



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **MAY 15 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:

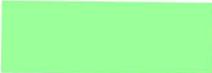
INSTRUCTIONS:

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 Director, Nebraska Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a California corporation engaged in the business of software development and support. It seeks to employ the beneficiary as its chief executive officer. 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 failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

I. The Law

Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

II. Procedural History

The record shows that the petitioner filed the Form I-140 on February 5, 2013 claiming five employees and a gross annual income of \$143,812 in 2011. In support of the Form I-140, the petitioner provided a supporting statement dated January 28, 2013, claiming to have secured “a favorable cooperation relationship with [REDACTED] through its foreign affiliate in Beijing, China. The petitioner stated that it entered into a new contract with [REDACTED] in an effort to expand its business in North America. The petitioner provided the following statement with regard to the beneficiary’s proposed employment in the United States:

In this position, [the beneficiary] will continue to manage the business development and operation of the U[.]S[.] company; setup [sic] goals and policies of the company; establish and maintain effective communication with headquarters, and coordinate in between to protect U[.]S[.] market and [the] company’s best interests; negotiate contracts with partners and customers in the U[.]S[.]A[.], and make decision [sic] on payment terms and payment method; provide excellent support to our partner [REDACTED] and customers; direct and oversee product installation, configuration, maintenance, upgrade, and tech support; monitor and plan modifications, optimize and promote new modules, next generation products, version upgrade, and new releases; direct and implement confidential and security policies, procedures and techniques to protect proprietary products and customers[?] private information; setup [sic] and improve tech support procedures; propose, plan, and direct marketing activities and trade shows; follow market trend and propose new products to help in company’s development direction; [and] recruit personnel per company’s business necessity.

After reviewing the petitioner’s submissions, the director determined that the petitioner failed to establish eligibility and therefore issued a request for evidence (RFE) on July 16, 2013. One focal point of the director’s request was documentation pertaining to the beneficiary’s proposed employment with the petitioning entity. Namely, the director instructed the petitioner to provide a detailed description of the beneficiary’s proposed job duties that reflect the petitioner’s staffing at the time the petition was filed. The petitioner was asked to supplement the list of job duties with percentage breakdown and to refrain from grouping tasks together, but rather to list each task separately and indicate what percentage of time the beneficiary would dedicate to each item on the list. Additionally, the director instructed the petitioner to provide a copy of its organizational chart illustrating its staffing, complete with each employee’s job title and description of duties.

In response, the petitioner submitted a statement from counsel dated August 20, 2013, briefly stating that the beneficiary “directs all business activities of the [petitioner,]” including recruiting personnel and entering into a new contract with [REDACTED] “to develop the payment interface based on a new published device specification in Taiwan.” Additionally, the petitioner provided a list of the petitioner’s four employees, supplemented with their respective job descriptions and educational credentials, which show that each individual possesses a graduate degree either in science or computer science. The petitioner submitted a corresponding organizational chart that listed the same four employees in addition to the beneficiary, thus

indicating a total of five employees. However, based on information contained within the petitioner's 2013 first quarterly wage report, which corresponds with time period during which the Form I-140 was filed, the petitioner paid wages to a total of four employees, including the beneficiary. A comparison of the wage report document, which names the petitioner's employees, and the employees listed in the chart indicates that [REDACTED] whom the organizational chart identified as "QA," was not employed by the petitioner at the time of filing.

Lastly, with regard to the beneficiary's job description, the petitioner provided a percentage breakdown of the beneficiary's job duties, emphasizing the beneficiary's integral role in being the petitioner's key policy maker, contract negotiator, chief communicator with the client company and the foreign affiliate, driving force behind directing product development, creating effective solutions, and ensuring good customer support for the petitioner's clients, personnel recruiter, and director of all marketing activities.¹

The director reviewed the petitioner's submissions and determined that the record lacked sufficient evidence to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The director found the beneficiary's job description to be overly vague and thus limited in its evidentiary value. The director further determined that a number of the job duties listed were not of a managerial or executive nature and thus concluded that the beneficiary's time would not be primarily allocated to tasks that are within a qualifying capacity. Lastly, the director determined that the beneficiary's subordinates are not supervisory, professional, or managerial employees.

