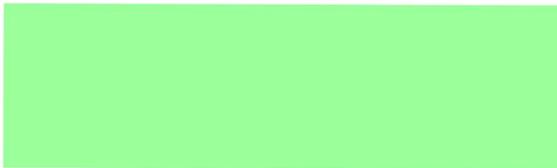




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **DEC 11 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 Maryland corporation that seeks to employ the beneficiary in the United States as its general 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 would be employed in the United States or that she was employed abroad 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. Factual Background and Procedural History

The record shows that the petition was filed on August 30, 2011. The petition was accompanied by a supporting statement, dated August 18, 2011, containing a description of the beneficiary's proposed job duties as well as job descriptions of her three subordinates – a marketing manager, sales manager, and a customer service manager – all depicted in the petitioner's organizational chart, which was also provided in support of the petition along with the petitioner's 2010 tax return and bank statements from November and December 2010 and January 2011. With regard to the beneficiary's employment abroad, the petitioner provided a letter, dated August 22, 2011, from the foreign entity's Human Relations (HR) director. The letter contains a chart depicting the foreign entity's management hierarchy with the beneficiary's position of Director of Business Development highlighted in red. The HR director claimed that the beneficiary is the direct superior to eight managers in the departments listed under the business development department.

On August 6, 2013, the director issued a request for evidence (RFE), informing the petitioner that the record lacks sufficient evidence to establish the petitioner's eligibility for the immigration benefit sought. The director noted a deficiency in the organizational chart depicting the foreign entity's management hierarchy and instructed the petitioner to provide a definitive statement describing the beneficiary's specific daily job duties, the percentage of time she would devote to each job duty, and IRS Form W-2 wage and tax statements for the petitioner's employees during the relevant time periods.

The petitioner's response included statements dated August 22, 2013 and August 28, 2013 from representatives of the foreign entity and the petitioner, respectively. Each statement included the beneficiary's job description with that entity and the entity's organizational chart with the beneficiary's position depicted therein. The petitioner also provided 2013 pay stubs for the five employees within the marketing department over which the beneficiary would preside under an approved petition.

After reviewing the petitioner's submissions, the director determined that the petitioner failed to establish that the beneficiary's employment abroad or her proposed employment with the petitioner meet the statutory criteria. The director therefore issued a decision dated October 4, 2013, denying the petition.

On appeal, counsel contends that the director made erroneous findings of fact. Counsel asserts that the petitioner complied with RFE instructions and submitted sufficient evidence to overcome the denial. Although counsel marked Box B at Part 2 of the Form I-290B to indicate that he intends to submit a brief and/or additional evidence within 30 days of filing the appeal, the record contains no evidence to indicate that any further evidence was provided subsequent to the filing of the appeal. Therefore, the record will be considered complete as presently constituted.

Upon review, and for the reasons stated below, we find that the petitioner has failed to establish that the beneficiary will be employed in the United States in a qualifying managerial or executive capacity or that her former employment with the foreign entity meets the statutory criteria pertaining to employment abroad.

III. Issues on Appeal

As indicated above, the two primary issues to be addressed in this proceeding pertain to the beneficiary's proposed employment with the petitioning entity and her former employment abroad.

A. Qualifying Employment in the United States

First, we will address the beneficiary's proposed position with the petitioning entity. 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 proposed job duties with the petitioning entity. See 8 C.F.R. § 204.5(j)(5). Published case law has determined that the duties themselves will reveal the true nature of the beneficiary's 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). That said, a detailed job description, without supporting evidence, would not be sufficient in determining that the beneficiary would be employed in a qualifying managerial or executive capacity. In other words, merely providing a detailed job description conveying an understanding of the beneficiary's proposed daily tasks would not be deemed sufficient if the petitioner ultimately lacked an organizational structure and support staff at the time of filing such that it was capable of relieving the

beneficiary from having to allocate her time primarily to tasks of a non-qualifying nature. As such, we consider other highly relevant factors, in addition to the beneficiary's job description, including the petitioner's organizational structure at the time of filing and the presence of other employees available to relieve the beneficiary from performing operational duties. We also assess these factors in light of the petitioner's specific business activity in order to determine the likelihood that the petitioner has the support staff and organizational complexity to support the beneficiary in primarily managerial or executive capacity.

