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



U.S. Citizenship  
and Immigration  
Services

DATE: **NOV 28 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)

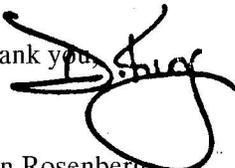
ON BEHALF OF PETITIONER:

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 Texas limited liability company that seeks to employ the beneficiary in the United States as its director of operations. 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 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.

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.

## II. Facts and Procedural History

The record shows that the petition was filed on August 8, 2013 and was accompanied by a supporting statement, dated August 6, 2013, which explained that the petitioner operates two businesses – a restaurant with eight employees and an organic food market with six employees. The petitioner provided a description of the beneficiary's proposed employment and indicated that the beneficiary would primarily perform job duties within a managerial capacity. However, the petitioner followed that claim with a breakdown of the components of executive capacity and referred to the beneficiary as "a senior level executive" thus indicating that the beneficiary's proposed employment may be in an executive capacity.

The petitioner also provided supporting evidence in the form of corporate and business documents as well as three organizational charts and pay stubs showing wages paid to employees of the petitioner's restaurant and grocery businesses. The first organizational chart depicts the petitioner's corporate structure with the board of directors at the top of the hierarchy, followed by the beneficiary and a director of business development at parallel tiers directly below the board of directors. The left side of the chart depicts the beneficiary's

subordinates, while the right side of the chart depicts the hierarchy subordinate to the director of business development. Each position is shown as directly overseeing the company secretary – [REDACTED] - who is shown as overseeing an accounts manager and a purchasing manager on the beneficiary's side of the chart and a banquet marketing coordinator and a restaurant marketing coordinator on the director of business development's side of the chart. It is noted that the chart does not provide employee names for the positions of purchasing manager, banquet marketing coordinator, or restaurant marketing coordinator, thus indicating that all three positions were vacant at the time of filing. The second organizational chart depicts the restaurant business's staffing hierarchy. Again, the board of directors followed by the beneficiary and the director of business development are depicted at the two top tiers of the hierarchy. The chart shows an existing restaurant in Dallas, Texas and names a restaurant manager, who is depicted as the subordinate of the business development manager, followed by a supervisor who is subordinate to the restaurant manager, ending with a grill cook and a server at the bottom of the hierarchy, both subordinate to the supervisor. Although the chart appears to indicate that the beneficiary would oversee the operations of two additional restaurants – one in Austin, Texas and another in Houston, Texas – with similar staffing as that of the existing restaurant in Dallas, Texas, no employees were named in association with the Austin or Houston locations, nor was any evidence provided to establish that the petitioner had restaurants actually operating in either city at the time the petition was filed. The petitioner's role with respect to the existing restaurant is not clearly defined by the information provided in the restaurants chart. Lastly, the petitioner provided a third chart purporting to depict the organizational hierarchy of its organic food market. As with the two prior charts, the organic market's chart also depicts the board of directors followed by the beneficiary and the director of business at the top two tiers of the hierarchy. The third tier shows a store manager, who oversees a retail salesperson and goods stocker, and a quality control manager, who oversees a goods stocker and merchandiser. Both managerial positions are depicted as the beneficiary's direct subordinates.

After reviewing the record, the director determined that the petitioner did not provide sufficient evidence to establish its eligibility and thus issued a request for evidence (RFE), dated November 1, 2013, in which he instructed the petitioner to provide, in part, an additional job description for the beneficiary's proposed position with the U.S. entity. The director asked that the job description include a list of the beneficiary's daily job duties and an estimate of the percentage of time the beneficiary would allocate to each job duty rather than to a broad category into which duties would be incorporated. The petitioner was also asked to provide a single organizational chart depicting the beneficiary and his subordinate employees along with their position titles, job descriptions, and educational levels. The petitioner was asked to identify the subordinate employees as either part- or full-time.

