U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: FEB 2 1 2014 OFFICE: TEXAS SERVICE CENTER

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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a limited liability company, organized in the State of Delaware. It seeks to employ the beneficiary as its managing director. 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, finding that the petitioner failed to establish that it would employ the beneficiary 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.

II. Procedural History

The record shows that the petitioner filed the Form I-140 with supporting documentation.

After reviewing the petitioner's submissions, the director determined that the record lacked sufficient evidence establishing that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. Accordingly, the director issued a request for evidence (RFE) instructing the petitioner to provide, in part, a definitive statement describing the beneficiary's proposed job duties with the U.S. entity. Namely, the director asked the petitioner to list the beneficiary's "specific daily job duties (rather than categories of duties)" and to specify what percentage of time the beneficiary would allocate to each of the listed tasks. The director also asked the petitioner to provide its Form 941s, Federal Quarterly Tax Reports for all four quarters in 2011, as well as a copy of the petitioner's organizational chart depicting its staffing hierarchy and specifying the beneficiary's subordinates, their job titles, job descriptions, and educational credentials.

The petitioner's response addressed the beneficiary's job duties, and the petitioner's staffing. The petitioner also complied with the director's request for a copy of its organizational chart and 2011 quarterly tax returns.

The director reviewed the petitioner's submissions and determined that the record lacked sufficient evidence to establish that the beneficiary would be employed by the U.S. petitioner in a qualifying managerial or executive capacity.

On appeal, counsel asserts that the "beneficiary *primarily* performs high level responsibilities" and does not manage employees in his employment with the petitioning entity. (Emphasis in the original). Counsel claims that the petitioner contracted three companies to carry out its "day-to-day duties" thus leaving the beneficiary to plan, organize, direct, and control the petitioner's consulting services.

The AAO finds that counsel's assertions are not sufficient to establish that the petitioner is eligible for the immigration benefit sought herein. The discussion below will provide a comprehensive analysis of the facts and evidence presented with regard to the key issues concerning the beneficiary's proposed position with the petitioning U.S. entity.

III. Managerial or Executive Capacity

As indicated above, the primary issue to be addressed in this proceeding is whether the petitioner established, by a preponderance of the evidence, that the beneficiary would be employed in the proposed position with the U.S. entity in a qualifying managerial or executive capacity.

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.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

In general, when examining the executive or managerial capacity of the beneficiary, the AAO reviews the totality of the record, starting first with the petitioner's description of the beneficiary's 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 the size of the petitioner's staff, job descriptions of the beneficiary's subordinates and other employees who carry out the petitioner's daily operational tasks, the nature of the

business conducted, and any other facts that may contribute to a comprehensive understanding of the beneficiary's actual role within the petitioning organization.

Turning first to the beneficiary's job description, the petitioner's original supporting statement listed the beneficiary's job duties as follows:

- Generate significant revenues in the U.S. market by fulfilling contractual obligations, which involve U.S.-based and Brazilian-based clientele.
- Develop programs that will help Brazilian and American firms grow their cross-border business ties by establishing and growing strategic alliances, funding sources, partnerships, and trade agreements.
- Provide strategic client management and leadership to those companies in the U.S. and in Brazil with whom CEFI [the beneficiary's foreign employer] has existing contractual agreements.
- Develop business with firms, who are related to existing clients . . . .
- Exercise wide latitude and discretionary decision-making in establishing the most advantageous course of action for the successful management our company.

The petitioner further stated that the beneficiary's proposed employment would be in an executive capacity and that the beneficiary would be responsible for the following: "coordinating [the petitioner]'s financial and budgeting activities in order to fund operations, maximize investments, and increase efficiency[;]" "oversee[ing] marketing and sourcing of clients to identify, conduct, negotiate, and form agreements with clients for products and services[;]" developing, directing, and implementing company policies and objectives, continuing to build a client base; helping to implement the petitioner's "strategic vision and goals[;]"; developing business partnership; ensuring that the company's products meet "internal and external performance requirements[;]" and providing quality services and support to the petitioner's existing and potential clients.

Subsequently, in response to the RFE, the petitioner provided another job description for the beneficiary. The petitioner listed the four prongs that constitute the statutory definition of "executive capacity" and separately added a discussion pertaining to each element to explain how the beneficiary's proposed employment meets the statutory criteria. With regard to the first element – directing the management of a major component of the organization – the petitioner stated that the beneficiary has been responsible for the company's finances as well as its marketing, sourcing of clients, and "developing, implementing, and refining [the petitioner's] products and services." With regard to the second element – establishing goals and policies of the organization, component, or function – the petitioner focused on the beneficiary's "extensive knowledge of [the petitioner]'s business environments" and indicated that the beneficiary will continue to establish goals and policies in the course of the petitioner's provision of consulting services. The petitioner specified that its goal will be to work with both small- and large-scale companies that are based in the United States and Brazil. Lastly, with regard to the two final prongs of the definition – exercising wide latitude in discretionary decision-making and receiving minimal supervision from superiors – the petitioner stated that the beneficiary's ownership interest and his experience in his current position as managing director allow him to enjoy decision-making authority and further explained that due to the beneficiary's success in running the

U.S. entity, the beneficiary receives only general supervision from the foreign entity's board of directors and the foreign entity's and petitioner's advisory boards.

