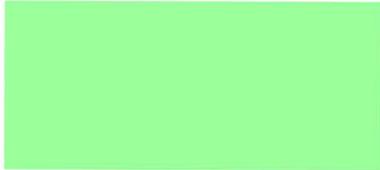




U.S. Citizenship
and Immigration
Services

(b)(6)



Date:

SEP 25 2013

OFFICE: TEXAS SERVICE CENTER

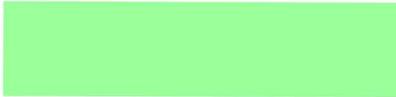
FILE:



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 preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss appeal.

The petitioner filed this immigrant petition to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner, a Texas corporation, states that it operates as a window and door manufacturer and distributor with six current employees and a gross annual income of \$534,699. The petitioner seeks to employ the beneficiary as its operations 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 petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner objects to the director's determination that the beneficiary's job description is vague and non-specific, and contends that the petitioner provided a sufficient description of the beneficiary's duties to establish that he will perform primarily managerial tasks. Counsel submits a brief and duplicate copies of evidence already contained in the record in support of the appeal.

I. THE LAW

Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a

statement, which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

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

The term “managerial capacity” means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor’s supervisory duties unless the employees supervised are professional.

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

The term “executive capacity” means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

II. THE ISSUE ON APPEAL

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

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on August 17, 2012. In support of the petition, the petitioner submitted a letter describing the beneficiary's position in the United States as follows:

The company transferred [the beneficiary] to the United States to take charge of the new company's operations in February 2011.

As the organizational chart demonstrates, [the beneficiary] works directly under the President. The organizational chart clearly confirms his position within the executive and management hierarchy of this organization. [The beneficiary] is responsible for implementing the organization's development and operations strategy on an international level. In this regard, he is responsible for planning, directing and coordinating all operations activities for both the U.S. and Mexico companies. He is required to ensure achievement of profitable revenue goals and a continual improvement in customer satisfaction.

As the President of this organization, I am often required to travel back and forth from Mexico and the U.S. to oversee my companies. In my absence, [the beneficiary] has full authority and control over the U.S. Company. He has full authority to hire and fire and has complete discretionary authority in all matters pertaining to the organization. He is required to set and monitor job goals for our work staff and other support personnel; as well as devising operation and production strategies to achieve our goals.

The breakdown of [the beneficiary's] executive/managerial and non-managerial duties is as follows:

Management Duties: 75%

- Carry out operations responsibilities in accordance with the organization's policies and applicable laws.
- Responsibilities include interviewing, hiring, and training employees;
- Plan, assign, and direct work;
- Appraise performance;
- Reward and discipline employees;
- Address complaints and resolve problems;
- Inspect finished products for conformance to specifications
- Study production schedules and estimate worker hour requirements for completion of job assignment;
- Interpret company policies to workers and enforces safety regulations;

- Interpret specifications and job orders to workers, and assign duties;
- Establish and adjust work procedures to meet production schedules;
- Recommend measures to improve production methods, equipment to increase efficiency of work crew;
- Analyze and resolve work problems, or assist workers in solving work problems.
- Initiate or suggest plans to motivate workers to achieve work goals;
- Maintain time and production records;
- Estimate, requisition, and inspect materials.
- Holds daily meetings with his shop manager
- Attends weekly meetings with Owner to discuss company operations
- Analyze company operating budgets and identify areas in which reductions can be made, and allocate operating budgets.
- Direct and coordinate activities of [the petitioner] which concern production, pricing, sales, or distribution of the company's products.
- Review financial statements, sales and activity reports, and other performance data to measure productivity and goal achievement and to determine areas needing cost reduction and program improvement.
- Monitor customer preferences to determine focus of production efforts.

Non-Executive Managerial: 25%

- Attend trade shows and represent company
- Maintains a commitment to the company vision
- Establish Web strategy by researching, analyzing, and defining customer requirements; and identifying target customers.
- Ensure customer satisfaction
- Resolve customer complaints regarding sales and service[.]

