



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **DEC 04 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)

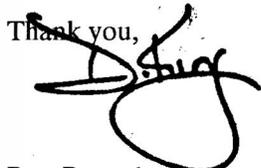
ON BEHALF OF PETITIONER:

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 revoked approval of the preference 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 is engaged in the import and export of general merchandise. The petitioner seeks to employ the beneficiary in the position of President.

The Form I-140 was filed on October 27, 1997. On November 9, 2010, the United States and Immigration Service ("USCIS") sent the petitioner a Notice of Intent to Revoke. On November 2, 2011, the director revoked approval of the petition, concluding that the petitioner did not submit sufficient evidence in rebuttal to the USCIS' Notice of Intent to Revoke and has not overcome the grounds for revocation. On February 4, 2013, USCIS moved to reopen the matter. The director sent requests for additional evidence on February 6, 2013 and August 1, 2013.

On December 6, 2013, the director denied the immigrant petition, finding the petitioner had failed to establish that the beneficiary would be employed within a qualifying managerial or executive capacity.<sup>1</sup>

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to us for review. On appeal, the petitioner submits a brief disputing the director's adverse findings.

On appeal, the petitioner contends that the director's decision to revoke the petitioner's previously approved preference visa petition over "twelve years after learning the purportedly derogatory information that necessitated the revocation was lawless" because "it violated an explicit regulatory limit on Director's authority to revoke [approval of a] petition;" and "the delay violated Petitioner's due process rights by impeding its ability to gather evidence necessary to mount a defense."

As a preliminary matter, Section 205 of the Act, 8 U.S.C. § 1155, states: "The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Esteime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of

<sup>1</sup> The director denied the petition, effectively revoking approval of the petition.

proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

*Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).

## 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.

Additionally, the regulations at 8 C.F.R. § 204.5(j)(3)(i) state that the petitioner must provide the following evidence in support of the petition in order to establish eligibility:

- (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
- (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;

- (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
- (D) The prospective United States employer has been doing business for at least one year.

## II. THE ISSUE ON APPEAL

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

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

#### 1. Facts

The petitioner offered the beneficiary the position of President. In support of the petition, the petitioner submitted a list of company employees with a brief job description for each employee. The beneficiary is listed as President who is "in charge of executive tasks." The beneficiary would supervise the manager of the warehouse and shipping department, the manager of the purchasing department and the secretary/accounting clerk. The petitioner submitted Forms W-2 for 1996 that indicated the petitioner employed five individuals in 1996, the year prior to filing the instant petition.

In response to the director's RFE dated February 6, 2013, the petitioner provided additional information regarding the proffered position:

- Executive & Strategy Duty: (estimate use 55% of working time)
- Carrying out the vision expressed by board of directors, establish and develop branch's strategies and operational policies to achieve business success and continuous generation of revenue.
  - Devise and set up the annual budget and fiscal plan and present it to the board of directors.
  - Make hiring and firing decision, training performance evaluations, salary pay and raise, staff disputes and ensure that deadlines are met.
  - Organizing the matters in connection with the establishment of the branches at beginning only need three departments.
  - Motivate and assist each department managers to achieve business objective.
  - Maintain long and short term economic viability surrounding the marketing of off grade paper, make sure nothing get bogged down in operations and develop new business opportunities.
  - Offering suggestion and feedback valuable information to board.

- Investigate problems from daily business operation of each department and decide the solution, lead the company through the day-to-day tasks necessary to keep the business profitable.
- Assesses the business staffing needs, plan expansion or reduction of the employee population.
- Established budget control system for controlling expenditures, recommending and implementing changes in operation.
- Analyze financial statement, sales reports, purchase reports, decide which areas cost cutting can be done.
- Representing [the petitioner] in all matters in respect of business operation and management.

Management Performance: (estimate use 45% of working time)

- Start a new business branch and manage it grows enough to support several level of management like parent company in China.
- Be responsible to manage and supervise all aspects of the company, report to and work under the supervision of board of directors.
- Team working with department heads, face to face meeting to communicate effectively and provide report operational functions, determine the root of problem and solve the problem on time.
- Review and monitoring daily business transaction, A/R, A/P, payroll, sales, purchase, inventory, sign check and invoice.
- Contact with CPA firm to ensure a clean and timely yearend audit, ensure all financial report deadlines are met.
- Maintains work flow processes, address concerns and praises successes.
- Visiting and negotiating with national & international supplies, attending trade shows, keep the business updated with the latest market trends.
- Prepare report regarding market condition and merchandise cost, control purchasing budget.
- Locate, select and procure merchandise for resale, solving the problem in purchase negotiation.
- Recommended new product by evaluating current products and identify customer needs.
- Deal with the supplies and maintain healthy relations with them.

[sic]

The petitioner also explained that the beneficiary's subordinates include: a Department Manager and one employee in the Warehouse and Shipping Department; a Purchasing Department Manager; and a Secretary/Accounting Clerk. The petitioner provided a brief job description for each employee.