The petitioner's response included two statements – one from counsel and another from the petitioner's company secretary – both of which addressed the beneficiary's proposed employment with the U.S. entity. The statement from counsel, dated January 20, 2014, indicates that "a total of [f]ourteen (14) employees have been working with the [p]etitioner . . . with [t]welve (12) of the employees working under the [p]etitioner." It is noted that counsel did not distinguish between what he meant by working "with" the petitioner versus working "under" the petitioner to account for the different numbers. The other statement, dated January 15, 2014, which was signed by [REDACTED] in his/her capacity as the "company secretary," contains the following description of the beneficiary's proposed employment:

**Planning and Control (40% – 16 hours per week)**

The beneficiary will be responsible in [sic] managing [the petitioner]. In accomplishing this, he will be required to establish guidelines in order to coordinate the work of the [m]anagers at each of our locations/businesses. He will steer our U.S. operations keeping in view our business model and strategy. He will analyze and identify the following avenues; [sic]

- The Restaurant/Banquet markets & Organic Food Markets;
- Competitors;
- Fresh Produce and Ethnic Food Products;
- Different business model in catering to the special requirements and needs of its customers;
- Providing special deals on various religious events; and
- Exploring other avenues of expansion including hosiery and towels.

It is pertinent to mention that . . . the beneficiary has communicated with various vendors, distributors, and manufacturers . . . .

**Human Resources (10% – 4 hours per week)**

The beneficiary is directly responsible for hiring all current managers and all future managers for each business location. [He] selected our Accounting Manager who is directly reporting to him. The General Manager, and Managers at each location[,] will have wide latitude in recruiting their staff through [the] HR Manager within the guidelines established by [the beneficiary] together with [the] Director Business Development. The beneficiary will also be one of the principal "ambassadors," exemplifying the best of [the petitioner's] values and collective voice. He will provide leadership to development and management of the organizational image by managing and representing the interests of [the petitioner] to external stakeholders.

**Marketing and Business Development (5% – 2 hours per week)**

The beneficiary will discuss with the Business Development Director and review feasibility study reports and business opportunities before recommending the expansion and diversification plans to the Board of directors and Managing Director. The beneficiary and Director Business Development will network with owners and executives of businesses . . . to develop long[-]term and high volume business opportunities.

**Finance and Operation Support (45% – 18 hours per week)**

The beneficiary will be responsible for negotiating and approving important long[-] and short[-]term operations related contracts with the financial institutions and other entities. The . . . [o]rganic food market . . . is one such recent example wherein the beneficiary made all the managerial decisions and was the main representative of the [p]etitioner. He has employed attorneys from each area with instructions on the terms and conditions based upon the business goals set by the Board of Directors. He and [the] Business Development Director (Expansion/Marketing related contracts/negotiations) approve all such contracts.

The beneficiary will manage the operation of the [p]etitioner as a whole and each location according to the operating plans that support strategic direction set by the Board of Directors. He will manage and monitor strategies while ensuring the long-term financial viability of the [p]etitioner. The main focus of these strategies is to reduce cost and increase productivity and profits of the [p]etitioner. To achieve this task he will coordinate with the General Manager (Supply Division) and Restaurant Managers of each location. He will review and revise strategically designed plans as required in order to achieve its main purpose.

The beneficiary will manage [the] General Manager and each location's manager in developing annual budgets that support operating plans. He will prudently manage the organization's resources within budget guidelines . . . .

The beneficiary will review and analyze budgets and income/expenditure reports prepared by [the] General Manager and Managers supporting the operating plans. He will discuss the budgets and reports with the General Manager [and] other managers and revise them, if needed, and approve them accordingly. [The beneficiary] will direct the Accounts Manager to prepare the financial statements as required to analyze and review the financial position and cash flows of the corporation. He will discuss the spending, finance control, and budgeting matters with [the] Accounts Manager. He will also provide prompt, thorough, and accurate information to keep the board and other Directors appropriately informed of the organization's financial position.

In addition, the petitioner repeated the claims previously made in its original letter of support, indicating that the beneficiary will primarily perform job duties within a managerial capacity while paraphrasing a job description that fits the elements of executive capacity, including directing and overseeing the petitioner's operations, establishing its goals and policies, exercising wide latitude in discretionary decision making, and reporting directly to the board of directors. The petitioner also indicated that the beneficiary's direct subordinates would include the following: a company secretary/manager of human resources, an accounts manager, a restaurant manager, and the food market manager. Lastly, the petitioner provided an organizational chart depicting a combined staffing structure within the context of its business operations. As with the charts previously submitted, the updated chart shows a board of director's at the top of the hierarchy followed by the beneficiary and the director of business development at the next tier. The third tier shows four managerial positions – a store manager, a quality control manager, a restaurant manager, and an accounts manager – all subordinate to the beneficiary, and a company secretary as the only subordinate of the business development manager. The bottom tier includes a retail sales person and goods stocker as the direct subordinates of the store manager, a goods stocker and a merchandiser as the direct subordinates of the quality control manager, and a supervisor who oversees a server and grill cook and is subordinate to the restaurant manager. Despite the accounts manager's position title, the chart does not show any employees subordinate to that position.