Additionally, the petitioner described the beneficiary's time distribution as follows:

- Continual monitoring and/or oversight of [the petitioner's] contract labor and [the foreign entity's] support staff (15%)
- Continual communication with current and prospective clients (25%)
- Ongoing efforts to develop new business with current clients (50%)
- Daily analysis of market conditions in the areas where [the petitioner] operates (10%)

The petitioner also provided a copy of its organizational chart, which depicts the beneficiary in two separate positions. One position shows the beneficiary at the top of the organizational hierarchy as one of three members of the board of directors. The other position depicts the beneficiary as the managing director and shows that his placement within the organization as alongside four other positions – one position captioned "client support in Brazil," and three positions identified as "office support." In a separate document, the petitioner provided additional information about the three companies who assume the "office support" positions within its organizational hierarchy. The petitioner explained that one company – – provides the petitioner with office facilities and maintenance as well as receptionist and secretarial services. The petitioner stated that these services are provided as part of its rental agreement with The petitioner stated that the two other companies – both provide "general office support services in connection with [the petitioner's] clients" and indicated that the petitioner pays for the services it receives by providing both entities with consulting services it offers to its other clients.

A review of the beneficiary's original job description shows that, while the beneficiary would assume a leadership role within the petitioner's organization, he would be tasked with certain key business developing responsibilities as well as client-focused tasks, all of which indicate that the beneficiary would allocate an undisclosed portion of his time to non-qualifying tasks.

Although the petitioner responded to the director's RFE by submitting a supplemental job description and percentage breakdown, the information provided fails to establish that the beneficiary's time would be allocated primarily to tasks within an executive capacity as claimed. First, claiming that the beneficiary would continue to oversee and monitor the petitioner's contract labor is overly vague and fails to explain specifically how or what tasks would constitute such oversight. The petitioner also failed to explain how the beneficiary's continued supervision of the foreign entity's staff would fulfill his job responsibilities as they specifically apply to his proposed position with the petitioning U.S. entity.

Next, the job description failed to explain the nature of the beneficiary's communications with the petitioner's current and prospective clients, thus leaving open the likely possibility that the beneficiary himself would be directly engaged in providing the very consulting services that the petitioner offers to its clients. It is noted that 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 Intn'l., 19 I&N Dec. 593, 604 (Comm'r 1988). While the petitioner claimed that only 25% of the beneficiary's time would be allocated to client communications, this non-qualifying aspect of the beneficiary's prospective position must be considered together with the remaining portions of the job description, which indicates that the beneficiary would be tasked with seeking out new business with the petitioner's existing and prospective clients. While not expressly stated in the job description, the business development aspect of the beneficiary's position indicates that the beneficiary would communicate with clients for the purpose of marketing and selling the petitioner's consulting services in an effort to increase company revenue, thus achieving the business development goal. It is unclear how carrying out the petitioner's sales and marketing functions could be classified as something other than daily operational tasks. Similarly, the petitioner failed to explain how conducting daily market analysis is representative of someone who is employed in an executive capacity at the top of the petitioner's organizational hierarchy.

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

As discussed above, while the petitioner failed to describe the beneficiary's proposed position with an adequate amount of detail, the information that was offered indicates that the primary portion of the beneficiary's time would be distributed among non-qualifying operational tasks that focus on marketing and selling the petitioner's services and acquiring new business from new and existing clients for the purpose of expanding the business and increasing the petitioner's revenue. While the AAO acknowledges 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. As previously stated, any 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 beneficiary's list of job duties lead to the conclusion that the beneficiary would be primarily involved in performing the petitioner's daily operational tasks and carrying out the consulting services offered to the petitioner's clients. When this information is further considered in light of the petitioner's lack of qualified in-house employees or contract-based labor capable of providing business consulting services, the petitioner leaves the AAO without a basis upon which to conclude that the petitioner is able to offer the beneficiary a bona fide position within a qualifying executive capacity where he would be

relieved of having to allocate the primary portion of his time to the performance of non-qualifying operational tasks that are necessary to provide the consulting services the petitioner offers to its clients.

While counsel claims on appeal that the petitioner has contracted three companies "to take care of all of the day-to-day duties such as secretarial, broadband communication, travel and other office requirements," this claim does not address the petitioner's lack of personnel to carry out the sales, marketing, and consulting job duties that are critical to the petitioner's business goal of serving existing clients and acquiring new clients to increase the petitioner's revenue. Furthermore, counsel's claim that the petitioner "utilizes as an integral partner in communicating and working with new teams" does not explain how the beneficiary would be relieved from having to provide key operational tasks, such as sales, marketing, and consulting.

Moreover, a review of the documents offered in response to the RFE shows that was identified as an entity that provides the petitioner with "general office support services." As the petitioner did not provide evidence explaining which specific office support services provides, the AAO cannot conclude that assumes a significant role in relieving the beneficiary from having to carry out non-qualifying operational tasks on a continuous daily basis. 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). Similarly, counsel's claim that the petitioner "uses project-specific contractors such as "Reza Sale'h" for its consulting expertise is not supported by documentary evidence and thus will be deemed to have little probative value in this proceeding.

Furthermore, the petitioner provided no evidence to support the mutual business relationship it claims to have with , where the petitioner purportedly receives services from both companies "in kind." 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d at 42; *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003). Furthermore, 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. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Looking at the totality of the evidence presented in the matter at hand, the petitioner has failed to substantiate the claim that it would employ the beneficiary primarily in a qualifying executive capacity. While evidence points to the likelihood that the beneficiary assumes a top-level position within the petitioner's organizational hierarchy and thus enjoys a high degree of discretionary authority, these facts must be considered together

with other evidence in the record, including the beneficiary's job description, which indicates that the primary portion of the beneficiary's time would be allocated to carrying out the petitioner's services, as well as the petitioner's organizational hierarchy, which shows a general lack of complexity and an overall inability to relieve the beneficiary from having to primarily perform the services that generate the petitioner's revenue. In sum, the petitioner has failed to establish that it has either the need or the capability to employ the beneficiary in a position where the primary portion of his time would be allocated to tasks within a qualifying managerial or executive capacity and on the basis of this conclusion the instant petition must be denied.

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, that burden has not been met.

ORDER: The appeal is dismissed.