In the present matter, the explanation provided in the RFE response with regard to the job duties the beneficiary would be expected to perform is sufficient to convey a meaningful understanding of the beneficiary's proposed job duties and role within the petitioning entity. However, as indicated above, we look to other evidence in the record to support the assertions the petitioner conveys through the beneficiary's job description and the job descriptions of her subordinates. Here, the petitioner supports the claims made in the supplemental job description with an updated organizational chart (which shows additional employees in the marketing department) and a set of corresponding pay stubs from 2013. While the 2013 pay stubs support the information offered in the updated organizational chart, they are irrelevant as to the matter of the petitioner's eligibility at the time of filing, which took place in August 2011 and thus predated the pay stubs and organizational chart by approximately two years. 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. 1971). Further, evidence pertaining to the beneficiary's support staff is relevant and should be considered, as it allows U.S. Citizenship and Immigration Services (USCIS) to gauge the petitioner's ability to relieve the beneficiary from having to primarily engage in the daily operational tasks that cannot be deemed as qualifying. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). As such, it is reasonable to conclude that the beneficiary would be required to assist with daily operational tasks and would not be able to focus on primarily qualifying managerial or executive tasks when the beneficiary prospective employer, i.e., the petitioner, fails to establish the existence of an adequate support staff at the time the petition is filed.

In addition, the record lacks supporting evidence to establish that the individuals who were claimed to be the beneficiary's subordinates at the time of filing were supervisory, professional, or managerial employees, despite claims made in the petitioner's original supporting statement as to the subordinates' respective educational credentials. Section 101(a)(44)(A)(ii) of the Act. 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 the updated organizational chart shows that the sales manager – one of the beneficiary's three proposed subordinates – has two subordinates, thus indicating that the sales manager position is managerial or supervisory, the original chart, which purportedly reflects the petitioner's staffing at the time the petition was filed, indicates that the marketing department had not yet expanded to include the two sales agents who were later included in the petitioner's more recent chart, which depicts the petitioner's organizational composition at the time of the RFE response rather than at the time of filing.

On appeal, counsel contends that the director's inquiry as to the job duties, educational levels, and terms of employment of the beneficiary's subordinates is not permissible. This assertion is incorrect. As noted above, the director has the discretionary authority to consider evidence and information that is relevant in the matter of the petitioner's eligibility. Information pertaining to the job duties to be performed by the beneficiary's subordinates is highly relevant, as it provides insight as to who within the petitioner's marketing department, which the beneficiary would head, would perform the daily operational tasks, thus relieving the beneficiary

from having to allocate the primary portion of her time to matters that are outside the realm of what is deemed as being within a qualifying managerial or executive capacity. The subordinates' educational credentials are also relevant when such individuals do not manage or supervise subordinates of their own. 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. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). In contemplating whether the beneficiary's subordinate employees are professional, 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 a subordinate is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary to perform the work of the three positions depicted as subordinate to the beneficiary's proposed position.

In light of the above, we find that the director's inquiry as to the job duties and educational credentials of the beneficiary's proposed subordinates was reasonable and that lack of evidence pertaining to these factors that are relevant to the issue of the beneficiary's own employment capacity precludes us from being able to conduct an analysis of the factors that could effectively contribute to a more complete understanding of the beneficiary's proposed employment and any characteristics that indicate whether such employment would be primarily comprised of tasks within a qualifying managerial or executive capacity. Accordingly, we find that, regardless of any organizational growth the petitioner may have experienced since the petition was filed, the record lacks sufficient evidence to establish that the petitioner possessed the capability to relieve the beneficiary from having to focus her time primarily on the performance of non-qualifying tasks at the time of filing and on the basis of this initial adverse finding, the instant petition cannot be approved.

