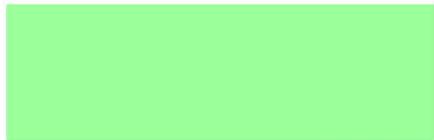




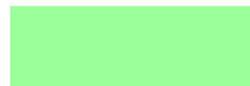
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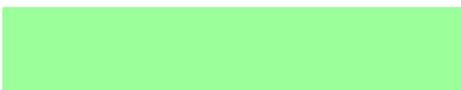


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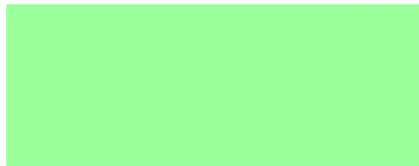


IN RE: Petitioner:
Beneficiary:



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

The petitioner is a Florida corporation, seeking authorization to continue to employ the beneficiary in the United States as its president and general manager.¹ 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, concluding that the petitioner failed to establish eligibility based on two independent adverse findings. Namely, the director concluded that the petitioner failed to establish that (1) the beneficiary would be employed in the United States in a qualifying managerial or executive capacity; and (2) the petitioner has been doing business in the United States.

On appeal, the petitioner asserts the director erred in denying the petition.

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.

¹ The petitioner states that it has employed the beneficiary in L-1A status since June 2007.

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, the regulations at 8 C.F.R. § 204.5(j)(3) require that the following evidence be submitted in support of the petition:

- (i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

- (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
- (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
- (C) The prospective employer in the United States 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; and
- (D) The prospective United States employer has been doing business for at least one year.

II. Procedural History

The record shows that the instant petition was filed on June 6, 2013 and was accompanied by a supporting statement, dated May 22, 2013, in which the beneficiary, in his capacity as the petitioner's president, described his proposed employment, the nature of the qualifying relationship between the petitioner and the beneficiary's foreign employer, and the petitioner's investments in two separate organizations operating in the United States. In addition, the record contains supporting evidence in the form of tax, corporate, and business documents pertaining to the petitioner, its U.S. investment entities, and the foreign entity shown as owner of the petitioner.

Upon review of the supporting evidence, the director determined that the record lacks sufficient evidence demonstrating eligibility. Accordingly, the director issued a request for evidence (RFE), dated August 7, 2013. The director addressed various issues, including the beneficiary's proposed employment with the petitioning entity and the petitioning entity's business activity during the one-year period prior to the filing of the instant petition. With regard to the former, despite acknowledging the petitioner's earlier submission of a list of job duties and their respective hourly breakdowns, the director indicated that the information provided was unclear and thus instructed the petitioner to provide a list of the beneficiary's specific daily job duties and to indicate the amount of time the beneficiary would allocate to each item on the list. With regard to the latter issue concerning the petitioner's business activity in the United States, the director observed that the petitioner's 2012 tax returns showed that the petitioner generated most of its income through investments, which it deemed is not sufficient evidence to show that the petitioner has been doing business in the United States. The director expressly asked the petitioner to provide receipts and/or invoices to show an exchange of goods and/or services.

The petitioner's response included a statement, dated October 21, 2013, a current list of the beneficiary's subordinates and their respective position descriptions and educational credentials, employer's quarterly reports, evidence of utilities and rent paid for the petitioner's business premises, photographs of the business

premises, a two-year commercial lease, a statement from the petitioner's accounting firm, and a certified English translation of a memorandum of understanding and its original.

Upon review of the submitted evidence, the director determined that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity or that the petitioner itself has been doing business in the United States. The director therefore issued a decision, dated January 21, 2014, denying the instant petition.

The petitioner has since filed an appeal supported by an appellate brief from counsel. Based on our review of the record and for the reasons stated below, we find that the petitioner has failed to overcome the grounds for denial as cited in the director's decision. A comprehensive discussion of the relevant documentation is provided in the sections to follow.

III. Issues on Appeal

As indicated above, this decision will focus on the two primary issues that served as grounds for denial. The first issue looks to the beneficiary's proposed position with the petitioning entity to determine whether the beneficiary would be employed in a qualifying managerial or executive capacity, while the second issue looks to the petitioner's business activity in the United States during the one-year period prior to the filing of the petition.

A. Qualifying Employment in the United States

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. 8 C.F.R. § 204.5(j)(5). A detailed description of actual daily job duties is crucial, as the duties themselves reveal the true nature of the employment. *See 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 job duties, we conduct a review of other relevant factors, including the employer's organizational structure, the presence of subordinate employees and their respective positions, the nature of the business conducted by the employing entity, and any other factors that may contribute to a comprehensive understanding of the beneficiary's actual duties and role in his position with the petitioning entity.

