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



U.S. Citizenship
and Immigration
Services

DATE: **JUN 05 2014** OFFICE: TEXAS 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:

SELF-REPRESENTED

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center ("the director") revoked the approval of the immigrant visa petition after issuing a Notice of Intent to Revoke (NOIR) and reviewing the petitioner's response. The Administrative Appeals Office (AAO) rejected the petitioner's timely appeal as improperly filed in accordance with 8 C.F.R. § 103.3(a)(2)(v)(A)(I). Subsequently, the petitioner filed a motion to reopen or reconsider the AAO's decision, asserting that the appeal should not have been rejected. As a matter of administrative discretion, the AAO considered the merits of the petitioner's claims and granted a *de novo* review of the record on certification.¹ The AAO affirmed the director's decision revoking the petitioner's approved Form I-140 petition and dismissed the petitioner's subsequent motion to reopen. The matter is now before the AAO again on a motion to reopen and reconsider. The motion will be granted and the AAO's previous decision will be affirmed. The approval of the petition will remain revoked.

The petitioner filed this Form I-140, Immigrant Petition for Alien Worker, 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 petitioner, a Texas corporation, operates retail gift shops and seeks to employ the beneficiary as its executive director.

Although the director initially approved the petitioner's Form I-140, a Department of Homeland Security, Office of Fraud Detection and National Security (FDNS) investigation provided potentially derogatory information about the continued operations of both the petitioner and the foreign entity. In addition, in reviewing the record of proceedings, the director determined that the record as it existed at the time of approval was lacking certain required initial evidence and thus the petition should not have been approved. Accordingly, the director issued a notice of intent to revoke (NOIR) the approval of the petition on January 19, 2010.

After considering the petitioner's response to the NOIR, the director revoked approval of the petition on March 12, 2010, concluding that the petitioner failed to overcome all of the bases for revocation. Specifically, the director revoked the approval based on a finding that the petitioner failed to establish: (1) that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity; (2) that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and (3) that the petitioner and the beneficiary's foreign employer have a qualifying relationship. The director's ultimate conclusions were based on the evidence of record as opposed to the findings of the FDNS report and there was no finding of fraud or material misrepresentation.

The AAO reviewed the record on certification and affirmed the director's conclusions that the petitioner failed to provide evidence to meet the eligibility requirements for the requested

¹ Like any USCIS office, the AAO may avail itself of the certification process. See 8 C.F.R. § 103.4(a). As a matter of administrative discretion, the AAO may certify a decision to itself for review. The AAO limits this practice to cases involving exceptional circumstances; it "is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations" *Matter of Jean*, 23 I&N Dec. 373, 380 n 9 (AG 2002).

classification and therefore determined that the approval of the petition was properly revoked. The AAO also dismissed the petitioner's subsequent motion to reopen on November 29, 2013.

On December 31, 2013, the petitioner filed the instant motion to reopen and motion to reconsider the AAO's decision of November 29, 2013. The petitioner provides a brief and additional evidence in support of the motion.

Upon review, the evidence submitted on motion is insufficient to overcome the grounds for revocation of the petition's approval and the AAO's prior decision will be affirmed.

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. Discussion

A. Employment in the United States in a Managerial or Executive Capacity

The approval of the petition was revoked, in part, based on a finding that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity as defined at sections 101(a)(44)(A) and (B) of the Act. In affirming the revocation of the petition, the AAO found that the petitioner failed to submit the required

detailed description of the beneficiary's job duties despite being given an opportunity to do so in response to the notice of intent to revoke. In addition, we emphasized that the petitioner claimed to have only five employees when the petition was filed on June 5, 2002, and the record reflected that three of these employees worked on a part-time basis, earning as little as \$206 over a three-month period. The petitioner did not explain how the beneficiary would be relieved from performing the day-to-day, non-managerial duties associated with operating the retail businesses on a daily basis given the staffing structure in place at the time of filing.

