



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: AUG 25 2014 OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

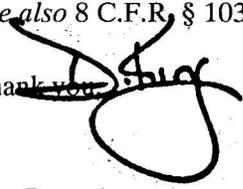
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:
[REDACTED]

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 Nebraska Service Center Director denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a multinational organization operating in the United States as a natural gas compression equipment and services provider. It seeks to employ the beneficiary in the United States as its senior service manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary was employed abroad and that he would be employed in the United States in a qualifying managerial or executive capacity.

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. Procedural History

The record shows that the petition was filed on May 14, 2013 and was accompanied by a supporting statement, dated May 7, 2013, which included brief job descriptions of the beneficiary's foreign and proposed employment. In addition to the supporting statement, the petitioner provided organizational charts for the U.S. and foreign employers, depicting the staffing structures and the beneficiary's respective positions therein.

After reviewing the record, the director determined that the petitioner did not provide sufficient evidence to establish that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity. Accordingly, the director issued a request for evidence (RFE), dated September 13, 2013, in which he instructed the petitioner to provide additional job descriptions for the beneficiary's positions with the foreign and U.S. entities. The director stated that the job descriptions were to describe the beneficiary's job duties in much greater detail, listing his specific daily tasks along with an

estimate of the percentage of time the beneficiary allocated and would allocate to each job duty with the respective entities. The director also instructed the petitioner to provide detailed organizational charts for each entity and job descriptions for the beneficiary's supervisors and subordinates. Lastly, the director asked the petitioner to provide information about the scope and nature of each entity's operations and to discuss the beneficiary's role within the context of those operations.

The petitioner's response included a statement, dated November 22, 2013, in which counsel provided a job description and percentage breakdown for the beneficiary's proposed position with the U.S. entity. Counsel declined to provide job descriptions for the beneficiary's superior and subordinate employees at each position, asserting that the director's request was burdensome and not required by applicable regulations that govern the filing of the instant immigrant visa petition. The petitioner also provided two additional statements, both dated November 12, 2013, addressing the beneficiary's former and proposed employment. Both statements included the beneficiary's job descriptions and percentage breakdowns with his respective employers.¹ The petitioner also provided both entities' organizational charts, reiterating the information that was provided in the original charts.

In a decision dated December 11, 2013, the director denied the petition, concluding that the petitioner failed to establish that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity. The director also noted that the petitioner failed to provide information that was requested in the RFE in the form of job descriptions of the beneficiary's superiors and subordinates at his respective positions with the foreign and U.S. entities.

The petitioner subsequently filed an appeal with a supporting statement from counsel, who asserts that the petitioner met its burden of proof. Counsel states that the petitioner provided lengthy job descriptions regarding the beneficiary's foreign and U.S. employment and asserts that the director's decision to deny the petition is an abuse of discretion. Counsel further states that the director cannot deny the petition based on the petitioner's failure to submit evidence that is not mandatory.

Based upon the review conducted pursuant to the petitioner's appeal, and for the reasons stated below, we find that the petitioner has failed to establish that the beneficiary was employed abroad and would be employed in a primarily managerial or an executive capacity.

III. Issues on Appeal

As indicated above, the primary issues to be addressed in this proceeding call for an examination of the beneficiary's former and proposed positions with the foreign and U.S. entities, respectively.

A. Qualifying Employment Abroad

In general, when examining the executive or managerial capacity of a given position, we review the totality of the record, starting first with the description of the beneficiary's job duties with the foreign entity. *See 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). Beyond the required description of the job duties, we conduct a review of other relevant factors, including the

¹ It is noted that the job description contained in the petitioner's separate statement is identical in content to the job description that was included in counsel's statement.

employer's organizational structure, the presence of subordinate employees and their respective positions, the nature of the business conducted by the employing entity, and any other factors that may contribute to a comprehensive understanding of a beneficiary's actual duties and role in his position with the foreign entity.

In the present matter, the petitioner described the beneficiary's employment abroad in its initial statement and in a separate statement that was part of the petitioner's RFE response.² In the statement submitted in the RFE response, [REDACTED] the foreign entity's human resources director, explained that certain job duties that the beneficiary performed overlapped and further stated that the beneficiary did not perform all of the listed job duties on a daily basis. While this information would not lead to an adverse decision, we note that the format of the percentage breakdown is confusing and fails to provide an accurate depiction of the time allocations. Regardless of whether the beneficiary performed each of the listed job duties on a daily basis, the petitioner was expressly instructed to indicate what percentage of the beneficiary's time on the job were allocated to the individual job duties included in the job description. In other words, the claim that the beneficiary allocated 80% of his time to managing the foreign entity's projects and another 80% of his time managing professional employees that reported to him suggests a mathematical impossibility where 100% is the most that the beneficiary could allocate to all of the job duties combined. Thus, while it appears that the beneficiary spent the same amount of time managing the foreign entity's projects as he spent managing professional employees, the actual portion of time the beneficiary allocated to each of the fourteen job duties listed in the job description is entirely unclear.

