



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **APR 16 2014**

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 Florida corporation that is engaged in metal recycling and the wholesale trade of machinery. The petitioner seeks to employ the beneficiary in the United States as its president/managing director. 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.

In support of the Form I-140 the petitioner submitted a statement dated December 3, 2010, which contained relevant information pertaining to the petitioner's eligibility, including descriptions of the beneficiary's foreign and proposed employment. The petitioner also provided evidence in the form of business documents pertaining to both entities as well as a copy of the petitioner's organizational chart.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a notice of intent to deny (NOID) dated August 27, 2012 informing the petitioner of various evidentiary deficiencies. The director made a number of observations regarding the evidence on record, finding that the record lacked sufficient evidence establishing that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The director instructed the petitioner to provide additional evidence, including a current organizational chart, job descriptions and evidence of the educational credentials of the beneficiary's subordinates, and evidence of wages paid to the petitioner's employees in 2010 and 2011, including IRS Form W-2 statements and Form 941 quarterly tax returns for all four quarters in 2011 and for the first two quarters of 2012.

The petitioner's response included several job descriptions for the beneficiary's proposed position, the petitioner's updated organizational chart, Form W-2 wage and tax statements the petitioner issue to its employees in 2010 and 2011, numerous quarterly federal tax returns, résumés belonging to the beneficiary's subordinates, the beneficiary's pay stubs, and the petitioner's 2010 and 2011 annual tax returns.

After considering the documents submitted as part of the response, the director determined that the petitioner failed to establish that the beneficiary would be employed with the U.S. entity in a qualifying managerial or executive capacity. The director observed the wages paid to the petitioner's employees in 2010, the year during which the petition was filed, and determined that a number of the employees were part-time or seasonal workers. The director questioned the petitioner's ability to employ the beneficiary in a primarily managerial or executive capacity and subsequently issued a decision dated November 7, 2012 denying the petition.

On appeal, counsel disputes the director's adverse determination, asserting that the director considered the petitioner's staffing without taking into account the petitioner's reasonable needs in light of its overall purpose and stage of development pursuant to 8 C.F.R. § 204.5(j)(4)(ii). Counsel also asserts that the director failed to consider the beneficiary's role in managing the entire U.S. entity or his authority over the U.S. entity's personnel, policies, and business strategy.

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. Discussion

The primary issue is whether the beneficiary's proposed employment with the U.S. entity would be in a primarily managerial or executive capacity.

A. Inconsistencies

As a preliminary matter, we will address director's determination regarding the distinctions between the original organizational chart the petitioner submitted in support of the petition and the one that was more recently submitted in response to the NOID. The petitioner was expressly instructed in the NOID to provide an organizational chart depicting its "current corporate structure," whereas the chart that was provided in support of the original petition was likely a representation of the petitioner's organizational structure at or near the time the petition was filed. It is reasonable to accept certain organizational changes may have taken place during the interim time period between the filing of the petition, which took place on December 17, 2010, and the NOID response, which was received by the service center on October 1, 2012.

However, the record reflects significant inconsistencies that cannot be attributed to the mere passage of time. For instance, the petitioner has not provided an explanation for altering the beneficiary's position title from "president/managing director," as indicated in the Form I-140 and in the initial organizational chart, to

"general manager," as indicated in the recently submitted job description and organizational chart. The original organizational chart also shows the position of purchase coordinator as one of the beneficiary's three subordinate employees, while the current chart excludes the position of purchase coordinator altogether and instead replaces that position with that of a financial manager—the only similarity between the two positions being that neither the purchase coordinator nor the financial manager have subordinate employees of their own. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Additionally, while the petitioner submitted an organizational chart depicting its "current organizational structure" in an attempt to comply with the director's request in the NOID, the question of the petitioner's eligibility requires a review of those facts and circumstances that existed at the time of filing. 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. 1971). Furthermore, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Therefore, even in instances where an entity's organizational chart reflects developments and advancements within the petitioner's organization, the petitioner maintains the burden of establishing its ability to employ the beneficiary in a qualifying managerial or executive capacity as of the date the petition was filed.

Lastly, in addressing the issue of inconsistencies, a review of the résumés of the beneficiary and [REDACTED] shows that both individuals' respective employment histories include having apparently worked in the same position of the general manager of the foreign entity in 2006 and 2007, ending in May 2008 after which the beneficiary (and possibly [REDACTED] was transferred to the United States. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and in this case, we have two individuals filling the same position at the same time.

