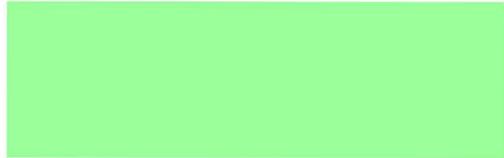


(b)(6)



U.S. Citizenship
and Immigration
Services



DATE: **OCT 21 2014** OFFICE: NEBRASKA SERVICE CENTER FILE:

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:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Nebraska Service Center Director denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this Form I-140, Immigrant Petition for Alien Worker, to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The petitioner, a California corporation, is engaged in movie production and distribution, and claims to be a subsidiary of [REDACTED] the beneficiary's former employer in Malaysia. The petitioner seeks to employ the beneficiary in the position of Chief Executive Officer (CEO).

The director denied the petition on April 2, 2013. The petitioner filed an appeal on May 1, 2013. On August 21, 2013, we withdrew the director's decision and remanded to the service center for entry of a new decision. The director subsequently denied the petition on February 3, 2014, concluding that: (1) the petitioner failed to establish the beneficiary would be employed in the United States in a qualifying managerial or executive capacity; and, (2) the petitioner failed to establish the beneficiary was employed abroad in a qualifying managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to us for review. On appeal, counsel submits a brief disputing the director's adverse findings.

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.

Additionally, the regulations at 8 C.F.R. § 204.5(j)(3)(i) state that the petitioner must provide the following evidence in support of the petition in order to establish eligibility:

- (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. THE ISSUES ON APPEAL

A. U.S. Employment in a Managerial or Executive Capacity

The first issue to be addressed is whether the petitioner established that it will employ the beneficiary in a qualifying managerial or executive capacity.

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.

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.

1. Facts

The petitioner has offered the beneficiary the position of Manager/Chief Executive. In a letter dated July 26, 2012, the petitioner described the beneficiary's proposed duties as follows:

As CEO, [the beneficiary] is responsible for implementing the strategy and vision of our parent company into our U.S. operations. He provides direction and leadership to [the petitioner], actively explores business opportunities and develops our market,

drives sales and profitability, develops budgets, sets targets and monitors performance, and serves as an ambassador of [the petitioner's] brand image in the United States.

To maintain efficiency, [the beneficiary] is relied upon to direct subordinates and manage a team of associates to ensure their compliance with [the petitioner's] company policies, procedures, and standards. Additionally, he tracks and analyzes performance, operations records and reports, and prepares executive reports and recommendations for use in policy direction and decisions. [The beneficiary] is also in charge of recruitment and manages all employee relations matters. He liaises with [redacted] in matters pertaining to major issues and decisions, maintains productive relations with our parent company. Given his history with our company and his extensive knowledge of our parent company's operations, he develops strategic partnerships with all levels of the business.

The petitioner submitted an organizational chart which listed the beneficiary as Chief Executive Officer who supervises a Post Supervisor and a Designer. The chart also indicated a Casting Director and Actors/Actress positions that were not yet filled. The organizational chart provides a work description for each position in the company. The work description for the beneficiary's position is as follows:

- Primarily in charge of overall strategic and long term advancement of the company via its numerous projects and movies
- Spearheads the team responsible for the various movies and is the main [sic] for all aspects of the look, feel and visualizations of all projects of the company
- Primarily responsible for selection of key people involved for each project/movie ranging from Actors, Designers and Technical crews
- Manages the organization's resources and keeps all projects within budgets
- Overse[e]s the general design, delivery and quality of all projects
- Serves as primary person involved in raising funding for all projects within the scope of the company.

In response to the director's second request for evidence, dated October 25, 2013, the petitioner provided a percentage break down as follows:

The role of the Manager/CEO bears significant responsibility, accountability, and authority within [the petitioner's] organization. In the role as the major decision-

maker, he will exercise a wide-latitude of discretionary decision-making authority in all administrative, marketing, financial and personnel decisions.

