



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: JAN 16 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 denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) summarily dismissed the petitioner's appeal and two subsequently filed motions to reopen and reconsider. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted and the petition will remain denied.

The petitioner is a Florida corporation that is engaged in the retail sale of imported products, and seeks to employ the beneficiary as its Vice President/Financial 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.

On January 26, 2009, the director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The AAO summarily dismissed the petitioner's appeal finding that the petitioner failed to submit a brief or additional evidence in support of the appeal. The AAO subsequently dismissed the petitioner's motions to reopen and reconsider.

The matter is now before the AAO again on a motion to reopen and reconsider. The petitioner submits additional evidence in support of its assertion that its former counsel filed a brief in support of the appeal. Upon review of the record, former counsel filed a timely brief on March 24, 2009. Thus, the AAO will review the merits of the petitioner's initial appeal filed on February 25, 2009.

### 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.

Finally, 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.

## II. Managerial or Executive Capacity

The sole issue addressed by the director is whether the petitioner established that it would employ the beneficiary in a qualifying managerial or executive capacity.

### A. Facts

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on December 27, 2004. The petitioner stated on the Form I-140 that is engaged in the retail sale of imported products, has six employees, and achieved gross annual income of \$173,987. The petitioner seeks to employ the beneficiary as its Vice President/Financial Manager.

In a letter submitted in support of the petition, former counsel described the beneficiary's proposed duties as the following:

Acts in absence of President of [the petitioner]; Coordinates and directs financial planning, budgeting, procurement, and investment activities of [the petitioner]; Directs preparation of reports summarizing [the petitioner's] current and forecasted financial position, business activity, and reports required by regulatory agencies; Delegates authority for receipt, disbursement, banking, protection and custody of funds; Analyzes past, present, and expected operations; Interprets current policies and practices and plans and implements new operating procedures to improve efficiency and reduce costs; Ensures that firm complies with tax and legal requirements; Arranges audits of company accounts; Advises management on economic objectives and policies, investments, and loans for short- and long-range financial plans; Evaluates need for procurement of funds and investment of surplus. As a member of the Board of Directors, he will establish policies and

procedures for [the petitioner]. He will exercise complete discretionary control over the financial function of [the petitioner]. He will report to the President of [the petitioner] and to the Board of Directors of which he will be a member.

The petitioner indicated that one subordinate supervisor, an assistant manager, reports to the beneficiary, and stated that he would allocate 80% of his time to executive duties and 20% of his time to nonexecutive duties.

At the time of filing, the petitioner submitted two different organizational chart depicting the staffing and structure of the organization. One chart identifies the beneficiary as "director" with a total of five subordinate employees, including a manager, an assistant manager, and three cashiers. The other chart identifies the beneficiary as "vice-president/financial manager," supervising a full-time assistant manager who, in turn, supervises three full-time cashiers. The petitioner's Florida Form UCT-6, Employer's Quarterly Report, for the third quarter of 2004 indicated that the petitioner had four employees, including the beneficiary, the company president, the employee identified as "manager" on the first chart, and another individual who did not appear on either chart. The manager and the unidentified employee each earned only \$900 for the quarter.

The petitioner's initial evidence included its Florida sales tax certificate, tobacco license, and occupational license indicating that the company was operating a [redacted] and convenience store located in [redacted]. The petitioner submitted a lease for this location valid from February 13, 2004 until January 31, 2005. The petitioner also submitted a lease for premises described as [redacted] in [redacted]. The lease commenced on February 5, 2002. According to the lease agreement, the petitioner would sell toys, collectables and sneakers. The terms of the lease require the business to be open for 70 hours per week with longer hours in summer months.

The director issued a request for evidence (RFE) on May 20, 2005 in which she instructed the petitioner to provide additional evidence of the company's staffing levels and organizational structure, including the position titles, duties and educational level of all employees, along with copies of all IRS Forms W-2, Wage and Tax Statement issued in 2004. The director also requested clarification regarding the beneficiary's work address and the nature of the petitioner's business, as well as a copy of the company's 2004 corporate tax return.

In response to the RFE, the petitioner stated that the beneficiary had transferred in February 2005 to the company's new Los Angeles, California-based division, which will engage in the import of clothing and leather products. The petitioner indicated that the Florida office would continue to serve as its company headquarters.

