



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **APR 18 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 Director, Texas 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 filed this Form I-140, Immigrant Petition for Alien Worker, 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 petitioner, a Florida corporation, is engaged in the wholesale trade of tropical fruits and is a subsidiary of [REDACTED] the beneficiary's former employer in Ecuador. It seeks to employ the beneficiary as its general manager.

The director denied the petition, concluding that the petitioner failed to establish: (1) that it will employ the beneficiary in a qualifying managerial or executive capacity; and (2) that the beneficiary's employment abroad was within 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 for review. On appeal, counsel for the petitioner asserts that the denial of the petition was in error based on the evidence and facts presented. The appeal consists of counsel's brief and additional documentary evidence.

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

The issues to be addressed in this matter are whether the petitioner established: (1) that the beneficiary will be employed in the United States in a qualifying managerial or executive capacity; and (2) that the petitioner's foreign parent company employed the beneficiary in a qualifying managerial or executive capacity for at least one year in the three years preceding his admission to the United States as a nonimmigrant.

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

The petitioner filed the Form I-140 on October 9, 2012. The petitioner indicated on the petition that it is engaged in the wholesale trade of tropical fruit, with seven employees, and gross annual income exceeding \$3.2 million.

In a letter dated May 4, 2012, the petitioner described the beneficiary's duties as general manager follows:

The supervision of the current and future employees as may be hired by the company; training of Employees (hiring and firing of employees); managing the Sales and Finances; planning, developing and implementing company strategy; planning the future expansion of the business; developing and implementing policies and new procedures for sales company; determining mark-up percentages necessary to insure profit, based on estimated budget, profit goals and average rate of client acquisition; developing policies and procedures for procurement of services; oversee the negotiating of contracts with clients; authorizing purchase of contract services based on estimates; formulating pricing policies for sales; review statements, invoices, bills of lading and insurance certificates; supervising the contact with the different purchasers; coordinate and develop the public relations policies designed to improve the business's image and relations with customers, the community and the public; evaluate market for new profitable opportunities in order to attain established policies and objectives of the company; plan and implementing new operating procedures to improve efficiency and reduce costs; review activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions; direct and coordinate formulation of financial programs to provide funding of new or continued operations to maximize returns on investments and increase productivity; evaluate market for new profitable opportunities in order to attain established policies and objectives of the company.

The petitioner indicated that the beneficiary will have supervisory authority over six employees, including two professionals with knowledge and experience in the international trade and financial fields.

In a letter dated July 2, 2012, counsel for the petitioner stated that the beneficiary's subordinates include: a sales manager (); a financial consultant (); a salesman (); two sales-administrative assistants () and an administrative

assistant – secretary [REDACTED] The petitioner provided copies of its federal and state quarterly tax returns confirming its employment of these employees, including the beneficiary, as June 2012.

Counsel’s letter also included a slightly different overview of the beneficiary’s duties as general manager. Counsel stated that the beneficiary allocates 45% of his time to “the management, supervision and control of the corporate activities,” 25% of his time to personnel supervision activities, 20% of his time compiling trade and consumer research, and 10% of his time traveling and promoting the business through direct visits to customers, phone calls and internet use.

The director issued a request for additional evidence (RFE) on December 21, 2012. The director requested, in part, the petitioner’s organizational chart and a copy of its Internal Revenue Service (IRS) Form 941, Employer’s Quarterly Federal Tax Return, for the third quarter of 2012.

In response, the petitioner submitted an organizational chart identifying the beneficiary as general manager supervising [REDACTED] – Business Manager, [REDACTED] – Accounting & Finance, and [REDACTED] – Administrative Manager. The chart depicts two employees subordinate to [REDACTED] namely [REDACTED] – Logistics & Quality, and [REDACTED] – Sales & Market Research. The chart further depicts [REDACTED], Administrative Assistant reporting to [REDACTED]. In addition, the beneficiary is shown to supervise a legal consultant as well as an “agent associate” identified as Hispanic Products, Distribution & Services. Finally, the chart indicates that [REDACTED] the business manager, has indirect supervisory authority over [REDACTED]. The petitioner provided copies of its IRS Forms 941 for the last two quarters of 2012, indicating that it paid seven (7) employees in each quarter.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. In denying the petition, the director determined that the beneficiary’s duties were described in vague terms that failed to specify what he actually does on a day-to-day basis. Further, the director found insufficient evidence that the beneficiary’s subordinate employees relieve him from involvement in the operational tasks inherent to operating the petitioner’s wholesale fruit export business.

