

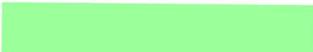


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: FEB 03 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)

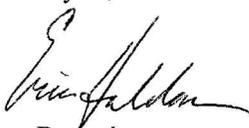
ON BEHALF OF PETITIONER:


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 preference visa petition and dismissed the petitioner's subsequent motion to reconsider. The petitioner appealed the matter to the Administrative Appeals Office (AAO) and the appeal was dismissed. The matter is now before the AAO on motion to reopen and reconsider. The AAO will grant the motion and affirm its previous decision. The petition will remain denied.

The petitioner is a Georgia limited liability company that seeks to employ the beneficiary as its executive. 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 had been employed abroad or would be employed in the United States in a qualifying managerial or executive capacity. In denying the petition, the director determined that the petitioner failed to submit a sufficiently detailed description of the beneficiary's duties and failed to establish that he has sufficient personnel to relieve him from performing the non-managerial functions of the petitioner's retail business. Furthermore, the director found that the record did not establish that the beneficiary's prior employment with the petitioner's claimed parent company was in in a managerial or executive capacity because it appeared the beneficiary served as a first-line supervisor of non-professional employees. The petitioner filed a timely motion to reconsider, and the director dismissed the motion without disturbing the initial denial.

On appeal, counsel asserted that the director's decision was arbitrary and the reasoning inconsistent. Counsel stated that the director failed to properly review the evidence of record and failed to explain why the evidence by itself, and when viewed in its totality, failed to meet the preponderance of the evidence standard.

The AAO dismissed the appeal concluding that the petitioner failed to establish that the beneficiary had been employed abroad, or would be employed in the United States in qualifying managerial or executive capacity. In addition, although not addressed in the director's decision, the AAO found that the evidence of record was insufficient to establish that the petitioner had a qualifying relationship with the foreign entity.

The petitioner subsequently filed the instant motion to reopen and reconsider which consists of a Form I-290B, Notice of Appeal or Motion and counsel's brief.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, that a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an

incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

On motion, counsel for the petitioner objects to each of the grounds for denial as stated in the AAO's decision, and references specific inconsistencies and deficiencies that formed the basis of the AAO's analysis. Counsel suggests that the AAO failed to consider the totality of the evidence submitted and placed undue emphasis on perceived inconsistencies and insufficiencies in the record.

The AAO will grant the petitioner's motion in order to consider the issues raised in counsel's brief. The petitioner did not submit additional evidence in support of the motion.

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.

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

In dismissing the petitioner's appeal, the AAO determined that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity as defined at sections 101(a)(44)(A) and (B) of the Act. The AAO reviewed the totality of the evidence submitted including the beneficiary's job descriptions, the petitioner's staffing levels, the number and types of subordinate employees working for the company, and the nature of the business, in reaching its conclusion.

With respect to the beneficiary's job duties, the AAO emphasized that the petitioner provided a brief breakdown of the beneficiary's duties at the time of filing which identified the percentage of time he would allocate to performing nine different functions. The petitioner submitted a separate statement of duties at the time of filing which listed 10 duties, several of which were not included in the other position description. In response to the director's request for evidence (RFE), the petitioner submitted a third, lengthier description of the beneficiary's duties, which also included tasks that were not in the original breakdown of how the beneficiary's time would be allocated. For example, the initial job description indicated that the beneficiary would allocate much of his time to financial duties, cost control, investment, and market analysis, while the job description submitted in response to the RFE indicated that half of the beneficiary's duties relate to the day-to-day supervision of the petitioner's store. The AAO further found that several of the duties included in the petitioner's expanded description of the beneficiary's duties could not be considered managerial in nature.

With respect to the petitioner's staffing and organizational structure, the AAO emphasized that the petitioner stated on the Form I-140 Immigrant Petition for Alien Worker, that its current number of employees at the time of filing in December 2011 was "15 – may vary." The petitioner submitted an organizational chart which identified 15 employees by name. However, the petitioner's state employer's quarterly reports and quarterly federal tax returns indicated, and the petitioner later conceded on appeal, that the company actually employed only four employees as of the date of filing. The AAO observed that two of the employees identified on the relevant quarterly report were not identified on the petitioner's organizational chart, and thus it was unclear which positions were actually occupied at the time of filing. Further, the record reflected that six of the 15 employees named on the organizational chart did not work for the petitioner at all in 2011. The AAO emphasized that the petitioner failed to provide any explanation for these discrepancies.