The petitioner provided the requested IRS Forms W-2 for 2004. The evidence reflects that the petitioner paid \$24,000 to the president, \$24,000 to the beneficiary, \$2,700 to [redacted], \$600 to [redacted], \$3,300 to [redacted], \$3,300 to [redacted], and \$600 to [redacted]. [redacted] do not appear on either of the submitted organizational

charts. The petitioner also provided its most recent Florida Form UCT-6, for the second quarter of 2005, which indicated that the company employed three employees, including the beneficiary, the president, and a part-time employee who earns \$600 per month.

The petitioner indicated that, in addition to the beneficiary and the president, the company employs a marketing manager who is responsible “to facilitate and promote the company’s merchandise goods strategies while ensuring high product quality, timely fulfillment of merchandise order quantities, and sustained cost effectiveness and customer satisfaction.”

The petitioner provided a copy of its IRS Form 1120, U.S. Corporation Income Tax Return, for 2004. The petitioner reported \$666,954 in gross receipts, \$50,424 in salaries and wages, \$3,210 in rents, and indicated that the company operated a gas station/convenience store located in [REDACTED]. The petitioner also submitted: a new lease, signed in January 2005, for an office in [REDACTED] to be used for an import business; a new lease, signed in April 2005, for a [REDACTED] California premises to be used for clothing wholesale and retail; its Certificate of Qualification to do business in California and California business licenses; and, a fictitious name statement indicating the petitioner would do business in California as [REDACTED].

The director denied the petition on January 26, 2009, concluding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. In denying the petition, the director found that the petitioner provided an overly vague description of the beneficiary’s duties which failed to establish what percentage of his time would actually be allocated on qualifying tasks. Further, the director determined that the petitioner did not have the organizational structure to support the beneficiary’s claimed managerial or executive position.

In the appellate brief, former counsel asserted that the direct placed undue emphasis on the size of the petitioning company and contends that the petitioner’s history “substantiates that [the beneficiary’s] position as Vice President/Financial Manager is one involving executive and managerial duties.” Counsel reiterated the job description provided at the time of filing and asserts that the evidence establishes that the beneficiary manages the financial function of the company and further “manages the managers who supervise and manage the staff who perform the work which produces the goods and services marketed by [the petitioner].”

In addition, former counsel asserted that the company has grown to a staff of seven employees with gross income of \$1.1 million, and that this growth could be attributed to the beneficiary’s leadership since 2002. In support of the appeal, the petitioner submitted, among other items: (1) copies of the petitioner’s IRS Forms 1120, U.S. Corporation Income Tax Return, for the years 2004 through 2008; (2) a proposed organizational chart; and (3) evidence of recent business transactions.

## B. Analysis

Upon review, and for the reasons discussed, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity.

In examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Published case law clearly supports the pivotal role of a clearly defined job description, as the actual duties themselves reveal the true nature of the 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); *see also* 8 C.F.R. § 204.5(j)(5). That being said, however, USCIS reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the petitioner's business, the employment and remuneration of employees, as well as the job descriptions of the beneficiary's subordinates, if any, and any other facts contributing to a complete understanding of a beneficiary's actual role within a given entity.

As a preliminary matter, previous counsel for the petitioner provided documentation for the petitioner for the years 2002 through 2009; however, the petitioner must establish that the beneficiary was eligible for the benefit sought at the time the petition was filed on December 22, 2004. 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). Any changes in the beneficiary's job duties and the petitioner's organizational structure that occurred subsequent to the time of filing are not relevant to this discussion.

Upon review, the petitioner provided a vague and generalized description of the beneficiary's duties as Vice President/Financial Manager that failed to convey what he would do on a day-to-day basis within the context of the petitioner's business. The petitioner stated that the beneficiary "coordinates and directs financial planning, budgeting, procurement, and investment activities of [the petitioner]"; "analyzes past, present, and expected operations"; and, "interprets current policies and practices and plans and implements new operating procedures to improve efficiency and reduce costs." It is unclear which specific tasks actually fall within these broad categories. 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 her daily routine. The actual duties themselves will reveal the true nature of the 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 petitioner's vague and general description of the beneficiary's position does not identify the actual duties performed, such that they could be classified as managerial or executive in nature.