B. Employment Abroad

Next, we turn to the issue of the beneficiary's employment abroad. The director determined that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. In reaching this conclusion, the director noted that the petitioner failed to provide a definitive job description in response to the RFE. The director's finding, however, is incorrect for two reasons. First, we have reviewed the RFE and all of the instructions contained therein and find no evidence that the petitioner was instructed to provide a statement pertaining to her employment abroad. Second, despite the fact that the RFE did not include a specific request for a job description pertaining to the beneficiary's employment abroad, the record shows that the petitioner did in fact supplement the record with a statement, dated August 22, 2013, in which the foreign entity's president included a percentage breakdown of the job duties that purportedly comprised the beneficiary's position abroad. As such, the record contradicts the director's finding that the petitioner failed to address an issue that was originally raised in the RFE and that finding is hereby withdrawn. That said, it is important to point out that the portion of section 203(b)(1)(C) of the Act that pertains to the beneficiary's foreign employment lists three requirements. While the petitioner focuses on one of those elements, which requires that the beneficiary's employment abroad was comprised of primarily qualifying managerial or executive tasks, the two remaining elements are equally relevant and must be met in order to

establish the beneficiary's eligibility for classification as a multinational manager or executive. Namely, in addition to establishing that the beneficiary's position abroad involved primarily qualifying tasks, the petitioner must also provide evidence to establish that (1) the beneficiary's employment abroad was for at least one year during the three-year period either prior to the filing of the petition or prior to the beneficiary's entry to the United States as a nonimmigrant to work for the petitioner in a qualifying capacity and (2) that the beneficiary's managerial or executive position abroad was with a qualifying entity that either has a parent-subsidiary relationship with the petitioner or that the two entities are affiliates based on the definition found at 8 C.F.R. § 204.5(j)(2). See section 203(b)(1)(C) of the Act. Any time a petitioner fails to demonstrate all three of the elements described in this paragraph, we must conclude that the petitioner does not meet the statutory criteria pertaining to the beneficiary's employment abroad and the petitioner is therefore deemed to be ineligible for the immigration benefit discussed in section 203(b)(1)(C) of the Act.

In the present matter, the evidence of record fails to show that the petitioner met two out of three of the foreign employment requirements that are described in section 203(b)(1)(C) of the Act. First, the record shows that the petitioner elected to file its 2011 and 2012 U.S. Income Tax Returns as an S Corporation (Form 1120S). To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any foreign corporate shareholders. See Internal Revenue Code, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if a *foreign corporation* owns it in any part. Here, the petitioner would not be eligible to elect S-corporation status if, in fact, it is majority owned by the foreign entity as claimed herein. The record contains no evidence to resolve this conflicting information concerning the ownership of the petitioning entity. 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). Given the lack of evidence reconciling the petitioner's claimed ownership and the inconsistency created by the petitioner's filing its tax returns as a subchapter S-corporation, we are unable to conclude that [REDACTED] the beneficiary's claimed employer abroad, owns the majority of the petitioner's stock such that would create a parent-subsidiary relationship between the beneficiary's foreign employer and the U.S. petitioner that seeks to employ the beneficiary in the United States. See 8 C.F.R. § 204.5(j)(2) (for definition of the term *subsidiary*).

Second, the petitioner failed to demonstrate that the beneficiary was employed abroad with [REDACTED] for at least one year during the three years prior to the date the instant petition was filed. Although 8 C.F.R. § 204.5(j)(3)(i)(B) states that the applicable three year period may be based on the date of the beneficiary's nonimmigrant entry to the United States when the purpose of such entry is to work for the petitioning entity, the record in this matter shows that the beneficiary's prior entries to the United States were in the nonimmigrant visa category of a B-2 visitor. Accordingly, as the beneficiary's prior B-2 entries into the United States were not for the purpose of being employed as a manager or executive within the petitioning entity, they cannot be the basis for determining the relevant three-year time period during which the beneficiary's employment abroad would be considered and the filing date of the instant petition will be used as the basis for determining when the three-year period started to toll. Applying this reasoning to the petitioner's Form I-140 filing date of August 30, 2011, the relevant three year time period commenced on August 30, 2008. In other words, the petitioner must establish that the beneficiary was employed at [REDACTED], the petitioner's claimed parent entity, for at least one year between August 30, 2008 and August 30, 2011 when this petition was filed.