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

## 2. Analysis

When examining the executive or managerial capacity of the beneficiary, we review the totality of the record, starting first with the petitioner's description of the beneficiary's proposed 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 job descriptions of the beneficiary's subordinate employees, the nature of the business that is conducted, the petitioner's subordinate staff, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role within the petitioning entity. While an entity with a limited support staff will not be precluded from the immigration benefit sought herein, it is subject to the same burden of proof that applies to a larger entity with a moderate or large subordinate staff. In other words, regardless of an entity's size or support staff, the petitioning entity must be able to provide sufficient evidence showing that it has the capability of maintaining its daily operations such that the beneficiary would be relieved from having to primarily perform the operational tasks.

In the present matter, upon review of the totality of the record, the evidence does not support a finding that the beneficiary would allocate her time primarily to the performance of tasks that are within a qualifying managerial or executive capacity.

On review, the petitioner provided a vague and nonspecific description of the beneficiary's duties with the petitioner that fails to demonstrate what the beneficiary did on a day-to-day basis. For example, the beneficiary will "establish and develop branch's strategies and operational policies to achieve business success and continuous generation of revenue;" and "investigate problems from daily business operation of each department and decide the solution, lead the company through the day-to-day tasks necessary to keep the business profitable." This description provides little insight into what the beneficiary primarily will do on a day-to-day basis and did not explain the petitioner's strategies and operational policies and goals. 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. at 1108.

The job description also includes several non-qualifying duties such as the beneficiary will "devise and set up the annual budget and fiscal plan and present it to the board of directors;" "establish budget control system for controlling expenditures, recommending and implementing changes in operation;" "analyze financial statement, sales reports, purchase reports, decide which areas cost cutting can be done;" "maintains work flow processes, address concerns and praises successes;" "visiting and negotiating with national [and] international supplies, attending trade shows, keep the business updated with the latest market trends;" "prepare report regarding market condition and merchandise cost, control purchasing budget;" and, "locate, select and procure merchandise for resale, solving the problem in purchase negotiation." It appears that the beneficiary will provide the services such as preparing the financial budgets, handling the work flow processes, negotiating,

marketing and market research and purchasing inventory rather than overseeing other employees that will perform the day-to-day tasks of running the business operations. Thus, it appears that the beneficiary is performing the duties inherent in running all of the charitable projects. An employee who "primarily" performs the tasks necessary to produce a product or provide a service 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).

Moreover, a critical analysis of the nature of the petitioner's business undermines the petitioner's assertion that the beneficiary is employed in a managerial or executive capacity. The Form I-140, submitted on October 27, 1997, stated that the petitioner employs five individuals. In response to the director's RFE dated February 6, 2013, the petitioner stated that it employs the beneficiary as President; a Department Manager and an employee in the Warehouse and Shipping Department; a Department Manager in the Purchasing Department; and a Secretary/Accounting Clerk. The petitioner also provided Forms W-2 Wage and Tax Statement for 1997, the year the I-140 was filed. According to the tax forms, the petitioner employed five individuals and paid the following wages:

- The Warehouse and Shipping Department Manager received a salary of \$4,400.
- The Purchasing Department Manager received a salary of \$4,000.
- The secretary/accounting clerk received a salary of \$3,040.
- The Warehouse and Shipping Department employee received a salary of \$2,640.

On appeal, the petitioner states that the wages appear low today but "there has been a substantial inflation between 1997 and 2014." The petitioner also stated that it was a start-up and it is "common knowledge that start-ups often do not have the funds to pay their employees competitive wages," and "consequently, they offer their employees non-cash incentives to supplement their wages." However, the petitioner did not submit any evidence to establish that they provided the employees other incentives to supplement their wages. 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).

Further, the petitioner indicated on its organizational chart that of the beneficiary's four subordinates, only one employee worked 40 hours a week. The chart indicates:

- The Warehouse and Shipping Department Manager worked 30 hours per week.
- The Purchasing Department Manager worked 30 hours per week.
- The secretary/accounting clerk worked 40 hours per week.
- The Warehouse and Shipping Department employee worked 25 hours per week.

Thus, the evidence of record is not sufficient to establish that the petitioner had sufficient employees that would perform the various operational tasks inherent in operating a business on a daily basis, such as purchasing inventory, paying bills, handling customer transactions, shipping, customs, and

negotiating contracts. The record is unclear as to the beneficiary's actual role and responsibilities within the petitioner's organization.

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 operations duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. As discussed above, the petitioner has not identified employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business.

In summary, the petitioner has failed to provide sufficient evidence to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity and the instant petition cannot be approved.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See sec. 291 of the Act, 8 U.S.C. 1361; see also *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. at 376 (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. See *U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (discussing "more likely than not" as a greater than 50 percent probability of something occurring).

Here, the submitted evidence does not meet the preponderance of the evidence standard. As noted in the director's decision, the petitioner did not provide sufficient evidence to establish the petitioner meets the regulatory requirements to establish eligibility for the I-140 immigrant visa petition.

### III. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reason. 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.