In a decision dated April 2, 2014, the director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The director found that the beneficiary's job description included various non-qualifying job duties, such as negotiating contracts and investments, identifying customers' needs, and networking with business owners. The director pointed out that seeking out investments does not fit the criteria of a qualifying managerial task.

In addition, the director found that the record does not establish that the beneficiary directly supervises an accounts manager and restaurant manager, as indicated in the amended organizational chart that was provided in response to the RFE. The director observed that, despite the petitioner's claim that the beneficiary will oversee a general manager, the position of general manager was not found on any of the submitted organizational charts. The director further reasoned that simply providing an organizational chart that depicts the beneficiary at an elevated position within the staffing hierarchy is insufficient without a specific list of job duties describing how the beneficiary will function within the petitioning organization and how the beneficiary's subordinates will function to relieve the beneficiary from having to allocate his time primarily to the performance of non-qualifying tasks.

The petitioner, through counsel, filed an appeal with a supporting appellate brief in which counsel asserts that the director erred in finding that negotiating contracts, identifying customers' needs, and networking with business owners are non-qualifying tasks, claiming that such tasks are "vital" to the petitioning organization.

Based our review of the record and for the reasons stated below, we find that the petitioner has failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. We therefore find that the petitioner has failed to overcome the basis of the director's decision.

### III. Issue on Appeal

As indicated above, the primary issue to be addressed in this proceeding calls for an examination of the beneficiary's proposed position with the U.S. entity.

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. 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). As indicated in the director's decision, we then conduct a review of other relevant factors, including the petitioner's organizational structure, the presence of subordinate employees and their respective positions and job duties, the nature of the petitioner's business, and any other factors that may contribute to a comprehensive understanding of the beneficiary's actual duties and role in his position with the U.S. entity.

In the present matter, the petitioner offered a vague job description that was not in compliance with the instructions provided in the RFE. Namely, the RFE expressly indicated that the petitioner was to provide a list of the job duties the beneficiary would perform on a daily basis and to allocate a time constraint to each of the items on the list. Instead, the petitioner allocated a percentage of time to each of four broad subject headings – planning and control, human resources, marketing and business development, and finance and operation support – without itemizing specific tasks associated with these general categories. For instance, the petitioner indicated that establishing guidelines to coordinate the work of the restaurant and market managers provides little information as to the specific underlying tasks that the beneficiary actually performs. Nor did the petitioner clarify what actual tasks are representative of "steer[ing] the U.S. operation" or setting the company's strategy. In other words how does the beneficiary "steer" the organization and what are some of the strategies he has or would set in his leadership role? That being said, the petitioner's organizational charts repeatedly depict the director of business development at a position that is parallel to that of the beneficiary in terms of the organizational tier structure. Given that this position is not depicted as one that is

subordinate to the beneficiary, but rather as the beneficiary's equal in terms of their respective placements within the petitioner's hierarchy, it would appear that the leadership role that the petitioner attributes to the beneficiary would be shared by someone who is similarly placed within the organization. However, the job description that the petitioner provided does not explain how the director of business development affects the beneficiary's leadership role, how the two positions coexist within the same organization, or whether the leadership role is shared between the beneficiary and one other employee with regard to the planning and control category. The job description also indicates that this category would require the beneficiary to analyze the petitioner's competitors, address specific customer needs through different business models in catering, and provide "special deals on various religious events." It is unclear how these job duties fit the definition of managerial or executive capacity or how much time the beneficiary would allocate to performing these individual tasks that are potentially non-qualifying. As previously noted, the petitioner failed to comply with the director's requested format, which instructed the petitioner to list the beneficiary's individual tasks and their specific time allocations.

Next, the petitioner indicated that the beneficiary would allocate 10% of his time to human resources tasks. In describing the beneficiary's role, the petitioner stated that the beneficiary selected the accounting manager and went on to say that the other management employees within the organization would have discretion in selecting their subordinates based on the guidelines established by the beneficiary. However, the petitioner did not explain what guidelines the beneficiary established or clarify why establishing hiring guidelines is a task that the beneficiary performs repeatedly on a weekly basis as claimed.

In addition, while the petitioner discussed the beneficiary's interaction with the director of business development in terms of their combined efforts with regard to the marketing and business development category, the petitioner has not established that the marketing and networking tasks performed in this category would be of a qualifying nature.