In the present matter, the beneficiary, in the initial supporting statement submitted with the Form I-140, indicated that the petitioner owns two other businesses – a restaurant and a limited liability company engaged in the online sale of pharmaceuticals. The beneficiary stated that he would be employed in a managerial capacity, which would require management of professional and supervisory personnel, who would carry out the non-managerial functions. The beneficiary provided the following breakdown of his proposed position with the petitioning entity:

[The beneficiary] manages his team to reach the best results in terms of profitability. He directs and coordinates the activity of the employees under his supervision. (15% of his time)

[He] shall continue to plan, direct, and coordinate the operations of the U.S. company. He shall formulate policies, manage daily operations, and plan the use of materials and human resources. (15% of his time)

[T]he beneficiary supervises departments linked to marketing, sales, finance and accounting. He is in charge of the global policy of the company and henceforth sets up goals to be reached, departmental policies and procedures to follow for each employee. (10% of his time)

In addition, [the beneficiary]'s managerial duties also include:

- Hire, dismiss, and recommend the appropriate personnel and supervise personnel decisions and relations[.] (5% of his time)
- Develop staffing plans and establish work plans and schedules for each phase of projects in accordance with time limitations and funding[.] (10% of his time)
- Evaluate project proposals and determine methods and procedures for accomplishing the projects, including staffing requirements and allotting funds to various phases of projects[.] (10% of his time)
- Plan and develop labor and public relations policies designed to improve the company's image and relations with customers, suppliers, employees and the general public[.] (5% of his time)
- Review activity reports and financial statements to determine status in obtaining objectives[.] (5% of his time)
- Supervise products and services development in order to ensure that the U.S. entity is kept abreast of current conditions[.] (5% of his time)

Furthermore, [the beneficiary] shall continue to be responsible for:

- Develop marketing strategies with the marketing department. This will include planning and setting prospective annual budget allocations for all marketing and promotion strategies[.] (10% of his time)
- Manage and coordinat[e] service representatives' sales and marketing, and support services to members and trade partners[.] (5% of his time)
- Exercise discretion in settling customer complaints and disputes in accordance with general company policies[.] (5% of his time)

The beneficiary added that he is primarily concerned with supplier negotiations, customer relations, department budgets, and employee compensation, including salaries and bonuses.

In response to the RFE, the petitioner offered a percentage breakdown that lists virtually the same job duties that were previously listed in the original job description. The petitioner did not provide additional information about its business activity or enhance our understanding of the beneficiary's specific role within the scope of that business. While the job description broadly states that the beneficiary will spend 15% of his time managing employees and directing and coordinating their activities, such information holds little

meaning without a context within which to evaluate the given job duties. Here, the petitioner fails to specify precisely what type of business it operates or how it generates revenue. As such, while several of the beneficiary's subordinates are assigned various sales and marketing tasks, the record remains unclear as to what the petitioner sells or whom the petitioner targets as its customer base. Given this lack of clarity with regard to the nature of the petitioner's business, it is unclear what "operations of the company" the beneficiary would be planning, directing, and coordinating for 15% of the time or what "global policy" and goals the beneficiary would be set for another 10% of the time.

Continuing with our analysis of the beneficiary's job description, which indicates that a total of 20% of the beneficiary's time is associated with planning around various projects in terms of determining staffing and budget requirements and making staffing schedules depending on a project's particular phase, the petitioner failed to specify what types of projects it undertakes. As such, the petitioner failed to provide a context within which to consider and evaluate this portion of the beneficiary's job description. Similarly, given the lack of information as to the specific nature of the petitioner's business activities, we are unable to assess the likelihood that the beneficiary would allocate 5% of his time to developing labor and public relations policies to improve relations with customers and business partners. That being said, the petitioner's claim that the beneficiary allocates 5% of his time to supervising services development is virtually meaningless in the absence of an explanation of the types of services the petitioner develops. Moreover, without a more definitive description of the types of projects the petitioner undertakes, it remains unclear how the sales and marketing components of the beneficiary's position, and the positions of his subordinates, come into play within the scope of the petitioner's business.

Next, turning to the petitioner's organizational composition, the petitioner indicates that the beneficiary currently oversees the work of six subordinate employees. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. Given that the petitioner did not claim, or provide evidence to establish, that the beneficiary's subordinates have subordinates of their own, we must consider their respective positions and educational credentials in order to determine whether the beneficiary oversees professional employees.

In evaluating whether the beneficiary manages professional employees, we evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, we must focus on the level of education required by the position, rather than the degree held by the subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant matter, the list of the beneficiary's six subordinates indicates that none appears to have attained a baccalaureate degree, nor has the petitioner submitted evidence to show that a bachelor's degree is actually necessary, for example, to perform the secretarial and administrative work of the executive

secretary/office manager, who is among the beneficiary's subordinates. Moreover, in reviewing the petitioner's second quarterly employer's report for 2013, it appears that the petitioner had a total of five employees, including the beneficiary, during the month the petition was filed and thus could have supervised no more than four employees. While it is possible that the petitioner hired additional employees after the Form I-140 was filed, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). As the petitioner had not hired six subordinates for the beneficiary to oversee at the time of filing, we cannot consider the staffing depicted in the RFE response when assessing the petitioner's eligibility.

