



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **MAR 20 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 immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, a limited liability company established in the State of North Carolina, is engaged in the import, export, and sale of furniture. The petitioner states that it is an affiliate of [REDACTED] located in Belgium. It seeks to employ the beneficiary as its chief executive officer (CEO). 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 had not established that it will employ the beneficiary in a managerial or executive capacity.

On appeal, counsel asserts the petitioner has submitted sufficient evidence to establish that the beneficiary will be employed in a qualifying managerial capacity as defined at section 101(a)(44)(A) of the Act.

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. The Issue on Appeal

The sole issue addressed by the director was whether the petitioner established that the beneficiary would be employed in a qualifying managerial or executive capacity in the United States.

In denying the petition, the director stated that the petitioner had submitted an overly vague position description that did not provide sufficient detail regarding the beneficiary's day-to-day activities. The director noted that the petitioner had only two employees, including the beneficiary, at the time of filing. Additionally, the director concluded that the petitioner had not established that it utilized contractors to perform the day-to-day operations of its business. Based on the apparent lack of operational employees to run the business, the director found that the record did not support a finding that the beneficiary would primarily perform executive or managerial duties.

On appeal, counsel asserts that the petitioner has submitted an appropriately detailed duty description for the beneficiary, including specifics relevant to the beneficiary's day-to-day activities. Counsel emphasizes that the petitioner engages contractors and employees from the foreign employer to perform the operational duties of the business thereby relieving the beneficiary from primarily performing these non-qualifying duties. Counsel contends that the director placed undue emphasis on the number of employees the petitioner had in the United States, and failed to consider the availability of staff outside the petitioner's immediate payroll. Further, in an additional brief, counsel asserts that the beneficiary qualifies as a function manager based on recently issued AAO decisions.

Counsel's assertions are not persuasive. Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity.

In order to determine whether the beneficiary would be employed in a qualifying executive or managerial capacity, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In response to the director's request for evidence (RFE), the petitioner provided a lengthy description of the beneficiary's job duties, including percentages of time spent by the beneficiary on various tasks, as follows:

General Operations

- Meet with Operational Subordinates (Design, Production, Sales and Marketing) to review work in progress- 15%
- Meetings with subordinates to review finished work prior to accepting same- 10%
- Discussions with subordinates re: problems, defects, etc.- 2%
- Discussions/meetings with subordinates re: problems, defects, etc.- 2%
- Discussions/meetings with subordinates re: Production lines/goals, etc.- 1%
- Meetings with staff to delegate follow through on all issues as appropriate- 1%

Sales and Marketing

- Create and amend marketing strategy- 2%
- Oversee preparations by design and production departments for presentations at [REDACTED] Furniture Market (twice yearly)- 5%
- Attend and Oversee Presentations at [REDACTED] Markets- 10%
- Supervise the preparation of furniture manuals and catalogs- 5%
- Meetings and negotiations with new customers regarding new and existing lines, possible sales, terms, etc.- 5%
- Maintain regular phone contact with key account customers regarding technical support issues, delivery times for new and existing orders, consumer trends and impact on company offerings, etc.- 2%
- Attend key account and new account sales meetings- 3%

Financial Operations

- Create annual budget- 1%
- Review proposed budget figures with subordinates- 2%
- Discussions with subordinates re: annual budgets and progress [within] year for same- 2%
- Discussions about alternations to design with [REDACTED] based on customer feedback technical solutions, cost issues, associated with changes and solutions, make decisions regarding the same, and delegate responsibility to implement decisions to appropriate department- 1%
- Discussions about pricing with [REDACTED] with sales agents to approve sales quotes, delivery estimates, etc.- 3%
- Conduct all meetings and negotiations with US and Foreign Banks and other agencies regarding LOC's, wire transfers, when and where to make deposits to maximize return on company assets; review and implement exchange rate modifications into price lists, etc.- 2%

- Have phone conferences regularly with [REDACTED] regarding design proposals, customer feedback, technical issues, cost issues, shipping and delivery, etc.; establish proper guidelines and responses for same, and delegate duty to implement same to appropriate employees- 10%
- Oversee preparations of monthly and annual financial reports, conferences with CPA regarding all interim issues during year, and discuss preparation of an modifications to company tax return, payments regarding same, etc.- 3%

Product Development

- Preliminary discussions about customer needs with [REDACTED] 1%
- Discussions about [REDACTED] 1%

Strategic Operations

- Oversee preparation and periodic modification of company's long range plan- 3%

General Oversight

- Establish goals and policies for company- 1%
- Internal issues, e.g., our real estate, gift for customers and employees, researching possibilities of acquisitions- 2%