Looking to Part 3 of the instant Form I-140, the petitioner responded with April 30, 2011 in answer to the question asking for disclosure of the beneficiary's date of arrival to the United States. Referring to the beneficiary's Form G-325A, Geographic Information, the beneficiary indicated that she has been residing in the United States since April 2011. Despite the fact that the form expressly asked the beneficiary to list her residences during the last five years, the beneficiary listed only her latest U.S. residence, providing no information as to where she resided from February 2009, the month after her residence in [REDACTED] China terminated, to April 2011, when her residence in the United States allegedly commenced. A review of the petitioner's previously filed Form I-140 (with receipt number [REDACTED]) further shows that the beneficiary previously entered the United States on September 6, 2009 also as a B-2 nonimmigrant. However, the record does not contain any evidence establishing the duration of that stay, nor is there any information as to whether the beneficiary resided in the United States during any time other than the dates indicated in the petitioner's two Form I-140s.

Moreover, in the initial supporting statement, dated August 23, 2011, counsel provided two different dates when discussing the beneficiary's employment abroad. More specifically, while on one page of the statement counsel indicated that the beneficiary's employment with the foreign parent entity commenced in April 2010, on the following page of the same statement, counsel claimed that the beneficiary's employment with that entity commenced in June 2010. If, in fact, the beneficiary's employment with the parent entity commenced in June 2010, as indicated on page nine of counsel's supporting statement, the beneficiary cannot be deemed as having been employed by a qualifying entity for the complete 12-month period that preceded the filing of the petition. As previously indicated in this decision, the petitioner must resolve any inconsistencies in the record by submitting 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. at 591-92. As the record contains no documentary evidence, such as the beneficiary's pay stubs or the foreign entity's payroll documents, to establish the full duration of the beneficiary's claimed employment with [REDACTED], this considerable inconsistency remains unresolved and it cannot be concluded that the beneficiary's employment abroad meets the statutory criteria discussed at section 203(b)(1)(C) of the Act.

On appeal, counsel asserts that the director violated the petitioner's right to due process by introducing in the denial an issue that had not been previously addressed in the RFE. Counsel's assertion, however, is without merit. First, we noted that there is no statutory or regulatory requirement mandating the director to limit the denial only to those issues that had been previously addressed in an RFE. In fact, the provisions at 8 C.F.R. § 103.2(b)(8) expressly allow the director the discretionary authority to determine when or if to issue an RFE or a notice of intent to deny (NOID). In other words, the director is under no legal obligation to issue either an RFE or a NOID prior to denying the petition. It follows, therefore, that the director may discuss any issue concerning the petitioner's eligibility, regardless of whatever issues may have been previously addressed in an RFE or NOID. Second, the record contains no evidence, that the director was in violation of the regulations or that a violation, if one had been committed, resulted in "substantial prejudice" to them. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). A review of the record and the adverse decision indicates that the director adequately applied the statute and regulations to the petitioner's case. As previously discussed, the petitioner has not met its burden of proof and the denial was the proper result under the regulation. Accordingly, the petitioner's claim is without merit.

As indicated above, meeting the criteria concerning the beneficiary's employment abroad requires the petitioner to establish the presence of multiple factors. As such, we cannot limit this discussion to include only the beneficiary's employment capacity in her position with the foreign parent entity. Given the petitioner's failure to establish that a qualifying relationship exists between the petitioner and the beneficiary's employer abroad and its inability to demonstrate that the beneficiary's qualifying employment lasted the entire year within the relevant three-year time period, we cannot conclude that the beneficiary was employed abroad in a qualifying managerial or executive capacity as statutorily required. Therefore, the instant petition must be denied on this basis.

IV. Conclusion

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, in light of the findings issued in the director's decision and the additional finding issued by this office, that burden has not been met.

ORDER: The appeal is dismissed.