



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **JUL 28 2014** OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was initially approved by the Director, Nebraska Service Center. On further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with a notice of his intention to revoke the approval of the preference visa petition, and his reasons therefore. The director ultimately revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a California corporation that operates as a manufacturer of construction materials. It seeks to employ the beneficiary as its plant superintendent. 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 revoked approval of the petition based on the conclusion that the petitioner failed to establish that the beneficiary 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.

In addition, with regard to the revocation of a previously approved petition, section 205 of the Act, 8 U.S.C. § 1155, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

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

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

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

II. Procedural History

The record shows that the petition was filed on November 5, 2012 and was accompanied by the petitioner's supporting statement, dated October 22, 2012. With regard to the beneficiary's position with the foreign entity, the petitioner stated that the beneficiary was employed as an electronics department manager. The petitioner stated that during the tenure of the beneficiary's employment abroad he "was solely responsible for ensuring the proper operation of all automation, [and] controls and electrical systems at three manufacturing plants" that were operated by the beneficiary's foreign employer in Israel. The petitioner further stated that the beneficiary was employed at a "senior level" and that he "interacted with plant employees, suppliers, and vendors to ensure that the plants' electrical, automation and control needs were effectively and timely met." The petitioner provided the following additional information regarding the beneficiary's employment abroad:

As the leader of the Electronics Department, [the beneficiary] was solely responsible for the functions he managed. The staff consisted of six electricians that would take care of the day to day repairs and maintenance of the automation, control and electrical systems. [The beneficiary] was responsible for assigning their tasks, guiding their daily work and continuously evaluating their work development. He had significant input on their hiring, advancement and if necessary, disciplinary action. Using his team of expert electricians, [the beneficiary] kept the three plants operating on a 24/7 basis by constantly evaluating existing electrical systems, anticipating plant electrical needs and making [*sic*] ordering necessary repairs and/or improvements.

* * *

As the ultimate authority within the Electronics Department, the beneficiary was solely responsible for the day to day operations of the Electronics Department. With limited intervention by the plant management[, the beneficiary] performed the following (non-exhaustive list) duties:

- Managed, directed and oversaw plant electricians;
- Directed the installation of new equipment and systems;
- Established electrical and electronic maintenance policies and procedures;
- Directed troubleshooting issues;
- Supervised all maintenance

On February 26, 2013, the director issued a request for evidence (RFE), instructing the petitioner to provide a detailed description of the beneficiary's employment abroad, complete with the duties performed and the time

allocated to each duty. The director also asked the petitioner to provide a copy of the foreign entity's organizational chart depicting the staffing hierarchy and the beneficiary's position therein.

In response, the petitioner provided the following breakdown of the beneficiary's job duties during his employment with the foreign entity:

- Managing, directing and overseeing 9-10 professional-level electricians and an electronic software hardware specialist at three plants. 80%
- Supervised the maintenance of all plant electrical systems including: PLC debugging and programming, ac/dc motors and drives installation and application, personal computer software and hardware installation and repair. 5%
- Directed the installation of new equipment and systems. 3%
- Established electrical and electronic maintenance policies and procedures. 3%
- Directed troubleshooting issues. 3%
- Established purchase of electrical electronic spare parts. 3%
- Diagnosed electrical, mechanical and operating malfunctions. 3%

The petitioner also provided the requested organizational chart pertaining to the foreign entity. The chart depicts the beneficiary's position as directly subordinate to the VP of operations. The beneficiary is shown as overseeing a total of eight employees with three subordinates working at each of two plants and two subordinates working at the third plant. All eight employees were shown as having the position title of electrician. Although the chart includes an IT hardware employee, that individual is shown as being directly subordinate to the VP of finance/CFO, whose position is depicted on the parallel tier as that of the beneficiary's immediate supervisor – VP operations.

On September 4, 2013, subsequent to the approval of the petition, the director issued a notice of intent to revoke (NOIR). The director reviewed the information the petitioner previously provided in support of the petition with regard to the types and number of employees under the beneficiary's supervisory control and determined that the petitioner failed to establish that the beneficiary's subordinates were professional employees, despite the petitioner's use of the term "professional-level" when referring to those subordinates. The director pointed out that the petitioner provided no evidence that the beneficiary's subordinates had bachelor's degrees or that such degrees were necessary to the performance of their respective job duties.

In response to the NOIR, the petitioner provided a statement from counsel, dated October 2, 2013, who stated that, in addition to being a supervisory manager, the beneficiary was also a function manager. Counsel claimed that the beneficiary managed three senior electricians, who were supervisory employees. Counsel stated that the beneficiary can be both a supervisory and a function manager, asserting that the two are not mutually exclusive. The petitioner also provided a response statement reiterating several of counsel's points. Specifically, the petitioner claimed that the beneficiary was employed in the role of a function manager, who was responsible for the foreign entity's electronic control systems at three different plants. The petitioner restated, verbatim, the job description with corresponding percentage breakdown that was previously provided in the petitioner's RFE response statement. The petitioner went on to state that the beneficiary was employed at a senior level with respect to the management of electrical functions and had ultimate authority over daily electrical projects he managed at each of the foreign entity's three plants. The petitioner claimed that the beneficiary assigned projects to electrical teams at each plant and negotiated with outside vendors if he determined that in-house employees would be unable to perform the necessary work. The petitioner

claimed that the beneficiary was not a first-line supervisor and that he supervised the work of senior electricians who played supervisory roles. The petitioner claimed that the beneficiary supervised a combined group of "nine to ten" employees.