Based on the petitioner's payment of only four employees at the time of filing, the AAO found that the petitioner had not met its burden to establish that the lower-level staff would relieve the beneficiary from performing non-managerial duties associated with the operation of the petitioner's store. The quarterly wage report reflected that the claimed assistant manager did not work for the company at the time of filing, and reflected that the shift manager was not employed on a full-time basis. In light of the deficiencies addressed with respect to the beneficiary's job descriptions and the petitioner's actual staffing levels, the AAO concluded that the petitioner failed to establish by a preponderance of the evidence that it would employ the beneficiary in a qualifying managerial or executive capacity.

On motion, counsel asserts that the job descriptions provided are wholly consistent and any differences between them are the result of the petitioner providing USCIS with the requested greater level of detail in response to the RFE. Counsel raises no other objection to the AAO's analysis of the beneficiary's job duties.

Counsel also addresses the AAO's findings regarding the petitioner's staffing levels:

The petitioner is aware that at the time of filing there were four employees; [h]owever, in immediate employment quarters before that there were more than twice as many, and in quarters since then, there have been more than that. As stated, the

number of employees "vary"; but there are sufficient employees to perform tasks that free the beneficiary to perform the tasks described [in] the regulations.

* * *

The Service may examine the reasonable needs of a small organization. However, this does not mean that a small organization does not need the executive and managerial guidance of senior-level direction, even where there are few employees. The Service is imposing their determination of managerial needs upon a small business, rather than accounting for the needs of the small business within the regulations, as envisioned by the Act. This business . . . does conduct operations in a regular and continuous manner, through employees and managerial structure. See *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Counsel, citing *Family, Inc. v. USCIS*, 469 F. 3d 1313, 1316 (9th Cir. 2006), asserts that the petitioner's business "is not so 'small' that it cannot support a position such as that proposed for the beneficiary." Further counsel cites *Matter of Church Scientology, Int'l*, 19 I&N Dec. 190 (Reg. Comm'r 1972) and contends that the beneficiary is not necessary to the daily "functioning" of the business.

Upon review, the petitioner has not submitted legal arguments or evidence on motion to overcome the AAO's adverse finding.

As discussed, the petitioner introduced a significant discrepancy in the record when it stated on the Form I-140 that its current number of employees is "15 – may vary." While there is evidence reflecting some variance in the petitioner's number of employees from month-to-month, it is uncontested that the actual number of employees working for the petitioner as of the date of filing was four, not 15 as stated on the petition. In light of this fact, it would have been accurate for the petitioner to state "4 – may vary" on the Form I-140.

Although counsel indicates that the petitioner employed twice as many workers immediately prior to the quarter of filing and even more employees since then, the petitioner has not provided documentary evidence in support of these claims. The record contains the petitioner's Georgia Employer's Quarterly Wage and Tax Report from the fourth quarter of 2010, which indicates that the company employed 10-11 employees one year before the petition was filed. The record is devoid of any evidence that the petitioner ever employed a staff of 15. Furthermore, 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 fact that the petitioner's number of employees may vary does not exempt it from providing accurate information regarding its actual staffing levels and organizational structure as of the date of filing. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

On motion, the petitioner has not addressed the inconsistencies between the petitioner's organizational chart and its quarterly wage reports, nor has it identified the names and job titles of those employees actually working at the time of filing. Counsel contends that the AAO is "unimpressed with the Organizational Chart" and asserts that it nevertheless "stands as accurate." Counsel elaborates by stating that "the Petitioner employed the number of employees it stated at the time it employed them." Finally, counsel asserts that the petitioner "employs at any given time its necessary number of employees; those necessary to free the Beneficiary to perform executive and managerial responsibilities normal to this type of business."

As noted, there were significant unresolved discrepancies in the record with respect to the company's staffing. Counsel's statement that the organizational chart with 15 named employees "stands as accurate" is unpersuasive in light of the petitioner's admission that it employed four workers at the time the organizational chart was submitted. 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).

