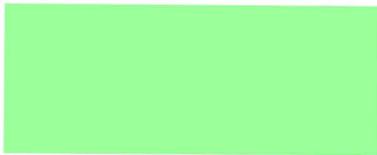




U.S. Citizenship
and Immigration
Services

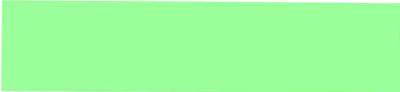
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DATE: **SEP 23 2013**

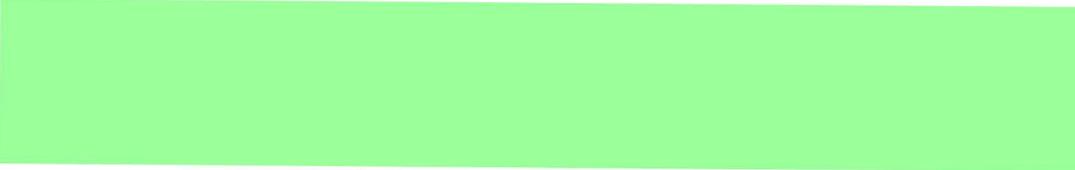
OFFICE: TEXAS SERVICE CENTER

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 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 is a limited liability company organized in the State of Louisiana engaged in the repair of heavy duty diesel machinery. The petitioner states that it is an affiliate of [REDACTED] located in Peru. It 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.

The director denied the petition, finding that the petitioner failed to establish that it will employ the beneficiary in a managerial or executive capacity.

On appeal, counsel submits additional evidence related to the petitioner's operations in the United States, and the beneficiary's proposed duties, and contends that the beneficiary will act in a managerial capacity as defined by 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.

I. The Issues on Appeal

A. Employment with the petitioner in a managerial or executive capacity

The sole issue addressed by the director was whether the petitioner had 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 that the petitioner's tax return documentation reflected that the petitioner did not have sufficient employees to relieve the beneficiary from performing the non-qualifying operational duties of the business and to elevate the beneficiary's position above that of a first-line supervisor. The director also determined that the beneficiary's position description was overly vague. Finally, the director pointed to the petitioner's failure to submit sufficient duty descriptions for the beneficiary's claimed subordinates, which were specifically requested by the director in a request for evidence (RFE).

On appeal, counsel states that the petitioner's lack of employees is due to an economic downturn in the region of Louisiana where the petitioner is located. Counsel asserts that the petitioner will expand its number of employees and operations in the future following planned economic investment in the region by an independent large corporation called [REDACTED]. Counsel contends that the beneficiary directs and controls an office manager who oversees subordinate employees handling the day-to-day operational duties of the business. Counsel also submits additional evidence on appeal, including a more detailed duty description for the beneficiary, duty descriptions for the beneficiary's claimed subordinates, and other evidence to support his claims that the petitioner can support the beneficiary in a managerial capacity.

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 support of the petition, the petitioner failed to submit a detailed description of the beneficiary's duties in the United States. The petitioner indicated that the beneficiary would serve as the general manager of the petitioner's diesel repair shop, stated that it had two current employees, and indicated that the company currently has a service contract with [REDACTED] to provide preventive maintenance and service to [REDACTED]. The petitioner provided a copy of its Internal Revenue Service (IRS) Form 941, Employer's Quarterly Federal Tax Return, for the first two quarters of 2012. The petitioner reported payment of \$1,560.00 in wages to one employee in each quarter.

The director issued a request for evidence (RFE), in which he instructed the petitioner to submit a definitive statement describing the beneficiary's duties in the United States including his position title, his specific daily duties, and the percentage of time he spent on each duty. However, the petitioner failed to submit the requested duty description to the director. Now, on appeal, the petitioner submits a more detailed U.S. duty description for the beneficiary, including the amount of time the beneficiary will devote to each task.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). 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).

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 submitted evidence 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.

The petitioner failed to submit a duty description for the beneficiary's proposed position, thereby precluding an essential line of inquiry in determining whether the beneficiary qualifies as an executive or manager consistent with the Act. 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). As such, without a duty description for the beneficiary, USCIS cannot determine that the beneficiary will primarily perform executive or managerial duties and the petitioner's claims fail on an evidentiary basis. The director properly denied the petition based on this evidentiary deficiency.