In a brief submitted in support of the current motion, counsel asserts that "[i]t was presumed that USCIS would recognize that the beneficiary . . . serves in an executive capacity. He planned and budgeted the cash flow to acquire two additional businesses. He was responsible for negotiating each purchase and he signed the contracts with the seller(s) as the buyer." Counsel asserts that "[p]urchasing and signing contracts to purchase two new businesses is far beyond the responsibilities of a supervisor or manager." The petitioner also submits a copy of an employee handbook and an employee evaluation form, and claims that the beneficiary developed these documents in his role as president of the company.²

In support of the previous motion, the petitioner also submitted its organizational chart dated "2002" which identified a total of eight (8) employees by name, as well as five contracted sales staff. As noted above, the petitioner claimed to have five employees at the time of filing. The petitioner did not identify who was working for the company in June 2002 when the petition was filed. Notably, the individuals identified on this chart as holding the positions of vice president/operations manager and general manager were identified by the petitioner as cashiers when it responded to the director's request for evidence issued in July 2003.

The petitioner submitted copies of seven IRS Forms W-2, Wage and Tax Statement, for 2002. The petitioner contended that "USCIS failed to recognize that [the beneficiary's spouse] assisted her husband by working for the business as the co-owner; however, in lieu of receiving a paycheck she received draws from the business." The petitioner stated that the beneficiary's spouse serves as vice president and operations manager and provided a description of her duties. However, as noted above, the petitioner provided evidence that the beneficiary's spouse was paid wages in 2003 and identified her as a cashier at that time. The petitioner did not claim to have an operations manager at the time the petition was initially approved.

The petitioner has not provided evidence of any payments to the unnamed contract workers indicated on the newly submitted 2002 organizational chart. The submitted Forms W-2 reflect

² Although the petitioner indicates that the beneficiary developed the employee handbook/policy and procedures manual, the handbook indicates at section 2.2 that the President of the company is "[redacted]" and at section 4.3 that the president of the company is "[redacted]". Neither of these names appears elsewhere in the record. While we do not question that the beneficiary is the president of the petitioning company, these anomalies raise questions as to whether the beneficiary actually created this document.

that the beneficiary earned \$42,000 in 2002 and the remaining six employees earned a combined total of \$28,103. The highest paid sales employee earned \$2,880 in annual wages while the other two sales staff earned less than \$1,000.

Upon review, the evidence submitted on motion is insufficient to overcome the grounds for revocation of the petition's approval. As noted, we affirmed the revocation decision because the petitioner failed to provide a detailed description of what the beneficiary actually did on a daily basis within the context of the petitioner's staffing arrangement at the time of filing, and because the petitioner failed to establish how the staff would relieve the beneficiary from performing the non-managerial duties associated with operating three retail stores.

On motion, counsel points to the beneficiary's responsibility for business expansion and acquisition, policy-making and other responsibilities as evidence that he will be employed in an executive capacity. 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). Here, while there is evidence that the beneficiary holds the appropriate level of discretionary authority over the petitioning company, the petitioner has not provided any additional evidence that would support a finding that he *primarily* performs managerial or executive duties.

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 indicated that it operated three gift stores, located in [REDACTED] and [REDACTED] Texas, and stated that each store was open for 48 hours per week. The petitioner stated on the Form I-140 that it had five employees, and the petitioner's most recent quarterly wage report at the time showed that three of those employees were working part-time. These employees earned \$1,440, \$544.25, and \$205.50 in wages for the quarter ended on March 31, 2002. The petitioner paid these employees (all cashiers) total wages of \$2,880, \$997 and \$544, respectively, in 2002. While the petitioner submitted an organizational chart on motion identifying these cashiers, five contracted employees, and three levels of supervisory staff subordinate to the beneficiary, the record as a whole does not support a conclusion that this chart reflects the staffing or organization of the company at the time of filing. 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 petitioner's claim that the beneficiary's spouse has been working as the company's operations manager without a regular salary or wages is undermined by the petitioner's own claim in response to the RFE that the beneficiary's spouse was working as a cashier, which was accompanied by evidence that the company was paying her wages. Similarly, the petitioner has not submitted evidence to establish that it employed sales staff on a contract basis when the petition was filed. 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)). Accordingly, the evidence provided on motion does not overcome the director's and this office's previous finding that the company was staffed by the beneficiary and a subordinate staff of one full-time and three part-time employees at the time the petition was filed.

Furthermore, the record contains conflicting evidence regarding the job title of the one employee who received wages during the first half of 2002. The petitioner identifies [REDACTED] as a general manager on its organizational chart, but the petitioner indicated in response to the RFE that this individual worked as a cashier. 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).

When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (USCIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts that contribute to understanding a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. The petitioner has not established that it had sufficient personnel at the time of filing to fully staff its three retail shops with cashiers and has not identified who was responsible for purchasing merchandise, performing inventory, and performing day-to-day administrative and clerical duties associated with operating the three shops.