- Create, communicate and implement [the petitioner's] vision, mission and overall direction. Toward this end, establish goals and objectives to point out where and when the company intends to go. Lead the development and implementation of its overall strategy, establishing how [the petitioner] intends to attain its goals and objectives. (20%)
- Formulate and implement the strategic plan that guides the direction of the business and oversee the complete operation of [the petitioner] in accordance with the direction established in this plan. (30%)
- Lead, guide, direct and evaluate the work of division heads, including the Chief Designer, Chief Production Officer, and Chief Effects Officer. (20%)
- Monitor and evaluate the success of the organization. Measure the achievements of the company vis-à-vis the plan. Submit reports to members. (10%)
- Maintain awareness of both external and internal competitive landscape, opportunities for expansion, customers, markets, new industry developments and standards for use in policy direction. (10%)
- Represent the organization for civic and professional association [r]esponsibilities and activities in the local community, the state, and at the national level. (5%)
- Allocate company's capital. Set and monitor the budgets, consider major expenditures to fund projects, and manage the firm's capital. (5%).

The petitioner also provided a brief job description for the Chief Designer, Chief Production Officer and the Chief Effects Officer. The new list of subordinate employees differs from the organizational chart previously submitted as the previous chart indicated that the beneficiary supervises a Post Supervisor and a Designer but the new list of employees includes a Chief Designer, a Chief Production Officer and a Chief Effects Officer.

The director denied the petition, in part, concluding the petitioner failed to establish that the beneficiary would be employed by the petitioner in a qualifying managerial or executive capacity. In denying the petition, the director determined that the petitioner provided an overly broad job description that failed to convey an understanding of what the beneficiary will primarily do on a day-to-day basis.

2. Analysis

When examining the executive or managerial capacity of the beneficiary, we review the totality of the record, starting first with the petitioner's description of the beneficiary's proposed job duties. See 8 C.F.R. § 204.5(j)(5). A detailed job description is crucial, as the duties themselves will reveal the true nature of the beneficiary's foreign and proposed employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The AAO will then consider this information in light of other relevant factors, including job descriptions of the beneficiary's subordinate employees, the nature of the business that is conducted, the petitioner's subordinate staff, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role within the petitioning entity. While an entity with a limited support staff will not be precluded from the immigration benefit sought herein, it is subject to the same burden of proof that applies to a larger entity with a moderate or large subordinate staff. In other words, regardless of an entity's size or support staff, the petitioning entity must be able to provide sufficient evidence showing that it has the capability of maintaining its daily operations such that the beneficiary would be relieved from having to primarily perform the operational tasks.

In the present matter, upon review of the totality of the record, the evidence does not support a finding that the beneficiary would allocate his time primarily to the performance of tasks that are within a qualifying managerial or executive capacity.

Looking to the job description the petitioner provided in response to the second RFE, we observe that the petitioner assigned a percentage breakdown to groups of actions rather than to individual tasks. For instance, the beneficiary will spend 20 percent of his time to "create, communicate and implement [the petitioner's] vision, mission and overall direction. Toward this end, establish goals and objectives to point out where and when the company intends to go. Lead the development and implementation of its overall strategy, establishing how [the petitioner] intends to attain its goals and objectives." In addition, the beneficiary will spend 30 percent of his time to "formulate and implement the strategic plan that guides the direction of the business and oversee the complete operation of [the petitioner] in accordance with the direction established in this plan." The petitioner did not, however, define the petitioner's vision, mission, goals and policies, or clarify the strategy plan and the financial and operations responsibilities of the organization. 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. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. The petitioner's descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature.

The job description also includes several non-qualifying duties such as the beneficiary will "measure the achievements of the company vis-à-vis the plan;" "maintain awareness of both external and internal competitive landscape, opportunities for expansion, customers, markets, new industry

developments and standards for use in policy direction;" "represent the organization for civic and professional association [r]esponsibilities and activities in the local community, the state, and at the national level;" and, "set and monitor the budgets, consider major expenditures to fund projects, and manage the firm's capital." It appears that the beneficiary will be in charge of market research, marketing, negotiations and financial operations rather than directing such activities through subordinate employees. According to the brief job descriptions of the beneficiary's subordinates, it appears that the Chief Production Officer will "assist the CEO in budgeting, accounting and scheduling," but in the area of production locations rather than the budgeting operations of the company. 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 Intn'l.*, 19 I&N Dec. at 604.

In the instant matter, the job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will perform. While the petitioner has provided a breakdown of the percentage of time the beneficiary will spend on various duties, the petitioner has not articulated whether each duty is managerial or executive.

While the AAO acknowledges 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 will perform are 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'r 1988).