The record also contains insufficient and complete information regarding the nature and scope of the petitioner's operations. In a support letter dated, December 20, 2004, counsel stated that the petitioner "operates a gift shop, selling clothes, gifts and collectibles" and it employs six

workers. The petitioner also submitted evidence related to its operation of a [REDACTED] and convenience store. As noted above, the petitioner submitted two different organizational charts at the time of filing, neither of which suggested that the company was operating more than one store. It is unclear which retail business, if either, the petitioner operated in December 2004 when the petition was filed. The petitioner also submitted conflicting information regarding its number of employees, as its quarterly wage reports for the last two quarters of 2004 indicated that the company had only two full-time and two part-time employees, rather than six full-time employees as indicated on the organizational charts.

Based on the information reported on the petitioner's quarterly wage reports, the petitioner employed the company president and the beneficiary on a full-time basis, and two part-time employees who each earned only \$300 per month. As the beneficiary and the president were the only full time employees, it is not clear who would perform the non-managerial duties that are necessary to run a retail store such as purchasing, inventory management, quality assurance and control, stocking, cashier duties, customer service, as well as day-to-day clerical, administrative and bookkeeping tasks. According to the terms of the petitioner's lease agreement, its store is required to be open for at least 70 hours per week, and both subordinates employed at the time of filing were working minimal hours in 2004. 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. Therefore, it is reasonable to believe that the beneficiary would be performing a combination of first-line supervisory and operational duties in order to assist in keeping the business open during its regular hours. If the petitioner was in fact operating two stores at the time of filing, then the petitioner's need for employees to perform non-qualifying duties would be even greater. 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

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.

The AAO acknowledges that the petitioner may have been in a transitional stage at the time of filing, as the record reflects that the company registered to do business in California in early

2005, and later moved the bulk of its operations to California. However, the petitioner is not exempted from establishing its ability to employ the beneficiary in a primarily managerial or executive capacity as of the date of filing, at which time it claimed to operate one or two stores in Florida while staffed by only a president, a vice president – who are both claimed to perform only managerial and executive duties - and two part-time employees. The petitioner did not submit evidence that it employed sufficient subordinate staff members who would perform the actual day-to-day, non-managerial operations of a company that operates one or more retail stores. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of a president, a vice president and two part-time staff whose duties have not been defined. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Finally, the AAO acknowledges the petitioner claim that the beneficiary has contributed to key decisions made by the petitioning company over the years, including the petitioner's decision to open a second store in Florida and its decision to expand its operations to California. The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). While the beneficiary may share a heightened degree of discretionary authority along with the company president, the petitioner has not explained how it would support two managerial or executive positions without sufficient subordinate staff to relieve the beneficiary from performing first-line supervisory and non-qualifying operational tasks.

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. Accordingly, the petition cannot be approved.

### III. Qualifying Relationship

Although not addressed in the director's decision, a remaining issue in this matter is whether the petitioner has a qualifying relationship with the foreign entity. 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 has consistently claimed that it is a wholly owned subsidiary of [REDACTED] a company located in Pakistan. The petitioner submitted a copy of its stock certificate number 2 indicated that the foreign entity owns all authorized and issued shares of the company.

However, the evidence of record suggests that the petitioner may no longer maintain a qualifying relationship with the foreign employer. The petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984). The petitioner has submitted copies of its IRS Forms 1120, U.S. Corporation Income Tax Return, for the years 2004 through 2008. On the 2004 Form 1120, at Schedule K, the petitioner indicated that [REDACTED] owns 51% of the company's stock, information which is inconsistent with the petitioner's claim that it is a wholly-owned subsidiary of the foreign entity. On its 2005 Form 1120, the petitioner failed to indicate that it is owned by a foreign entity. On its Forms 1120 for the years 2006, 2007 and 2008, the petitioner indicated at Schedule K that it is majority-owned (51%) by a Pakistani company called "[REDACTED]". Nevertheless, previous counsel continued to refer to the petitioner as a wholly-owned subsidiary of [REDACTED]. 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).

Due to these unresolved discrepancies in the record, the petitioner has not established that it has a qualifying relationship with the foreign entity. For this additional reason, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

#### IV. Conclusion

The petition will be 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 petition is denied.