B. Totality of the Record

Inconsistencies aside, we review the totality of the record when examining the beneficiary's executive or managerial capacity, 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). This information will be considered 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, the size of the beneficiary's subordinate staff, and any other facts that may contribute to a comprehensive understanding of the beneficiary's actual role in the organizational hierarchy of the entity in question.

Turning first to the petitioner's initial supporting statement dated December 3, 2010, the job description included therein was vague and lacked sufficient information about the actual job duties the beneficiary would be expected to perform in his proposed position. For instance, the petitioner broadly stated that the beneficiary would spend 30% of his time coordinating plans and company policies, developing and implementing business strategies, directing and coordinating sales, marketing, financial, and administrative management functions, providing guidance and assistance in planning, implementing, and evaluating

operations, systems, and procedures, and creating processes to ensure that operations run smoothly. However, these generalities fail to explain the specific underlying tasks that the beneficiary would perform or clarify the extent of his involvement in sales, marketing, and administrative functions. As indicated above, only by revealing the beneficiary's specific tasks would USCIS be able to gauge the extent to which the beneficiary would or would not be involved in the petitioner's daily operational tasks. *See id.*

The petitioner further stated that the beneficiary would allocate another 20% of his time to formulating and implementing growth strategies, including identification of business opportunities and setting business goals, developing business relationships and managing key accounts, developing marketing opportunities to ensure business growth, developing sales presentations, and managing and executing all aspects of product development. Without further explanation, a number of the items associated with formulating and implementing growth strategies would require the beneficiary's direct involvement in actual sales and marketing tasks. It is therefore unclear what portion of this segment of the job description would involve qualifying tasks that are within a managerial or executive capacity. Similarly, the beneficiary's human resources responsibilities would go beyond merely having discretion over hiring and firing and would actually require the beneficiary to carry out non-qualifying tasks, including training and allocating work to employees, resolving problems, and motivating the employees. Lastly, the beneficiary's time spent dealing with subcontractors, suppliers, and collaborators, negotiating contracts on behalf of the company, and communicating with potential and existing clients to establish and maintain business relationships would also be deemed as tasks that are outside the purview of an employee who works primarily within a managerial or executive capacity.

While we have reviewed the information that the petitioner provided in response to the NOID with regard to the beneficiary's position with the U.S. entity, it appears that the more recent job description does not reflect the petitioner's organization as it existed at the time the petition was filed. Namely, items 1, 2, 4 and 9, which account for 25% of the beneficiary's time, either mention the position of financial manager or mention job duties related to a position dealing with finances, despite the fact that the original organizational chart indicates that the petitioner did not fill the position of financial manager or a similar position when the petition was filed. Given the petitioner's references to a position that clearly did not exist as part of the petitioner's organization when the petition was filed, it is unclear how much of the job description can actually be applied to the organizational structure that existed at the time of filing. Furthermore, while item No. 16, which would consume 10% of the beneficiary's time, indicates that the beneficiary's role with respect to the petitioner's finances would be limited to merely directing and coordinating financial activities, this claim is not supported by the petitioner's original organizational chart, which indicates that the petitioner did not employ a financial manager to assume tasks related to the petitioner's finances.

Additionally, several items in the job description, namely, Nos. 11, 13, 17, contained statements that were overly vague and thus failed to explain the beneficiary's role with regard to certain tasks. For instance, it is unclear what specific tasks would be involved in planning and developing short- and long-term goals and annual objectives, determining whether events and processes meet regulatory and legal standards, and overseeing compliance to determine procedures and guidelines. These responsibilities, which cumulatively account for 30% of the beneficiary's time, are so broad as to preclude any meaningful understanding of the underlying tasks that would be involved given the petitioner's particular type business operation and in light of the petitioner's specific organizational structure at the time of filing.

Lastly, the activities mentioned in Nos. 7, 10, and 14, which amount to another 25% of the beneficiary's time, are not readily identifiable as qualifying managerial- or executive-level tasks. Specifically, looking to item No. 7, it is unclear by what means the beneficiary would ensure the movement of goods in and out of the petitioning entity without assuming an active role with respect to the operational tasks associated with "the movement of goods." Further, the beneficiary's responsibility for developing relationships with suppliers and various service providers can be better classified as operational, non-qualifying tasks rather than tasks that fall within the purview of a manager or executive, as defined by the Act. See sections 101(a)(44)(A) and (B) of the Act. Finally, while reviewing market research in order to make recommendations to the board of directors regarding new business opportunities is not outwardly a non-qualifying task, it is unclear who within the petitioner's organizational hierarchy was available to actually do the market research that would serve as the basis for the beneficiary's recommendations to the board.