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

At the time of filing, the petitioner operated a gas station and convenience store with four employees. The AAO cannot determine which positions were occupied or whether the positions were full-time or part-time. Nevertheless, the record shows that the company employed the beneficiary as president and three subordinates as of December 2011.

Counsel and the petitioner claim that the petitioner's store has supported a significantly larger staff, and the record shows that the petitioner had employed 10-11 staff for the same business in 2010. However, the petitioner has not explained how three subordinate employees, at least one of which worked part-time, are able to perform the duties previously performed by 9 or 10 staff. Nor has the petitioner explained how this staff of three relieved the beneficiary from assisting with the day-to-day operations of the store. While the AAO does not doubt that the beneficiary exercises discretion over the store on a daily basis, or that the petitioner conducts business in a regular and continuous manner, the petitioner must still establish that employees other than the beneficiary are available to perform the non-managerial functions of the business during its regular operating hours. The petitioner has not met this burden. As such, the petitioner has not established that it has a reasonable need for the beneficiary to perform primarily managerial or executive duties.

Reading section 101(a)(44) of the Act in its entirety, the "reasonable needs" of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir, 2008).

Upon review of the totality of the evidence, the record does not establish that the beneficiary would allocate his time to primarily managerial or executive duties. First, several of the job duties attributed to the beneficiary are related to the company's day-to-day purchasing, marketing, bookkeeping, banking and other administrative functions, rather than to managerial or executive functions. Further, as addressed in the AAO's previous decision and herein, the petitioner has not provided evidence of a staff sufficient to relieve the beneficiary from involvement in additional non-managerial functions of the petitioner's retail business.

For the foregoing reasons, the AAO's decision will be affirmed.

III. Managerial or Executive Employment Abroad

The second issue addressed by the AAO was whether the petitioner established that the foreign entity employed the beneficiary in a primarily managerial or executive capacity.

In dismissing the appeal, the AAO noted that there was a discrepancy between the beneficiary's stated job title of "general manager," and the position descriptions provided by the beneficiary, which suggested that his role was limited to financial and accounting matters. The AAO further observed that the beneficiary's stated job duties did not include any responsibilities for personnel supervision or other personnel matters, although the foreign company's organizational chart reflected that he would manage a supervisor, a sales executive and an accountant/cashier. Nevertheless, the AAO determined that none of the claimed subordinates were shown to be managers, supervisors or professionals based on their job duty descriptions, and thus the beneficiary could not qualify as a manager based on his supervision of subordinate personnel.

Finally, the AAO considered whether the beneficiary managed an essential function of the foreign entity. The AAO observed that the beneficiary was primarily responsible for the company's financial and accounting activities, and found that the record did not show that there were other employees available to perform the non-qualifying duties associated with these functions. Although the petitioner claimed to employ an accounting/cashier subordinate to the beneficiary, the petitioner did not provide a duty description for this employee, nor did the beneficiary's job description indicate that he allocated any non-qualifying tasks to a subordinate. The AAO concluded that, absent this evidence, it could not be determined that the beneficiary was relieved from performing accounting and finance functions for the foreign entity, rather than managing these functions.

On motion, counsel's contentions with respect to the issue of the beneficiary's foreign employment are limited to the following:

And the AAO raises a totally irrelevant consideration in considering employment in India – did such a position require a Bachelor's degree? Really? How many small and medium-sized entrepreneurs in the U.S. and India are college graduates? Is Bill Gates? Was Steve Jobs? Are they to be considered executives? Employees?

Counsel's assertion that the AAO considered whether the beneficiary's position in India required a bachelor's degree is incorrect. In determining whether the beneficiary's foreign employment was in a managerial capacity, the AAO evaluated whether the beneficiary's claimed subordinate employees held professional positions which require the completion of a bachelor's degree.

The statutory definition of "managerial capacity" allows for both "personnel managers" and a "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; 8 C.F.R. § 204.5(j)(2). 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.

Therefore it was reasonable for the AAO to consider whether the beneficiary supervised professional employees. Contrary to counsel's contentions the AAO did not consider whether the beneficiary's position required a bachelor's degree.