We also concur with the director's finding that use of the term "manage" to describe what the beneficiary was actually doing is insufficient, as the foreign entity's job description fails to specify what actual tasks the beneficiary carried out to manage the operational activities of various projects and the foreign entity's preventative maintenance program and commissioning standards. Furthermore, the record lacks evidence to support the claim that the beneficiary managed the work of 23 professional employees. In the foreign entity's organizational chart, the beneficiary is shown as holding a superior position over four divisions: the planning/warehouse, transportation, and mechanic divisions, and one division comprised of shift supervisors. In addition, while the chart suggests a tier-like hierarchy by listing two mechanics helper positions directly below the company's two mechanics and an [REDACTED] technician directly below the mechanics helpers, there is no evidence to suggest that the mechanics supervised the mechanics helpers or that the mechanics helpers supervised the [REDACTED] technician, as no supplemental job descriptions were provided for any of the beneficiary's subordinate employees. Despite the contentions counsel expressed in his RFE response statement and on appeal, asserting that the director's request for job descriptions of the beneficiary's subordinates was unreasonable, such information is highly relevant and could have been used to explain and clarify the specific hierarchy within the petitioning entity.

Furthermore, regarding counsel's claim that the director instructed the petitioner to provide additional evidence that was not expressly mandated by relevant regulatory provisions, the regulation at 8 C.F.R. § 103.2(b)(8) states that even in instances where the petitioner provides all of the required initial evidence, U.S. Citizenship and Immigration Services (USCIS) may still find that eligibility has not been established. The same provision gives USCIS the discretionary authority to determine not only whether to issue an RFE or notice of intent to deny, but also to determine the content of either type of notification. Thus, while it is true that the regulations do not expressly require the petitioner to provide evidence in the form of job descriptions

² As the director included both job descriptions in his decision denying the petition, this information need not be restated in the instant discussion.

of the beneficiary's subordinates, this omission is not to be interpreted as an indication that the director abused his discretion by having requested this information in the RFE. Contrary to counsel's understanding, the director has broad discretionary authority with regard to the issuance of an RFE and its content. While the petitioner may choose to disregard a request they find to be overly burdensome or unreasonable, the regulation at 8 C.F.R. § 103.2(b)(14) expressly states that failure to submit requested evidence *that precludes a material line of inquiry* shall be grounds for denying the petition. Here, the petitioner's failure to provide the requested job descriptions precludes a material line of inquiry, as the subordinates' job descriptions often help to establish the staffing hierarchy within a given chain of command and, in the case of subordinates who are not supervisory or managerial employees, help establish the level of knowledge and education required for a given position, which may assist in determining whether a particular subordinate is employed in a professional capacity.

In addition, the record lacks any evidence to support counsel's claim that two of the beneficiary's subordinate employees – a QHSE³ supervisor and an [REDACTED] technical support provider – were degreed professionals. As indicated above, the petitioner did not provide either employee's job description nor did the petitioner supplement the record with evidence of either individual's educational credentials. Moreover, despite counsel's claim that these two positions were among those that were directly subordinate to the beneficiary, the foreign entity's organizational chart shows both positions at a parallel tier within the foreign entity's staffing hierarchy, thus indicating a high probability that neither individual answered directly to the beneficiary, but rather was likely to have been supervised by the same operations manager, who was positioned in the chart as the beneficiary's superior. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Lastly, counsel asserts on appeal that the petitioner does not need to establish that the beneficiary's subordinates were professional employees because the subordinates were working in supervisory positions. However, a review of the foreign entity's organizational chart does not show that either the planning and warehouse employee or the transportation employee held supervisory or managerial positions, as the chart did not identify any subordinate employees in their charge. Similarly, given the petitioner's failure to provide sufficient evidence showing that the two mechanics or the mechanics helpers hold supervisory or managerial positions, the director was correct in attempting to assess the professional nature of these employees, who also appear to be the beneficiary's direct subordinates. The petitioner's failure to establish that the mechanics, mechanics helpers, and the two [REDACTED] technicians hold positions of a professional nature precludes us from finding that this set of subordinate employees fit at least one of the four statutory criteria. *See* section 101(a)(44)(A)(ii) of the Act. As stated above, counsel's statements, particularly when they contradict evidence that the petitioner has submitted, will not constitute probative evidence and cannot be given evidentiary weight in this proceeding. *See id.*

In light of the considerable shortfalls of the supporting evidence submitted in this proceeding, it cannot be concluded that the beneficiary was more likely than not employed abroad in a qualifying managerial or executive capacity. While it is not impossible that the beneficiary's position abroad may meet the statutory requirements, the record lacks sufficient evidence to enable us to make an affirmative conclusion. Therefore, contrary to counsel's assertion, the petitioner has failed to meet the preponderance of the evidence standard

³ QHSE stands for quality, health, safety and environment.

with regard to the beneficiary's former employment abroad and on the basis of this initial conclusion, this petition cannot be approved.