On appeal, the petitioner asserts that the evidence establishes that the beneficiary holds the senior position in the company with the associated level of authority and performs indispensable functions related with the development of the business activities.” The petitioner maintains that the evidence submitted establishes that the beneficiary does not perform basic tasks such as manufacturing a product or providing services, as these tasks are executed by his subordinate employees, and that the beneficiary’s duties are primarily managerial or executive in nature.

In support of the appeal, the petitioner submits evidence of educational credentials for three of the beneficiary’s subordinates, and copies of business correspondence and other business documents related to the beneficiary’s offered position. Counsel emphasizes that USCIS recently approved the petitioner’s request to extend the beneficiary’s L-1A nonimmigrant status based on similar facts and evidence.

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 whether the beneficiary will be employed in an executive or managerial capacity, we will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5).

The petitioner submitted a broad overview of the beneficiary's duties which outlines his authority for setting policies and procedures, planning for business expansion, developing and implementing the company's strategies, hiring, supervising and training all employees, managing sales and finance, and formulating financial programs. While these duties reflect that the beneficiary exercises the appropriate level of authority over the company and its operation, the petitioner has not described what specific tasks the beneficiary performs or how much time he allocates to such tasks. 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).

Further, other duties included in the beneficiary's job description, such as evaluating the market, overseeing contract negotiations, authorizing purchases, reviewing statements, invoices, bills of lading, and supervising contact with purchasers, suggest the beneficiary's more direct involvement in the company's sales, marketing, purchasing and logistics functions. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's described above do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). The record contains only a broad breakdown of the beneficiary's duties that is insufficient to establish how much time the beneficiary spends on qualifying tasks.

Although the director addressed the deficiencies in the beneficiary's job description in the notice of denial, the petitioner has not provided a more detailed description of his daily duties on appeal. Rather, counsel asserts that director erred in finding the position description deficient and states that "the functions detailed, in a 100%, correspond to the executive and managerial tasks, as you may find and consider and provide in multiple books or treaties about business and managerial administration." Counsel provides a copy of a non-precedent AAO decision in support of her assertion that the beneficiary will perform primarily qualifying duties. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are

not similarly binding. Counsel's reliance on the definitions of managerial and executive duties found in unspecified books about business administration is similarly unpersuasive.

Further, the documentary evidence submitted in support of the appeal confirms that the beneficiary does in fact allocate some portion of his time to non-qualifying duties that must be considered operational or first-line supervisory in nature. For example, the petitioner submitted an e-mail from the beneficiary to a client in which he states: "I've been instructed by my father to search for different products in the USA that you may need for your new warehouse in Tyrana, such as grains, sunflower, and corn oil and exotic fruits. I have already contact a couple of exporters that have reply to me their inquiries. . . . Please send me pictures, packing details, all the information available in order to obtain the precise product for your needs." The record also includes an e-mail from the beneficiary to his administrative subordinates in which he states that "one of my clients is demanding the following products" and requests their assistance in finding suppliers for the products. While the beneficiary undoubtedly delegates some tasks to subordinates, there is also evidence that he is directly involved in purchase and sales transactions and other customer interactions on a day-to-day basis.

In sum, the position description and supporting evidence provided suggests that the beneficiary performs a combination of qualifying managerial and executive and non-qualifying operational duties and fails to adequately address how much time he allocates to managerial or executive functions. Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to understanding the beneficiary's actual duties and role in a business.

The petitioner has consistently claimed to employ a total of seven employees including the beneficiary; however, it has provided inconsistent information regarding its employees' job titles. At the time of filing, the petitioner stated that the beneficiary's subordinates include a sales manager, financial consultant, a salesman, two administrative-sales assistants and an administrative assistant – secretary. In response to the RFE, the petitioner stated that these same employees hold the titles of business manager, accounting & finance, sales & market research, logistics & quality, and administrative assistant. The petitioner also identified an administrative management position, an "agent associate" and an external company, [REDACTED] on its organizational chart, which were not identified at the time of filing. The only position descriptions offered for the beneficiary's subordinates correspond to the job titles submitted 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). Due to these unexplained inconsistencies, the petitioner has not provided evidence to establish what functions the beneficiary's subordinates and external contractors perform or to what extent they relieve the beneficiary from performing the non-qualifying duties associated with the day-to-day operation of its wholesale trade business.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act. If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Section 101(a)(44)(a)(iii) of the Act.