[The beneficiary] is required to keep abreast of all new regulations and changes in law which can have an impact on our production decision making, manufacturing and processing. Additionally, numerous factors in the economy can affect our decision making. [The beneficiary] is required to keep in tune with all economic changes.

[The beneficiary] directs and oversees the production staff through his Production/Shop Manager, [REDACTED]

* * *

The Production/Shop Manager oversees four shop laborers. . . .

Please note that we will be hiring an additional manager for our Garage Door distribution operations within the next 6 months. This individual will work under the management of [the beneficiary].

* * *

[The beneficiary] continues to have full discretionary authority of our company's day to day operations. He reports directly to me, the owner of the company.

The petitioner provided an undated organizational chart for the U.S. company, depicting [redacted] as president, supervising [redacted] as "administrator/bookkeeper" and the beneficiary as "operations manager." The chart indicates that the beneficiary, as the operations manager, supervises a "distribution manager," [redacted] but notes that this person is "to be transferred." The distribution manager supervises a "shop manager," [redacted] who supervises a "shop foreman," [redacted] who then supervises a "shop laborer," [redacted]

As evidence of wages paid to its employees, the petitioner submitted its IRS Form 941, Employer's Quarterly Federal Tax Return, for the second quarter of 2012, and an Employee Earnings Record showing weekly earnings for all employees between May 1 and July 18, 2012. The petitioner reported a total of seven employees on the Form 941. Based on the Employee Earnings Record, the petitioner employed the following staff as of July 2012: the beneficiary, [redacted] and [redacted]. One additional employee, also named [redacted] received wages in May and June 2012.

The petitioner provided a brief list of job duties for the president, administrator/bookkeeper, distribution manager, shop manager, shop foreman, shop laborer, and operations manager (the beneficiary). The beneficiary's duties were described, in part, as follows:

- A) Make sure that the construction of the glass and vinyl building is running according to schedule. And [k]eep owner informed of any delays or problems which might arise. 10%
 - B) Through the shop foreman, will also oversee the crew in the welding and installation department which is currently functioning. 10%
 - C) Until a full crew is hired, he will be responsible for interviewing and hiring the necessary temporary personnel for window installation projects; 30%
 - D) Develop processing schedules based on projected number of windows to be built; develop budgets and expenditures and confer with owner on same; Analyze staffing requirements and responsibilities related to business needs and forecasts; Monitor the company's performance and prepare reports for parent company, as well as plan for changes to schedules and policies; set operation policies and standards, including determination of safety procedures for the handling of goods and ensure compliance with transport regulations. 40%
 - E) Liaise with warehouse worker with regards to inventory and delivery of finished products. 5%
- Through his subordinate worker (shop foreman, provide a continuously safe and healthy work place and environment [sic]. Through the shop foreman, he will insure [sic] that the window installations are being done to order and as per the customers' instructions. 5%

On January 24, 2013, the director issued a request for additional evidence ("RFE") in which he instructed the petitioner to submit a definitive, detailed statement from the U.S. company describing the beneficiary's duties, the percentage of time he spends on each duty, the number and types of subordinates he supervises, and their job duties and education levels. The director further observed that the evidence showed a "tenuous connection" between the beneficiary's managerial position and the petitioner as his name and signature did not appear on the company's legal documents or invoices, the company's bank account, or copies of proposals and estimates given to customers, etc.

In response to the RFE, the petitioner submitted a letter specifically describing the beneficiary's duties as follows:

Management Duties:

[The beneficiary] is required to direct and coordinate activities of [the petitioner] which concern production, pricing, sales, & distribution of the company's products.

