminating advisories, warnings, and new techniques"; and "detecting and diagnosing network problems." However, these stated duties are inconsistent with the petitioner's claim that the foreign entity operates a textile distribution company. 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).

Based on the foregoing deficiencies and inconsistencies, the AAO concurs with the director's determination that the petitioner provided insufficient evidence to establish that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity. For this additional reason, the appeal will be dismissed.

### III. CONCLUSION

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.