The petitioner has not established that the beneficiary's subordinates are managers or supervisors. As discussed, the petitioner provided inconsistent job titles for nearly all of its employees and did not provide position descriptions corresponding to the job titles submitted on its organizational chart. Therefore, while the chart depicts two employees subordinate to the business manager, his job title alone is insufficient to establish that he is a manager or supervisor. The other claimed managerial or supervisory employee, the administrative manager, was not identified among the petitioner's employees at the time of filing. A 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).

The petitioner has submitted sufficient evidence that one of its employees, the finance and accounting employee, has a bachelor's degree in economics and additional qualifications in accounting and is more likely than not performing in a professional capacity.¹ However, the beneficiary's supervision of a single professional employee is insufficient to establish that beneficiary will primarily perform the duties of a personnel manager. The petitioner also submitted educational qualifications for the administrative manager, but did not establish that she was employed at the time of filing, and for an employee initially

¹ In evaluating whether the beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, we focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above.

identified as a salesman, but did not provide sufficient evidence of his job duties to support a finding that he will be employed in a professional capacity.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

As discussed, the record establishes that the beneficiary has the appropriate level of authority and indicates that his duties will include establishing the organization's goals and policies. However, due to the lack of specificity in the beneficiary's job description, his performance of non-qualifying duties, and the petitioner's failure to provide consistent information regarding the roles of the beneficiary's subordinate staff, the record as a whole fails to support a conclusion that the beneficiary would be performing primarily executive duties, or a conclusion that the beneficiary's subordinates relieve him from involvement in the day-to-day operations of the business.

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.

Here, the petitioner introduced discrepancies in the record with respect to the company's organizational structure. While the company's size is not dispositive in this matter, it is reasonable to expect a petitioner with seven employees to consistently identify its employees' job titles and roles in support of its assertion that those subordinates relieve the beneficiary from involvement in non-qualifying duties such as first-line supervision of lower-level staff, sales, marketing, and other operational functions associated with the 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. Based on the deficiencies addressed

above, the petitioner has not established that it has a reasonable need for the beneficiary to perform primarily managerial or executive functions.

Counsel asserts that USCIS has approved L-1A nonimmigrant petitions filed on behalf of the beneficiary based on similar facts and evidence. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427. Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

In making a determination of statutory eligibility, USCIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). In this matter, the record of proceeding contains insufficient information regarding the beneficiary's actual job duties and inconsistencies regarding the job titles, roles and duties of the beneficiary's subordinates and therefore falls short of establishing that the beneficiary will be employed in a qualifying managerial or executive capacity.

B. Foreign Employment in a Managerial or Executive Capacity

The remaining issue addressed by the director is whether the petitioner established that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity.

In denying the petition, the director found that the petitioner submitted an overly vague description of the beneficiary's job duties and failed to provide evidence that the beneficiary's subordinates within the foreign entity were professionals.

Upon review, the AAO will withdraw the director's determination with respect to this issue. The petitioner has established that the beneficiary was employed abroad in an executive capacity. The record reflects that the beneficiary served as president of a 42-person company with a subordinate general manager, at least two tiers of subordinate managers and supervisors, and sufficient lower-level staff to perform the day-to-day tasks associated with the company's major functions, and to relieve the beneficiary from involvement in such tasks. The petitioner complied with the director's requests to submit the foreign entity's organizational chart, provided the requested job titles and job duties for the beneficiary's subordinates, submitted an adequately detailed description of the beneficiary's duties, and has further supplemented the record on appeal.

The petitioner has submitted relevant, probative, and credible evidence to support a conclusion that the beneficiary was more likely than not employed abroad in an executive capacity. Therefore, the director's adverse finding with respect to this issue alone will be withdrawn.

III. Conclusion

The petition will be denied and the appeal will be dismissed based on a finding that the petitioner did not establish that it will employ the beneficiary in a qualifying managerial or executive capacity. 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 been met.

ORDER: The appeal is dismissed.