In addition, while counsel's appellate brief references the petitioner's hiring of independent contractors, the petitioner failed to provide evidence establishing that it hired contractors at the time of filing or the services they performed. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Accordingly, after having reviewed the totality of the evidence and assessed the probative value of the evidence offered to support the petition, we find that the record lacks sufficient evidence to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity and on the basis of this initial adverse finding, the instant petition cannot be approved.

B. Doing Business in the United States

Next, we will address the issue of the petitioner's business activity in the United States. As indicated above, the regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) requires the petitioner to provide evidence to demonstrate that it has been doing business in the United States for at least one year prior to filing the Form I-140.

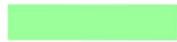
The regulation at 8 C.F.R. § 204.5(j)(2) defines *doing business* as the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

In the present matter, in response to Part 5, No. 2.a. of the Form I-140, which asks the petitioner to indicate what type of business it plans to operation, the petitioner indicated that it would operate as a restaurant and carry out "other activities." In its May 22, 2013 supporting statement, the petitioner indicated that it owns a restaurant in [REDACTED] Florida and further claimed that it "opened a branch – [REDACTED] – to diversify its activities." The petitioner explained that the latter entity is an online retailer of pharmaceutical products. The documents provided in support of the petition included evidence showing that [REDACTED] was organized in the State of Florida as a limited liability company. Thus, despite the petitioner's reference to [REDACTED] as its branch, which implies that the latter entity is an operating division or office of the petitioning organization, the record clearly shows that [REDACTED] is in fact an entity that is separate from the petitioner. See 8 C.F.R. § 214.2(l)(1)(ii)(L). In addition, while the record shows that [REDACTED] is also a separate entity, which owns and is doing business as [REDACTED] the petitioner provided no evidence to show that it operates or has an ownership interest in a food or restaurant business. Thus, leading up to the issuance of the RFE, the petitioner had not provided evidence showing the nature of its business operations or evidence of ongoing provision of goods and/or services.

Accordingly, the issue of the petitioner's business activity in the United States was duly addressed in the RFE, where the director reiterated the above regulatory provision requiring the petitioner to establish that it has been doing business for at least one year. The petitioner's response included an explanation from counsel, dated October 17, 2013, wherein counsel referred to the petitioner as a holding company, whose "branches have tremendously expanded their commercial activities." Counsel claimed that the petitioner was "created to further increase the worldwide clientele portfolio" and further stated that the holding company has been doing business in the United States since its incorporation in [REDACTED]. As previously noted, however, counsel's claims alone cannot be deemed as evidence sufficient to support the petitioner's claims. *Matter of Obaighena*, 19 I&N Dec. at 534.

The petitioner also provided a statement, dated September 25, 2013, from its accounting firm confirming that the petitioner "has a commercial activity" related to the sale of pharmaceutical products and perfumes for which it issues invoices on a regular basis. The statement further indicated that [REDACTED] is the petitioner's only customer and that given the petitioner's 50% ownership of the latter entity, any invoice payments made by that entity to the petitioner must be categorized as guaranteed payments rather than gross receipts. While this explanation clarifies why [REDACTED] alleged payments to the petitioner do not appear as gross receipts on the petitioner's tax return, it does not address the fact that the record contains no actual invoices that the petitioner is claimed to have issued. The claims of a third party are treated much like the claims of the petitioner itself in the sense that they require supporting documentary evidence 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)). Merely referring to the invoices and claiming that they exist without actually producing a sampling of the invoices is not sufficient, as the claims alone does not constitute evidence. In the present matter, while the petitioner did in fact submit invoices, all such invoices were for the petitioner's rent and [REDACTED] bills. None of the invoices revealed a specific business activity through which the petitioner has generated revenue or established that the petitioner sold goods and/or services on a regular, systematic, and continuous basis.

Furthermore, while the petitioner submitted a memorandum of understanding indicating that the petitioner's mission in the United States would be "to revive the sales of stays at the hotel in the U[.]S[.]A[.]" by contacting existing agents and researching new travel agents and tour operations, none of the documents in the record indicate that the petitioner operates a business that is associated with providing travel or hospitality services. In fact, all prior statements made by the petitioner and other third parties indicate that the petitioner derives revenue from its ownership interest in another entity – [REDACTED] – which conducts business through online sales of pharmaceuticals. It is entirely unclear how the petitioner's employees fit within the scope of that business model or what specific business is carried out by the petitioner itself. Even if the petitioner is able to establish that an entity, which it partly owns, conducts business on a regular, continuous, and systematic basis, the same would not be said of the petitioner itself without adequate supporting documents establishing that the petitioner provides goods and/or services in the manner prescribed. Given that the instant record lacks such supporting evidence, we are unable to conclude that the petitioner was doing business for one year prior to filing the instant petition, nor can we conclude that the petitioner continues to do business at the present time.



IV. Conclusion

In light of the above, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.