- Interview workers when necessary. Through Foremen, plan, assign, and direct work; appraise performance. Interpret specifications and job orders to workers, and assign duties. 15%
- Reward and discipline employees; address complaints and resolve problems; interpret company policies to workers and enforces safety regulations; analyze and resolve work problems, or assist workers in solving work problems; initiate or suggest plans to motivate workers to achieve work goals. 20%
- Inspect finished products for conformance to specifications; study production schedules and estimate worker hour requirements for completion of job assignment; maintain time and production records; estimate, requisition, and inspect materials. Establish and adjust work procedures to meet production schedules; recommend measures to improve production methods and equipment to increase efficiency of work crew[.] 30%
- Holds daily meetings with his shop manager; attends weekly meetings with Owner to discuss company operations; review financial statements, sales and activity reports, and other performance data to measure productivity and goal achievement and to determine areas needing cost reduction and program improvement. 30%
- Monitor customer preferences to determine focus of production efforts. 05%

The petitioner provided a brief list of job duties for the following subordinates: [redacted] distribution manager; [redacted] shop manager; [redacted] laborer; and [redacted], warehouse coordinator.

The petitioner provided a new, undated, organizational chart for the U.S. company, depicting [redacted] as president, supervising a "business operations manager" indicated "to be hired." It appears that the proposed business operations manager position will supervise "sales representatives," also "to be hired," [redacted]

independent contractor/window installation and outside sales, administrator, management consultant, and the beneficiary as operations manager. administrator, supervises receptionist/secretary. The beneficiary, operations manager, supervises distribution manager, who supervises warehouse coordinator, and shop manager, who then supervises laborer.

The petitioner submitted a print-out of its Texas Employer's Quarterly Report for the third quarter of 2012, the quarter in which the petition was filed. The petitioner reported a total of nine employees, including: and (the beneficiary). Two of these nine employees received less than \$250 in wages during the quarter.

On March 27, 2013, the director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity in the United States. In denying the petition, the director observed that the job descriptions provided for the beneficiary's position are general and broad and fail to convey an understanding of what the beneficiary would actually be doing on a daily basis.

On appeal, counsel for the petitioner asserts that the beneficiary is employed by the petitioner in a managerial capacity. Counsel reiterates the same list of job duties for the beneficiary previously submitted with the petition and in response to the RFE. The petitioner also submits a new organizational chart and a declaration from counsel explaining the discrepancy in the number of current employees listed on the Form I-140.

The new organizational chart depicts as president, supervising as administrator/bookkeeper and the beneficiary as operations manager. the administrator/bookkeeper, supervises two secretaries, and . The beneficiary, as operations manager, supervises shop manager, who supervises shop laborer, shop laborer, , shop laborer, and shop laborer.

Upon review, and for the reasons discussed herein, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the 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 entities in question, the size of the subordinate staff of the entity in question, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role within the petitioning entity.

The petitioner's description of the beneficiary's duties fails to establish that the beneficiary will be employed in a qualifying managerial or executive position. The petitioner has not provided sufficient information detailing the beneficiary's duties at the U.S. company to demonstrate that these duties qualify him as a

manager or as an executive. The petitioner provided two different lists of job duties at the time of filing, and stated that each list of duties accounts for 100% of the beneficiary's time. One of descriptions provided by the petitioner at the time of filing specifically identifies "management duties," to which the beneficiary devotes 75% of his time, and non-managerial duties, which take up the remaining 25% of his time. The petitioner characterized the beneficiary's role as operations manager and initially identified some of his "management duties" as, "plan, assign, and direct work"; "appraise performance"; "address complaints and resolve problems"; "inspect finished products for conformance to specifications"; "interpret company policies to workers and enforce safety regulations"; "hold daily meetings with shop manager"; and "direct and coordinate activities of [the petitioner] which concern production, pricing, sales, or distribution of the company's products." The petitioner identified his "non-executive managerial" duties as, "attend trade shows and represent company"; "maintain a commitment to the company vision"; "establish web strategy by researching, analyzing, and defining customer requirements; and identifying target customers"; "ensure customer satisfaction"; and "resolve customer complaints regarding sales and service."