In light of the deficiencies discussed above with regard to both sets of job descriptions, neither version describes the characteristics of someone who is to be employed primarily within a qualifying managerial or executive. 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 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).

In the present matter, given the various anomalies and unanswered questions regarding the beneficiary's job duties and the petitioner's organizational limits at the time the petition was filed, the evidence does not support a conclusion that the petitioner was ready and able to relieve the beneficiary from having to allocate his time primarily to the performance of non-qualifying tasks. While counsel challenges the director's consideration of the petitioner's staffing structure, asserting that the director neglected to consider the petitioner's reasonable needs in light of its stage of development, it must be emphasized that the petitioner's needs, no matter how reasonable, cannot supersede the statutory requirement that mandates the petitioner to establish that the beneficiary's time would be allocated primarily to the performance of qualifying tasks. Section 101(a)(44)(C) of the Act.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. See *Systronics*, 153 F. Supp. 2d at 15.

Building on the discussion above, it is important to consider who within the organization was performing the petitioner's daily operational tasks at the time the petition was filed. Here, the petitioner did not present the

information that is necessary to ascertain who within the organization was available to perform the necessary operational tasks, what tasks the beneficiary himself would perform given the organizational structure the petitioner had in place at the time of filing, and what portion of the beneficiary's time would be allocated specifically to qualifying managerial or executive tasks.

In light of the above, the petitioner has not established that it was ready and able to employ the beneficiary in a qualifying capacity at the time the petition was filed. If USCIS fails to believe that an asserted fact stated in the petition is true, USCIS may reject that assertion. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

While counsel clearly disagrees with the director's conclusion, the appellate brief contains no persuasive legal argument or additional pertinent information that would indicate that the director's decision was made in error. Therefore based on the foregoing discussion of the relevant facts that have been presented herein, the instant petition does not warrant approval and the appeal will be dismissed.

III. Additional Deficiencies

Additionally, while not previously addressed in the director's decision, the record contains other deficiencies that preclude approval of the petition.

First, the record lacks sufficient evidence to establish that the beneficiary was employed abroad during the requisite time period in a qualifying managerial or executive capacity. As previously discussed, both the beneficiary's résumé and the résumé of one of his direct subordinates in his position with the U.S. entity indicate that both individuals were employed in the position of general manager during an overlapping period in excess of two years. It is not credible to claim that two different people filled the same position—that of general manager—within one entity. Again, if USCIS fails to believe that an asserted fact stated in the petition is true, USCIS may reject that assertion. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Although the petitioner's earlier submissions indicated that the beneficiary was employed abroad in the position of executive director, this information is not consistent with the beneficiary's own résumé, which indicates that the beneficiary assumed the position of general manager during his claimed employment with the foreign entity. As indicated previously in this discussion, the petitioner bears the burden of resolving any inconsistencies in the record, particularly when the inconsistencies are material to issues concerning the petitioner's eligibility. *See Matter of Ho*, 19 I&N Dec. at 591-92.

Furthermore, the record lacks sufficient information pertaining to the foreign entity's organizational hierarchy or the beneficiary's role and job duties therein to enable a determination regarding the nature of beneficiary's employment abroad. Therefore, in light of the above described anomaly as well as the lack of necessary information pertaining to the beneficiary's employment abroad, the petitioner has not established that the beneficiary meets the statutory requirement regarding his foreign employment. *See also* 8 C.F.R. §§ 204.5(j)(3)(i)(A) and (B).

Second, the petitioner has not provided evidence to establish that the foreign entity, where the beneficiary was allegedly employed prior to coming to the United States, continues to do business. The regulation at 8 C.F.R. § 204.5(j)(2) defines doing business as the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office. In the present matter, the record lacks sufficient evidence, such as invoices for services or goods provided, to establish that the foreign entity was doing business at the time the petition was filed.

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). Therefore, based on the additional deficiencies discussed above, this petition cannot be approved.

IV. 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, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.