Further, when examining the managerial or executive capacity of a beneficiary, USCIS reviews the totality of the record, beyond the beneficiary's duties, including the duties 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 petitioner asserts that it operates a repair shop providing maintenance and repair services to trucks and other heavy duty machinery. On the I-140 Immigrant Petition for an Alien Worker, the petitioner stated that it had two employees. The petitioner's IRS Form 1065 U.S Return of Partnership Income for 2011 indicated that it earned \$81,168 in income in 2011. Further, IRS Form W-2 Wage and Income Statements from 2011 reflect that the petitioner had one employee and paid her \$1,300 in total wages in 2011. The petitioner also submitted IRS Form 941 Employer's Quarterly Federal Tax Return statements for the first and second quarters of 2012 indicating that the petitioner employed one employee and paid \$1,560 in wages in each of the first two quarters of 2012. Additionally, the petitioner acknowledged that it was forced to close a party supply store it formerly operated, which the petitioner demonstrated had employed a number of sales representatives, and that it was unsuccessful at opening a planned medical supply store.

In the RFE, the director requested that the petitioner submit an organizational chart showing the number of subordinate managers/supervisors or other employees reporting directly to the beneficiary, along with a brief description of their duties and their education levels. In response, the petitioner submitted two conflicting

organizational charts. The first chart reflected that the beneficiary had two subordinates, a salesperson working at the party supply store and a mechanic presumably working at the mechanical repair shop. The other submitted organizational chart reflected that the beneficiary had two manager assistants reporting directly to him, along with subordinate employees reporting to the manager assistants, including two salespersons working at the party supply store, and a mechanic and an assistant working for the mechanical repair shop. The petitioner provided no additional supporting evidence that the employees referenced in the provided organizational charts were currently employed by the petitioner, despite previously submitted tax documentation indicating that none of the aforementioned employees (apart from the beneficiary's wife in the position of manager assistant) worked for the petitioner in 2011 or 2012. As noted, the petitioner also stated that it had a contract in place with a company called [REDACTED] pursuant to which it provides mechanical maintenance on the company's diesel equipment.

On appeal, counsel again explains that the petitioner's lack of operations and employees are due to an economic downturn in Louisiana, but that planned investment in the region by a company called [REDACTED] will boost the economy of the region and allow "the petitioner's business to develop and attract more employees." Supporting the petitioner's lack of operations and employees, the petitioner submits a Louisiana Workforce Commission, Report of Change document stating that the petitioner "ceased operations" during the fourth quarter of 2012 and that it has not paid wages since June 2012. Additionally, an IRS Form 941 dated January 2, 2013 indicates that the petitioner is not currently paying wages and has not done so since June 2012. Despite evidence that the petitioner is not doing business and that it has no current employees beyond the beneficiary, the petitioner submits an organizational chart indicating seven employees subordinate to the beneficiary, including an office manager, four subordinate "sales" employees, a cashier, and a mechanic/technician reporting to the office manager. The petitioner also now submits duty descriptions for these employees and employee evaluation forms it asserts were completed by the beneficiary for the employees reflected in the petitioner's most recent organizational chart.

The petitioner has submitted evidence establishing that its operations are insufficient to support the beneficiary in a qualifying managerial or executive capacity. First, the petitioner was requested by the director to provide titles, duty descriptions, and education levels for the beneficiary's subordinates in the RFE. The petitioner failed to provide this evidence, but now submits it on appeal. Again, when 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 submitted evidence 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 this evidence submitted on appeal.

Regardless, even if considered, the petitioner's organizational chart on appeal is not supported by other evidence submitted on the record. In fact, the petitioner's most recent tax documentation submitted on appeal states directly that the petitioner is not operating as a business and that it has no employees. Additionally, employer tax documentation from 2011 and from the first two quarters of 2012 indicates that the company had only one employee, the beneficiary's wife, during the 18 months preceding the filing of the petition. However, the petitioner now claims on appeal in the most recent organizational chart that it has at least six

(b)(6)

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employees subordinate to the beneficiary. The organizational chart submitted on appeal also indicates that the petitioner employs a number of employees that formerly worked for the petitioner's party supply store that it states is now closed. Further, the petitioner's most recent Louisiana Sales and Use tax documentation reflects that the petitioner has limited, or no operations, as it has claimed only \$1,000 in revenue in the second quarter of 2012. Lastly, the employee evaluation forms submitted on appeal are for former employees who no longer worked for the petitioner at the time of their claimed evaluations. For instance, the petitioner provided evaluations for [REDACTED] and [REDACTED] Her- Office Assistant dated in 2011; however the petitioner has provided no evidence that it actually paid salaries or wages to either individual in 2011. Rather, the evidence shows that the petitioner paid a total of \$1,300 in wages to a single employee, [REDACTED], in 2011. 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). In sum, the evidence submitted by the petitioner indicates that the petitioner has minimal or no current business operations or employees and that the petitioner thereby cannot support the beneficiary in a managerial or executive capacity.