When asked to submit a comprehensive description of the beneficiary's job duties, the petitioner rearranged the beneficiary's previously listed duties and allocated 100% of his time to the "management duties" initially listed with the petition. The petitioner did not even reference the "non-executive managerial" duties previously listed as taking up 25% of the beneficiary's time or the duties included in the second position description provided at the time of filing. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather changed the initial percentage of time spent on the listed duties from 75 to 100 and allocated specific percentages to each grouping of duties. The petitioner also provided a new organizational chart with additional subordinates not previously listed at the time of filing. 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 response to the RFE, the petitioner identifies each of these and other listed tasks as managerial and concludes that the beneficiary spends 100% of his time on these tasks. However, the majority of the duties described in the record, which the petitioner states will account for more than half of the beneficiary's time, cannot be classified as managerial. The petitioner indicates that the beneficiary devotes at least 60% of his time to non-qualifying operational duties, such as, "interview workers when necessary"; "through foremen, plan, assign, and direct work"; "appraise performance; "interpret specifications and job orders to workers, and assign duties"; "address complaints and resolve problems"; "interpret company policies to workers and enforce safety regulations"; "analyze and resolve work problems, or assist workers in solving work problems"; "initiate or suggest plans to motivate workers to achieve work goals"; "inspect finished products for conformance to specifications"; "study production schedules and estimate worker hour requirements for completion of job assignment"; "estimate, requisition, and inspect materials"; and "monitor customer

preferences to determine focus of production efforts." The petitioner indicates that the beneficiary is actually responsible for performing the majority of the day-to-day tasks associated with first-line supervision of non-professional workers in the manufacturing and warehouse departments of the business. 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).

While the AAO acknowledges that 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 would perform are only incidental to the proposed position. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

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, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Although the AAO does not find that the size of the petitioning entity served in any way as an obstacle to establishing eligibility, this factor can and should be considered for the purpose of determining who within the organization would be available to perform the necessary non-qualifying such that the beneficiary is relieved from having to allocate the primary portion of his time to tasks that are not within a qualifying managerial or executive capacity. Neither the petitioner's reasonable needs nor its stage of development can be used to justify a favorable finding when the petitioner is unable to establish that the beneficiary would spend his time primarily performing tasks within a qualifying capacity.

Here, the petitioner has submitted three different organizational charts. The first organizational chart indicates that the beneficiary has four subordinates, one of which was pending transfer from the foreign entity. The second organizational chart also indicates that the beneficiary has four subordinates, but some of the titles differ from the first chart. The third and final organizational chart, submitted on appeal, indicates that the beneficiary has five subordinate, and again, some titles have changed from the previous chart. Additionally, some of the job duties for the beneficiary's subordinates not only overlap with the beneficiary's listed duties, such as those relating to the supervision or management of lower-level staff, but have changed over time. For example, at the time of filing the petition, the petitioner indicated that the "shop manager," [REDACTED] devotes 35% of her time to supervision of lower-level employees, while it did not list any supervision duties for the "distribution manager," who was pending transfer from the foreign entity. In response to the RFE, the petitioner indicates that [REDACTED] "distribution manager" will devote 10% of his time to "supervise shop employee[s]," and [REDACTED] shop manager, has a vague reference to "supervising shop helper" among her list of duties without any specific allocation of time. 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 (BIA 1988).

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 his 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 subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

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

As previously indicated, the petitioner has failed to establish that the petitioner has reached a stage in its development such that it could relieve the beneficiary from having to primarily carry out non-qualifying tasks. Notwithstanding the beneficiary's placement within the petitioner's hierarchy, the petitioner has not established that the job duties to be performed in the proposed position would be primarily within a managerial or executive capacity. While the petitioner has submitted a five-year business plan outlining the company's anticipated growth, the petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Accordingly, the appeal will 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.