On appeal, counsel disputes the director's adverse conclusion, asserting that the evidence of record does not support the director's findings. Counsel points to the petitioner's previously approved L-1A petitions that were filed on behalf of the same beneficiary, pointing out that the beneficiary would continue her employment in the same position as the one she occupied when the prior nonimmigrant petitions were filed. Counsel emphasizes the petitioner's business relationship with [REDACTED] and the beneficiary's key role in fortifying that relationship through the software development solutions provided by the petitioner through the beneficiary's guidance.

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

III. Managerial or Executive Capacity

As indicated above, the primary issue to be addressed in this proceeding is whether the petitioner established that the beneficiary's proposed employment with the U.S. entity would be in a qualifying managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

¹ As the director restated the beneficiary's job description in the denial, the AAO need not restate the same job description in this discussion.

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

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

In general, when examining the executive or managerial capacity of the beneficiary, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record, starting first with the petitioner's description of the beneficiary's job duties. See 8 C.F.R. § 204.5(j)(5). 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). Also critical to this analysis are factors such as staffing size, job descriptions of the beneficiary's subordinates and other employees who will carry out the petitioner's daily operational tasks, the nature of the business conducted, and any other facts that may contribute to a comprehensive understanding of the beneficiary's actual role within the organization.

Turning first to the beneficiary's description of duties, we find that the petitioner has failed to establish that the beneficiary would allocate her time primarily to the performance of tasks within a qualifying managerial or executive capacity. On par with the director's reasoning, the AAO also finds that a number of the components within the job description are overly broad in their use of generalized terms that can be widely applied to any given number of positions. For instance, the petitioner indicated that 10% of the beneficiary's time would be allocated to setting long- and short-term financial goals and business policies. However, the petitioner provided no discussion of any specific goals or policies that the beneficiary set up or explain how the setting of goals and policies is reflected through tasks the beneficiary would perform on a daily basis. It stands to reason that any individual who assumes a position as head of an organization, regardless of the organization's size or business purpose, is charged with setting goals and policies. However, these broad statements fail to convey a meaningful understanding of what this means in terms of the beneficiary's specific tasks within the petitioner's actual organization.

Similarly, the petitioner failed to explain what types of tasks represent the beneficiary's role in managing deliverables and making decisions regarding payment terms and methods. In other words, it is unclear when, other than during the contract negotiation phase, the beneficiary would be required to determine payment terms and methods. That being said, the petitioner has not provided any evidence to establish that it has more than one client and that negotiating contracts and making decisions regarding payment terms and methods are part of the beneficiary's daily job responsibilities. 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)). It is not reasonable to assert that the beneficiary would spend an average of four hours per week on tasks that are associated with contract negotiation when there is little evidence to establish that the beneficiary has multiple clients such that contract negotiations would have been a regular part of the beneficiary's job at the time the petition was filed.

Additionally, while the petitioner states that the beneficiary would spend 20% of her time maintaining a good relationship with [REDACTED] it is unclear precisely what types of tasks the beneficiary would perform, aside from her weekly phone call to [REDACTED] in order to meet this broad business goal. In other words, the petitioner's mention of "new customers, solution designs, project plans and installation schedules," does not explain the specific tasks that the beneficiary herself would perform in order to maintain and expand the petitioner's business relationship with [REDACTED].