Although the petitioner has submitted a lengthy duty description for the beneficiary, the description fails to convey the actual nature of the beneficiary's day-to-day activities. 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. For instance, the petitioner indicates that more than half of his duties are devoted to discussions with his subordinates abroad regarding daily operational matters, such as reviewing work in progress, reviewing finished work and accepting the same, problems and defects, production lines/goals, delivery times and locations, annual budgets and progress related thereto, alterations in design based on customer feedback, approval of sales quotes and delivery estimates, and customer needs. However, the petitioner has not provided details regarding the actual duties performed by these subordinates, or examples of the problems and defects resolved through the beneficiary's direction, production lines and goals established, or alterations in product lines implemented. It is reasonable to expect that the petitioner would have submitted some details regarding the beneficiary's specific activities, particularly considering that the beneficiary has been acting in this capacity since 2009. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. *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); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Moreover, the petitioner's description of the beneficiary's duties reflects that he allocates more than half of his time to non-qualifying operational duties. As noted above, the beneficiary's duty description indicates that he spends more than half of his time having discussions on day-to-day operational matters such as reviewing work in progress, reviewing finished work and accepting the same, problems and defects, production lines/goals, delivery times and locations, annual budgets and progress related thereto, alterations in design based on customer feedback, approval of sales quotes and delivery estimates, and customer needs. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner's description of the beneficiary's duties does not demonstrate that he is engaged in the performance of qualifying duties, such as those related to the establishment of goals and policies for the organization, but explains that the beneficiary devotes more than half of his time coordinating and responding to day-to-day operational matters, rather than delegating these duties to his asserted foreign subordinates. Indeed, the petitioner has provided no details or specifics regarding goals and policies implemented or established by the beneficiary, a central purpose for a qualifying manager or executive, and states that this only involves one percent of the beneficiary's daily duties.

Further, certain discrepancies in the duty description leave question as to whether they accurately represent the beneficiary's actual day-to-day duties. For instance, the petitioner states that the beneficiary devotes fifteen percent of his time to attending and overseeing presentations at [REDACTED] and [REDACTED]. However, the duty description also states that the [REDACTED] furniture market only takes place once a year and the [REDACTED] market only twice per year. As such, it is not clear how the beneficiary devotes fifteen percent of his daily time to activities that these infrequently held events. The beneficiary is also stated to perform operational duties through the petitioner's relationship with [REDACTED] including regularly performing site inspections of the contractor's work, coordinating on the design of specific client orders, and resolving manufacturing delays. At the same time, the beneficiary is stated to delegate these operational duties to subordinate employees pursuant to his role with the foreign employer. 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. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Additionally, when examining the managerial or executive capacity of a beneficiary, USCIS reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. Despite the petitioner's submission of a lengthy duty description for the beneficiary's position, the evidence as a whole does not support a conclusion that the beneficiary will perform primarily executive or managerial duties.

The petitioner states that it engaged in the design and manufacture of high-end luxury furniture, upholstery and related fabrics and accessories and that it focuses primarily on the designer market for residential and professional customers. The petitioner further asserts that "the company imports fabrics and materials from Europe, renders designs for various pieces of furniture for a select group of customers, and then oversees the production of the final product (which is manufactured locally in the United States and sold in both the US and Europe." The petitioner noted that eighty percent of its finished products are made and sold in the United States.

The petitioner states that it has two employees, the beneficiary and [REDACTED], who acts as chief designer and creative director. The petitioner further asserts that the business relies on the operational support of various employees working for the foreign company and depicts these employees as the beneficiary's subordinates on the U.S. organizational chart. For instance, the petitioner's organizational chart reflects a product and design director reporting to [REDACTED] and a finance and operational director reporting to the beneficiary. Additionally, subordinate to these managers is a marketing officer, a production officer for Europe orders, a production officer for U.S. orders reporting to the aforementioned product and design director, and an IT and logistics manager, invoicing/administration employee, and warehouse manager reporting to the aforementioned finance and operational director. In total, the petitioner asserts that it has eight foreign company employees supporting its operations. Counsel asserts that the petitioner relies on these employees to perform the day-to-day operational duties of the business and relieve the beneficiary from performing non-qualifying duties. In response to the director's RFE, the petitioner provided one line duty descriptions for the foreign company employees.

Additionally, the petitioner submitted documentation demonstrating that it engages the services of three contractors in the United States to manufacture furniture, including [REDACTED]. Amongst the documentation submitted by the petitioner are two letters from the executive director of [REDACTED] attesting to this company's provision of outsourced manufacturing services for the petitioner.

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).