Therefore, the petitioner has not established that it employs a staff that will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial or executive duties. Further, regardless of the beneficiary's executive position title, the record is not persuasive that the beneficiary will function at a senior level within an organizational hierarchy.

For the foregoing reasons, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity. Accordingly, the approval of the petition will remain revoked.

B. Foreign Employment in a Managerial or Executive Capacity

The next issue to be addressed is whether the petitioner established that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity as defined at sections 101(a)(44)(A) and (B) of the Act.

In affirming the revocation of the petition approval, the AAO determined that the petitioner did not provide a sufficiently detailed description of the duties the beneficiary performed abroad and did not provide sufficient information or evidence pertaining to the foreign entity's staffing levels or the organizational structure in place during the beneficiary's period of foreign employment.

On motion, counsel asserts that "[i]t was presumed that USCIS would recognize the supporting documents previously submitted which clearly identify the beneficiary's majority interest in the business." The petitioner submits a copy of the foreign entity's partnership deed, a copy of a May 21, 2003 letter referencing a request for an extension of the beneficiary's L-1A status, and copies of the beneficiary's pay stubs for the period July 1999 through August 2000.

While these documents confirm the beneficiary's job title with the foreign entity and his majority ownership of the company, they do not provide any further insight into the actual duties the beneficiary performed. 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). The fact that the beneficiary owned a majority interest in the foreign entity and had an executive job title is not sufficient to establish that he was employed in a qualifying managerial or executive capacity as those terms are defined at section 101(a)(44) of the Act.

Further, beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the company'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 foreign entity's business, and any other factors that will contribute to understanding the beneficiary's actual duties and role in a business. As discussed, the record lacks evidence of the foreign entity's staffing levels and organizational structure during the three-year period preceding the beneficiary's admission to the United States and the petitioner has not addressed these deficiencies on motion. Accordingly, the petitioner has not established that the foreign entity employed the beneficiary in a qualifying managerial or executive position and our previous decision will be affirmed.

C. Qualifying Relationship

The third and final issue to be addressed is whether the petitioner has a qualifying relationship with the beneficiary's foreign employer in India and whether it remains a multinational company.

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"). Moreover, the term "multinational" means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

In affirming the director's decision to revoke the approval of the petition, the AAO found that the petitioner's claimed affiliate relationship with the foreign entity was severed when the foreign entity ceased operations in 2004, and that there was no evidence that the petitioner currently qualifies as a multinational organization. We emphasized that federal regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed or when the visa is issued by a United States consulate. 8 C.F.R. § 245.1(a), 22 C.F.R. § 42.41.

If the beneficiary of an approved visa petition is no longer eligible for the classification sought, the director may seek to revoke his approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for "good and sufficient cause." Notwithstanding the USCIS burden to show "good and sufficient cause" in proceedings to revoke the approval of a visa petition, 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).

On motion, the petitioner submits a 1999 joint venture agreement between the foreign entity and the petitioner and asserts that this evidence establishes a qualifying relationship between the entities. Counsel does not address the AAO's finding that the petitioner is no longer a multinational company and therefore cannot establish eligibility.

The existence of a qualifying relationship between the U.S. and foreign entities at the time of filing is not relevant to the fact that the foreign company no longer exists. A multinational executive or manager is one 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." Section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C). In order to establish eligibility for classification as a multinational manager or executive for immigrant visa purposes, the petitioner must establish that it is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas. 8 C.F.R. § 204.5(j)(3)(i)(C). In this matter, the petitioner does not address the fact that as of 2004 the foreign entity was no longer in business and the claimed affiliate relationship between the petitioner and the foreign entity was severed. The petitioner cannot establish an ongoing qualifying relationship with a foreign entity that no longer exists. Therefore the petitioner no longer meets the definition of "multinational" as it no longer conducts business in the United States and in at least one other country. The petitioner has not addressed this finding on motion and therefore the AAO's previous determination will be affirmed.

As a final note, the proper filing of a motion to reopen and/or reconsider does not stay the AAO's prior decision to dismiss an appeal or extend a beneficiary's previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

III. 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). The petitioner has not sustained that burden.

ORDER: The AAO's previous decision is affirmed. The approval of the petition remains revoked.