Lastly, with regard to the beneficiary's role in the category of finance and operation support, the petitioner did not specify what is meant by managing the operation "as a whole" in terms of the daily tasks the beneficiary would perform. While the petitioner stated that the beneficiary is responsible for conducting negotiations with financial institutions, no other specific tasks were individually identified. The petitioner also failed to indicate what portion of the beneficiary's time would be allocated to this task.

Furthermore, as properly pointed out in the director's decision, the claim that the beneficiary would oversee a general manager is inconsistent with the organizational charts the petitioner submitted, none of which identified a general manager within the petitioner's organization. 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). Counsel neither acknowledged the director's finding nor provided evidence to resolve the inconsistency. Further, given the lack of evidence showing that the petitioner actually employed a general manager at the time the petition was filed, all claims associated with the beneficiary's purported oversight of a general manager become invalid, as the beneficiary cannot oversee a position that did not exist within the petitioner's organization at the time the petition was filed.

Moreover, the claim that the beneficiary would manage "each location's manager" requires additional information, as the petitioner appears to have had a total of two managers – one managing the restaurant and

another managing the food market – at the time the petition was filed. While the petitioner provided an organizational chart indicating plans to open restaurants at two additional locations within the State of Texas, there is no evidence that such plans had actually been realized at the time the petition was filed. We note that 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. 1971). Thus, the claim that the beneficiary would manage "each location's manager," if applied to businesses that did not exist at the time of filing, would be deemed irrelevant in the matter at hand.

While 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 would perform are only incidental to the proposed position. 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. While we consider multiple factors when determining the beneficiary's employment capacity, such factors generally require a detailed job description, which then serves as a foundation for a comprehensive analysis of other factors. Here, the petitioner failed to provide a comprehensive list of the specific tasks the beneficiary would perform and the amount of time he would allocate to each individual task. In fact, the petitioner did not clearly state whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. As previously noted, while the petitioner repeatedly claimed that the beneficiary would be employed in a managerial capacity, this claim was followed by a paraphrased version of the components of executive capacity, whose application to the facts in the instant matter is questionable, given the petitioner's repeated claims indicating that the beneficiary would focus a considerable portion of his time overseeing the work of other employees, which is a characteristic of managerial capacity. This anomaly further adds to the confusion and detracts from our understanding of the beneficiary's proposed employment. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

On appeal, counsel contends that there are no strict rules for defining the role of a manager "in the business world" and further asserts that managers can contribute to an organization "by managing or [by] doing," thus asking us to apply the layman's definition of "managerial" to the facts of this case. However, counsel's assertion seemingly overlooks the specific statutory definition of "managerial capacity" that applies to any petitioner seeking to classify a beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Act. While we recognize the beneficiary's potentially vital role within and his contributions to the petitioner's organization, this factor does not excuse the petitioner from the burden of having to meet applicable statutory and regulatory requirements.

Counsel also offers several unpublished AAO decisions in support of his supporting statement. However, the record contains no evidence to establish, nor does counsel explain, how the facts of the instant petition are analogous to those in the unpublished decisions. Furthermore, 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.

In addition, contrary to counsel's assertion, the record does not establish that the director relied "solely on the job duties" that the beneficiary has previously performed in making his determination regarding the petitioner's eligibility. The record clearly shows that the director considered the job descriptions and organizational charts that the petitioner provided during various stages of the adjudication of this petition. Further, while counsel is correct in pointing out that the beneficiary is not required to perform the proposed job duties unless and until the Form I-140 is approved, the petitioner's ability to employ the beneficiary in a primarily managerial or executive capacity must be established at the time the petition is filed. *See Matter of Katigbak*, 14 I&N Dec. at 49. Thus, the beneficiary's job description cannot be based on a projection of the petitioning organization's stage of development at the time of the director's decision concerning the petitioner's eligibility. Given that the record shows that the petitioner's organization included a single restaurant location and a food market that the petitioner acquired just days prior to filing the instant petition, the provided job duties must be considered within the limitations of the petitioner's operation at the time of filing and cannot include consideration of the petitioner's growth potential, no matter how imminent. If the petitioner wishes to introduce additional facts or circumstances that may have materialized after the petition was filed, the petitioner would be best served by filing a new Form I-140.

In summary, the above analysis indicates that the petitioner failed to provide sufficient probative evidence to properly support the claim that the beneficiary would be employed in a qualifying managerial capacity. Therefore, this petition cannot be approved.

#### IV. Conclusion

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.