In reviewing other components of the job description, it appears that an unspecified portion of the beneficiary's time would also be allocated to tasks that are not within a qualifying managerial or executive

capacity. Namely, in its discussion of the beneficiary's role in directing product development and managing deliverables and customer support, the petitioner indicated that the beneficiary would "[f]oresee technical directions, optimize and promote new modules, next generation products, and new releases." However, the petitioner did not explain what specific tasks the beneficiary would perform. Without an explanation of the specific tasks that would be involved, it cannot be determined that the nature of such tasks would be managerial or executive. Similarly, while the petitioner stated that the beneficiary would "ensure excellent support is provided to partners . . . and customers," it did not specify which specific tasks the beneficiary would carry out to meet this goal. As the petitioner did not list these duties separately, but rather included them with other duties the comprise the category dealing with directing product development and managing deliverables and customer support, it is unclear precisely how much time the beneficiary would allocate to the tasks that are deemed as non-qualifying. The petitioner also stated that the beneficiary would spend time recruiting personnel and directing marketing activities. However, despite the petitioner's need to have the beneficiary carry these key operational job duties, neither qualifies as job duties typically performed by someone within a managerial or executive capacity. Rather, the recruitment of staff is a human resources task and following marketing trends and performing other similar types of marketing tasks within an organization that has no human resources or marketing personnel can only be deemed as tasks necessary to produce a product or to provide services.

While it is true that no beneficiary is required to allocate 100% of his or her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary performed were only incidental to the position in question. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988). Merely establishing that the beneficiary performs tasks at a professional level is not sufficient unless those tasks rise to the level of managerial or executive capacity. In the matter at hand, the petitioner provided a deficient job description, which not only lacks the requisite detail describing the beneficiary's specific daily tasks, but also includes non-qualifying tasks without clearly indicating what portion of time the beneficiary would allocate to qualifying versus non-qualifying tasks.

Additionally, in reviewing the petitioner's personnel structure, the record is inconsistent as to the number of employees the petitioner had at the time of filing. While the petitioner claimed five employees on its Form I-140, the petitioner's quarterly wage report that corresponds with the time period the petition was filed indicates that the petitioner had no more than four employees during the entire first quarter of the year 2013. 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). While the director concluded, erroneously and contrary to the evidence of record, that the beneficiary's subordinates are not supervisory, professional, or managerial employees, the petitioner has still failed to provide sufficient evidence to establish that its employment of one business development manager, one professional service manager, and one computer programmer at the time of filing was sufficient to relieve the beneficiary from having to allocate her time primarily to the performance of non-qualifying tasks. The beneficiary's job description, albeit deficient, nevertheless strongly indicates that the beneficiary would continue to perform certain non-qualifying tasks. The burden is on the petitioner to establish that those tasks

would not occupy the primary portion of the beneficiary's time. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). While the record shows that the beneficiary would oversee a staff of professional employees, it is unclear how much of her time would be devoted to these and other qualifying tasks.

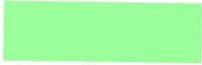
Looking at the totality of the evidence presented in the matter at hand, the petitioner has failed to establish that the beneficiary would be employed in a qualifying managerial capacity. While evidence points to the likelihood that the beneficiary assumes a top-level position within the petitioning organization, this fact must be considered together with other evidence in the record. Here, given the various non-qualifying tasks that were expressly assigned to the beneficiary and in light of the limited support staff the petitioner employed at the time of filing, it cannot be concluded that during the petitioner is ready and able to employ the beneficiary in a qualifying managerial or executive capacity and on the basis of this conclusion the instant petition cannot be approved.

IV. Previously Approved Nonimmigrant Petitions

Lastly, with regard to the petitioner's previously approved L-1 nonimmigrant petitions, which the petitioner filed on behalf of the same beneficiary, it must be noted that each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits to warrant approval. USCIS is not required to assume the burden of searching through previously provided evidence submitted in support of other petitions to determine the approvability of the petition at hand in the present matter. The prior nonimmigrant approvals do not preclude USCIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The approval of a nonimmigrant petition in no way guarantees that USCIS will approve an immigrant petition filed on behalf of the same beneficiary. USCIS denies many I-140 immigrant petitions after approving prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 25; *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103.

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. at 597. It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Finally, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).



V. 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.