After reviewing the petitioner's submissions, the director determined that the petitioner failed to overcome the adverse findings listed in the NOIR. Accordingly, in a decision dated October 19, 2013, the director revoked the approval of the petitioner's Form I-140, concluding that the petitioner failed to establish that the employees the beneficiary supervised during his employment abroad were professionals. The director also noted the petitioner's inconsistent claims with regard to the types and number of employees the beneficiary supervised; pointing out that the first time the petitioner claimed that the beneficiary supervised senior electricians was in response to the NOIR. This portion of the director's decision shall be withdrawn. The petitioner previously submitted an organizational chart of the foreign entity, depicting a vertical hierarchy among the electricians, which indicates that each plant had at least one supervisory electrician. The director noted that the petitioner initially claimed that the beneficiary supervised six electricians and later asserted that he managed nine to ten electricians, including three supervisory electricians. The director rejected the petitioner's claim that the beneficiary assumed the role of a function manager.

Lastly, the director issued a finding with regard to an issue that was not previously addressed in the NOIR. Namely, the director observed that the company filing the Form I-140 was not the same as the entity where the beneficiary's U.S. employment would take place. In light of this information, the director determined that the petitioner failed to provide a valid job offer as required at 8 C.F.R. § 204.5(j)(5).

The petitioner filed an appeal, disputing the director's adverse findings.

Upon review, and for the reasons stated below, we find that the petitioner has failed to establish that the beneficiary was employed abroad in a primarily managerial or an executive capacity. Notwithstanding our decision to affirm the director's decision revoking the approval of the petitioner's Form I-140, we find that the director erroneously issued the decision on the basis of a finding that had not been previously addressed in the NOIR. The regulation at 8 C.F.R. § 205.2(b) mandates that the director must provide the petitioner with an opportunity to offer evidence in support of the petition and in opposition to the grounds alleged for revocation of the approval. Contrary to this requirement, the director's final notice of revocation included a new ground that had not been previously cited in the NOIR. Therefore, to the extent that the petitioner was not given the opportunity to provide evidence to overcome the new ground cited in the revocation, we hereby withdraw this ground as a basis for the revocation.

III. Issues on Appeal

As indicated above, the primary issue to be addressed in this proceeding is the beneficiary's former employment with the foreign entity and whether such employment was in a qualifying managerial or executive capacity.

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 job duties with the entity in question. 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). Beyond the required description of the job duties, USCIS reviews

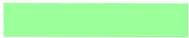
the totality of the record, including the employing entity's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the business conducted, and any other factors that may contribute to a comprehensive understanding of a beneficiary's actual duties and role within the foreign entity.

Turning first to the beneficiary's job description, we find that the petitioner provided inconsistent information as to the number and types of employees the beneficiary managed. While the petitioner's original supporting statement, dated October 22, 2012, indicated that the beneficiary's entire subordinate staff was comprised of six electricians, in its follow-up statement, which was submitted in response to the RFE, the petitioner claimed that the beneficiary's subordinate staff consisted of "9-10" employees and that those employees were "professional-level electricians and an electronic software hardware specialist." The petitioner created further confusion by its submission of an organizational chart that was inconsistent with the original and subsequent claims made in response to the RFE. As noted above, the organizational chart indicated that the beneficiary supervised a total of eight electricians and did not include a hardware software specialist among the beneficiary's subordinates. Rather, the chart indicated that while an IT hardware position was part of the foreign entity's organizational hierarchy, this position was subordinate to the VP of finance rather than to the beneficiary, whose position was subordinate to the VP of operations. 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).

Moreover, contrary to counsel's assertions on appeal, the petitioner may not simultaneously claim that the beneficiary is both a function and a personnel manager. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). Given that the very essence of a function manager is that he or she does not oversee the work of subordinate employees, the claim that the beneficiary is both a function and a personnel manager leads to a factual improbability within the context of a multinational manager or executive.

The petitioner repeatedly claimed that 80% of the beneficiary's time was allocated to overseeing the work of his subordinates, therefore the petitioner cannot successfully establish that the beneficiary allocated his time primarily to the management of a function. 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)). Furthermore, given the petitioner's inconsistent information with regard to the number and types of employees managed, the petitioner cannot successfully establish that the beneficiary allocated his time primarily to the management of a supervisory, managerial, or professional staff. It is noted that 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. at 591.

Accordingly, in light of the numerous anomalies and inconsistencies described in the discussion above, we find that the petitioner failed to establish that the beneficiary's employment with the foreign entity was primarily within a qualifying managerial or executive capacity and on the basis of this adverse finding this petition cannot be approved.



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.