Further, although the petitioner submits a contract to provide repair services for [REDACTED] the petitioner states that the beneficiary acts as a consultant for this customer, and therefore he does not direct or manage others related to the provision of goods or services, but is providing such goods and services himself. As noted, the evidence presented does not establish the employment of any other supporting employees to perform these services beyond the beneficiary. 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).

The AAO acknowledges counsel's assertion that the economic downturn caused the current lack of operations and employees and that these operations will increase following anticipated investment in the region. However, qualification as an immigrant multinational executive or manager is not a prospective endeavor. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Additionally, even if such prospective evidence was considered, the petitioner has submitted insufficient supporting evidence to support its assertions regarding investment in the region and resulting growth in the business. The evidence submitted relevant to the petitioner's current operations establishes that the petitioner has limited to no operations, and no current employees. Therefore, the evidence submitted is not sufficient to support a conclusion that the beneficiary will primarily employed in a managerial or executive capacity.

In conclusion, the petitioner has failed to submit a detailed duty description or sufficient evidence relevant to establish that its current organizational structure despite the director's specific request for this material evidence. Further, the evidence submitted by the petitioner demonstrates that it does not have sufficient operations or employees to support the beneficiary in a managerial or executive capacity. For this reason, the appeal must be dismissed.

B. Employment with the foreign employer in a managerial or executive capacity

Beyond the decision of the director, the petitioner has not established that the beneficiary was employed in a qualifying managerial or executive capacity with the foreign employer in one of the three years preceding his admission to the United States as a nonimmigrant.

Again, in order to determine whether the beneficiary would be employed in a qualifying executive or managerial capacity, U.S. Citizenship and Immigration Services (USCIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In support of the Form I-140, the petitioner submitted the following job duty description for the beneficiary's previous position with the foreign entity:

[The beneficiary] has successfully served as general manager of [the foreign employer], . . . since it has established in 1994, and it is believed that [the beneficiary] is uniquely qualified to serve as general manager of [the petitioner]. As general manager, [the beneficiary] has been responsible for the overall performance of the company, he established and managed [the foreign employer] . . . he has directed and coordinated the manufacturing, marketing, and financing of the company. He oversees the hiring and training of employees, he reviews financial statements to determine the financial status of the company. He formulates financial programs to obtain maximum returns of investments.

In the RFE, the director requested that the petitioner submitted evidence to establish that the beneficiary primarily performed executive or managerial duties for the foreign employer. Specifically, the director asked that the petitioner submit a definitive statement from the foreign company describing the beneficiary's job duties, including the position title, specific daily duties, and the percentage of time spent of each duty. However, in response to the director's request, the petitioner provided no further specifics regarding the beneficiary's job duties with the foreign employer. Once 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).

Also, as previously noted, 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 foreign job duties provided in support of the petition are insufficient to establish that the beneficiary primarily performed executive or managerial duties with the foreign employer. 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 job description offered by the petitioner is overly vague and provides little probative value as to the beneficiary's actual day-to-day activities. The petitioner indicates that the beneficiary's duties included being responsible for the overall performance of the company, directing and coordinating manufacturing, marketing, and financing of the company, overseeing

the hiring and training of employees, and formulating programs to obtain maximum return on investment. In each case, the petitioner has failed to provide details, specifics or supporting documentation to corroborate the vague responsibilities. Given that the petitioner asserts that the beneficiary worked for the foreign entity since 1994, it is reasonable to expect a detailed discussion of his specific duties and responsibilities along with examples of his managerial or executive authority. The petitioner has provided no evidence to differentiate the beneficiary's listed duties from those of any executive or manager in any industry. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature. 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)). Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Therefore, the petitioner has not established that the related foreign entity employed the beneficiary in a qualifying managerial or executive capacity prior to his admission to the United States as a nonimmigrant. For this additional reason, the appeal must be dismissed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO reviews appeals on a *de novo* basis).

III. Conclusion

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.