In the current matter, the petitioner has not provided sufficient evidence with respect to the contributions of the claimed foreign staff. As noted, the petitioner states that it engages eight foreign company employees to perform "administrative and logistics functions," thereby effectively relieving the beneficiary from performing these duties. However, the petitioner has failed to document that the foreign employer currently employs these workers and has not established the specific duties they perform to support the day-to-day operations of the U.S. company. In fact, the petitioner has stated that approximately eighty percent of its goods are manufactured and sold in the United States. Therefore, it is not clear from the evidence presented how the beneficiary's asserted

foreign subordinates are significantly contributing to the petitioner's U.S. operations. 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 short, the petitioner has not submitted any evidence that the foreign company employees are performing operational duties for the petitioner or sufficient evidence to support that the beneficiary is performing executive or managerial duties. In fact, the petitioner submits substantial invoices and bank records reflecting payments made by check to [REDACTED] from bank accounts in the United States and receipts indicating numerous local shipments of goods from [REDACTED] locations in North Carolina. The petitioner has not established that these check payments from bank accounts in the United States were, or could be, made by foreign company employees located in Belgium, or that shipments could be made from [REDACTED] stores by these same employees located abroad. The petitioner provides no further detail or supporting evidence to demonstrate the performance of operational duties by the remotely located foreign employees.

In a second brief submitted on appeal, counsel relies on a recent non-precedent AAO decision to assert that the beneficiary qualifies as a function manager consistent with the Act. The term "function manager" applies generally when a managerial employee 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). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. Finally, the petitioner must establish that someone other than the beneficiary actually performs the non-managerial duties associated with the function.

The petitioner has not demonstrated with sufficient evidence that the beneficiary acts as a function manager. First, counsel refers to unpublished decisions pursuant to which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though beneficiary was the sole employee, and another case whereby a beneficiary was determined to qualify as an executive or manager based upon his management of both contractors and foreign company employees. The AAO notes that while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Also, counsel has not furnished sufficient evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. As discussed, the petitioner has provided insufficient evidence to establish that it has employees or other staff to perform the non-managerial functions required for the day-to-

day operation of the business. This lack of evidence is in contrast to the petitioners in each of the aforementioned unpublished decisions who submitted sufficient evidence regarding the engagement of outside employees and their contributions to the U.S. business. Contrary to counsel's assertions, United States Citizenship and Immigration Services (USCIS) is not obligated to demonstrate that the beneficiary primarily performs non-qualifying duties to deny a petition. Indeed, the petitioner must submit sufficient evidence to demonstrate that a beneficiary primarily performs executive or managerial duties and that it has sufficient operational employees to relieve the beneficiary from significant involvement in non-qualifying tasks. As discussed herein, the petitioner has failed to meet this burden, primarily because it has failed to submit evidence to support the assertion that it utilizes foreign company employees to relieve the beneficiary from performing non-qualifying operational duties.

Further, although the petitioner has furnished sufficient evidence to demonstrate that it has relationships with manufacturers in the United States, this does not resolve the issue of who is performing the other operational duties of the business, nor does this evidence demonstrate that the beneficiary will spend a majority of his time managing contracted manufacturers. In fact, the letters submitted from the primary contract manufacturer, [REDACTED] suggest that these parties operate at arms-length and that the beneficiary has no supervisory authority over any of the employees working for the contracted manufacturers. The letters from [REDACTED] reflect that the petitioner provides designs to [REDACTED] and coordinates closely with this contractor on their specialized manufacture. The petitioner has failed to establish that the beneficiary primarily performs managerial duties. Therefore, the petitioner has not established that the beneficiary qualifies as a function manager.

Counsel further contends on appeal that the director did not give proper deference to an expert opinion submitted by the petitioner from a professor of marketing at the [REDACTED] in response to the director's RFE. The aforementioned professor concluded that based on his review of the evidence submitted, the beneficiary would act in a managerial or executive capacity as defined by the Act. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron Int'l.*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. *Id.*; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may even give less weight to an opinion that is not corroborated or is in any way questionable. *Matter of Caron Int'l.*, 19 I&N Dec. at 795. Furthermore, merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

The expert opinion is not persuasive as it is based primarily upon the conclusion that the petitioner engages staff of the foreign company to perform administrative and logistics functions. The AAO concurs with the expert opinion that sufficient operational employees to relieve a beneficiary from performing operational duties may be established through evidence of contractors and foreign

employees performing these duties. However, as noted previously, the petitioner has submitted inconsistent and insufficient evidence related to establishing which employees perform the operational duties of the business. As such, based on this insufficiency in the submitted evidence, the AAO does not find the conclusion of the expert persuasive in establishing that the beneficiary will be employed in a qualifying capacity.

Counsel further contends that the director inappropriately emphasized the small size of the business in determining that the beneficiary would not act in a managerial or executive capacity. First, the AAO concurs that undue emphasis should not be placed on the size of a business alone in determining whether a beneficiary will act in a managerial or executive capacity. 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. However, despite this guidance from the regulations, the petitioner must still establish that the beneficiary's position requires him to perform primarily managerial or executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from significant involvement in operational and/or administrative tasks. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44).

In conclusion, the petitioner has submitted insufficient and contradictory evidence with respect to demonstrating that it has sufficient employees and operations to support the beneficiary in a managerial or executive capacity. Thus, the petitioner has failed to establish that it will employ the beneficiary in a qualifying managerial or executive capacity. For this reason, the appeal must be dismissed.

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). Here, that burden has not been met.

ORDER: The appeal is dismissed.