Counsel asserts that evidence was presented to show that the beneficiary's responsibilities while employed by the foreign entity were the same as those found in the regulations at 8 C.F.R. §204.5(j)(5). The AAO's decision included a detailed discussion of the beneficiary's duties and explained why the petitioner failed to establish that they are primarily managerial or executive in nature. While counsel plainly disagrees with the AAO's finding he has not explained how the law was misapplied to the facts of this case. Again, 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).

Counsel insists that "an equitable review of the totality of evidence in the record merits a favorable adjudication of the filing" and cites to *Espinosa v. INS*, 991 F. 2d 1294 (7th Cir.1993). However, the AAO decision specifically refers to its consideration and review of the record in its entirety. Further, counsel fails to identify how the AAO failed to consider the totality of the evidence submitted in this case.

As counsel raises no other specific objections to the AAO's findings, the prior decision will be affirmed for the reasons stated herein.

IV. Qualifying Relationship

The third and final issue to be addressed is whether the petitioner established that it has a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The petitioner claims that it is a wholly-owned subsidiary of [REDACTED] the beneficiary's former employer in India. The AAO acknowledged that the petitioner submitted a copy of its membership certificate number [REDACTED] indicating that the company issued an 81% membership interest to the foreign entity on September 15, 2008. However, the AAO noted a number of unexplained inconsistencies in the record and found that the membership certificate alone was insufficient to corroborate the claimed relationship.

These inconsistencies included: (1) a 14 month-gap between the organization of the company and the issuance of its membership certificates; (2) the unexplained cancellation of membership certificates numbers [REDACTED] which were issued to the beneficiary (51%) and another individual (49%) on September 15, 2008; (3) the petitioner's 2008 IRS Form 1120S, U.S. Income Tax Return for an S Corporation, which identified [REDACTED] as the 100% owner of the company; (4) the petitioner's submission of a different tax return, also for 2008, filed on Form 1120 and identifying different ownership; and (5) a number of documents which referred to the petitioning limited liability company's "stock," which it is not authorized to issue. In light of the discrepancies, the AAO determined that the membership certificate alone was not sufficient to establish that the foreign entity actually owns the petitioner.

On motion, counsel states:

The AAO questions the qualifying relationship because no explanation is provided for the voided issuance of stock certificates. This is beyond credulity. ALL ISSUED STOCK CERTIFICATES WERE PROVIDED. MINUTES WERE PROVIDED. The certificates were voi[d]ed to reflect the proper ownership of stock issuance. Previous ownership existed previously. The Petitioner erroneously continued to file an S return, however, all ownership documents were completed and new tax returns prepared.

As discussed above, the AAO did not question the claimed qualifying relationship based solely on the petitioner's failure to explain the voided stock certificates. Rather, the AAO discussed in detail various omissions and discrepancies in the submitted evidence. While it is true that the petitioner submitted copies of membership certificates numbered [REDACTED] all of these certificates were issued on September 15, 2008, 15 months after the company was established. Counsel's assertion that "previous ownership existed previously" suggests that there was, in fact, a different owner or

owners prior to this date. The petitioner's IRS Form 1120S for 2008 shows [REDACTED] as the sole owner of the company at the time of filing. If this was the "previous ownership" to which counsel refers, then the petitioner would reasonably have issued a membership certificate identifying him as the 100% owner. None of the submitted stock certificates convey this information. Again, 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).

Counsel further states "While the Service is not required to give more weight to evidence that is 'questionable', when evidence is consistent with, and contributes to the totality of evidence in the record, and it is the Service's own reading and inconsistency that is questionable, then, that that (*sic*) is an 'abuse of discretion.'" Counsel cites to *Garavito v. United States Immigration and Naturalization Service*, 901 F. 2d 173 in support of the assertion. In *Garavito* the Court found an abuse of discretion due a visa denial based on an "obviously false factual premise." In this matter, counsel has pointed to no such obviously false factual premises upon which the AAO has relied.

Counsel's unsupported assertions are insufficient to overcome the AAO's findings. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Accordingly, the AAO will affirm its previous decision.

V. Conclusion

The AAO's previous decision will be affirmed and the petition will remain denied for the above stated reasons, with each considered as an independent and alternate basis for the decision. 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 motion is granted. The AAO's decision dated May 28, 2013 is affirmed and the underlying petition remains denied.