B. Qualifying Employment in the United States

Next, turning to the beneficiary's proposed employment with the petitioning U.S. entity, we conduct a similar comprehensive analysis of the totality of the record. As indicated above, a determination of the beneficiary's managerial employment capacity starts with an analysis of the beneficiary's proposed job duties with the petitioning entity. *See* 8 C.F.R. § 204.5(j)(5).⁴ Reviewing the evidence in the matter at hand, we note that the deficiencies we observed in the beneficiary's description of his employment abroad similarly apply to the description of the beneficiary's proposed employment with the petitioning U.S. entity. Namely, [REDACTED] the petitioner's human resources manager, provided a similar explanation as the one provided by the foreign entity's human resources director, claiming that the beneficiary would perform overlapping job duties and that not all of the listed job duties were be part of the beneficiary's daily routine. Again, we note that the format of the percentage breakdown provided by both human resources employees is confusing and fails to provide an accurate depiction of the beneficiary's time allocations. Regardless of whether the beneficiary would perform each of the listed job duties on a daily basis, the petitioner was expressly instructed to indicate what percentage of the beneficiary's time would be allocated to each of the beneficiary's assigned tasks in his proposed employment. Claiming that the beneficiary would spend 80% of his time managing the petitioner's central northeast region and another 80% of his time managing professional employees is mathematically impossible where 100% represents all of the time the beneficiary's would spend on the job and each of the beneficiary's assigned job duties represent a portion of the total 100%. In other words, 100% is the most that the beneficiary could allocate to all of the job duties combined. Thus, while it appears that the beneficiary may spend the same amount of time managing the central northeast region as he spends managing professional employees, the actual portion of time the beneficiary allocated to each of the individual job duties is entirely unclear. While counsel, in the appellate brief, points to the length of the beneficiary's job description, we find that merely providing a lengthy description is not sufficient if that description lacks the necessary degree of detail.

In addition, the record lacks sufficient evidence to support the claim that the three intermediate-level field service technicians, who are directly subordinate to the beneficiary, are supervisory employees who manage the work of four entry-level field service technicians. While the respective position titles denote a difference in the level of experience possessed by the intermediate- versus entry-level field service technicians, it is not clear that this distinction alone is sufficient to establish that the intermediate-level field service technicians supervise the entry-level technicians. Furthermore, as the petitioner failed to provide job descriptions for any of the beneficiary's subordinates, it is unclear how the three intermediate-level field service technicians manage their purported subordinates. The petitioner's claim that the three intermediate-level field service technicians are supervisory employees rests entirely on an organizational chart that depicts only one of the intermediate-level field service technicians – [REDACTED] – at a supervisory level. The two remaining intermediate-level field service technicians – [REDACTED] – are not shown as supervising any subordinates despite the fact that their respective positions are depicted at a higher level within the petitioner's organizational hierarchy than that of the entry-level field service technicians. The petitioner provided no other information clarifying what types of supervisory job duties would be performed

⁴ As the director included the petitioner's job description with the petitioning entity in the decision denying the petition, we need not repeat this information in the instant proceeding.

or how the supervisory job duties would be divided among the three intermediate-level field service technicians if, in fact, they are supervisory employees.

In addition, similar to the foreign entity's organizational chart, the petitioner's organizational chart also depicts two employees – a QHSE manager and another charged with mechanical integrity – at the same tier of the petitioner's hierarchy as that of the beneficiary himself. Therefore, despite the claim that these two positions are among those that are directly subordinate to the beneficiary, the petitioner's organizational chart does not support this claim. Furthermore, even if the organizational chart depicted the QHSE manager and mechanical integrity as the beneficiary's subordinates, the record lacks any evidence to support the claim that these individuals are degreed professionals as claimed in the RFE response statement that contained the beneficiary's job description. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

While we acknowledge 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). In the present matter, the record does not establish precisely how much of the beneficiary's time would be allocated to non-qualifying tasks, including managing subordinates at the level of a first-line supervisor. Furthermore, while it appears that the beneficiary performs tasks at a professional level, the petitioner has failed to establish that the primary portion of the beneficiary's time would be allocated to performing tasks that rise to the level of managerial or executive capacity.

In summary, the above analysis indicates that the petitioner has failed to provide sufficient probative evidence to properly support the claim that the beneficiary would be employed in a qualifying managerial capacity where the primary portion of his time would be spent managing a staff of supervisory, professional, or managerial employees. As with the beneficiary's employment abroad, while it is not impossible that the beneficiary's proposed position may meet the statutory requirements, the record lacks sufficient evidence and thus precludes an affirmative conclusion. Therefore, the petitioner has failed to meet the preponderance of the evidence standard with regard to the beneficiary's proposed employment and on the basis of this second adverse conclusion, 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, 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.