In addition, the information regarding the staff of the petitioner is not consistent. The petitioner initially provided an organizational chart that indicated the beneficiary as CEO who in turn supervises a Post Supervisor and a Designer. In response to the second request for evidence, the petitioner indicated that it employs a Chief Designer, Chief Production Officer and the Chief Effects Officer. The petitioner did not explain the change in the staffing from the initial petition and from the response to the second request for evidence. 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).

Furthermore, as noted in the director's decision, the petitioner stated that the office space it is leasing provides an executive suite staff. In a letter from the landlord dated January 10, 2014, it stated that the "rental includes Office Manager, Receptionist, Telephone Operator and other facilities such as Conference Room, Reception Area, general office equipment, supplies, furniture and maintenance." However, the letter does not clearly explain the duties of each of these positions and how this staff

specifically assists the petitioner. It appears that the executive suite staff is also assisting all the tenants and is not only assisting the petitioner. 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 light of the foregoing discussion, the petitioner has not established that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity and on the basis of this second adverse conclusion, this petition cannot be approved.

B. Employment Abroad in a Managerial or Executive Capacity

The second issue to be addressed is whether the petitioner established that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

1. Facts

In a letter dated July 26, 2012, the petitioner explained that the beneficiary's assignment with the foreign employer was as "Co-CEO, Executive Producer, Writer, and Director, and he performed the following duties:

Executive and Managerial Duties

80%

- Establish company's goals, objectives and policies
- Responsible for overall management of the company
- Direct, control and manage all aspects of production including financial and personnel matters. This involves the hiring, training, assigning and directing the work of staff members
- Analyze technical needs for the film production/development, managing and controlling the budget and making decision on purchases.

[The beneficiary] exercised a wide latitude and discretionary decision-making authority, responsible only to the Members.

Business Development Duties

10%

- Develop, direct and coordinate marketing strategies to promote new film productions in U.S. and Malaysia produced and distributed in U.S. and Malaysia [sic]
- Oversee establishment of company's marketing plan for new movies in terms of brand identity, products, price points, and channels of distribution
- Oversee analysis of market potential to establish and cultivate new strategic alliances within the industry
- Coordinate and enter into negotiations and contracts with cinema chains across Malaysia for box office gross sales figures and percentage sharing
- Review operational records and reports to project sales profitability

Networking/Communications

5%

- Represent [foreign entity] as a liaison with industry executives
- Act as main point of contact for the U.S., subsidiary to confer on company objectives and priorities, business development, financial, and technical issues, and reports on progress and activities.

Film Production/Development

5%

- Conceptualize, visualize, write and direct a story for a new movie to be developed in U.S.
- Oversee overall technical aspects of movie-making process from production to post production, ensuring all processes are completely timely
- Coordinate and direct projects, making detailed plans to accomplish goals of each function in the process of film production/development of new movies.

[The beneficiary] functioned in executive and managerial capacities while employed at [the foreign entity]. His duties entailed the establishment of company goals and objectives, and directing, controlling, and managing all aspects of company finance, production activities, marketing and promotions, and personnel matters.

The petitioner submitted an organizational chart of the foreign company that indicated the beneficiary as Director/CEO who in turn supervises a Lead Actor and a Technical Staffer. On the

same level, the company also had a Producer/CEO who in turn supervises an Operations Executive who in turn supervises a Management Executive. Another Producer/COO was also on the same level as the beneficiary and the Producer/CEO who in turn supervised a Production Manager and a Marketing Executive.

The petitioner also explained that the beneficiary worked as a writer, director and executive producer that accounted for 20% of his work time and included the following duties:

- Managed, controlled and worked alongside employees involved in the technical aspect of production, e.g. assistant director/lead actor, technical person, and producers to discuss, conceptualize, and create stories for film, television and commercials. (10%)
- Coordinated, directed projects, made plans to complete the major functions of the process of film production and development, and oversaw technical aspects of production. (10%).

The petitioner submitted a second organizational chart in response to the RFE and the second chart differed from the previous chart. In the second chart, some positions were moved in the hierarchy and are supervised by different supervisors. In addition, the new chart now has a new producer that was not listed in the first chart. The petitioner never explained the difference in the two organizational charts. 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).

The director denied the petition on February 3, 2014, concluding that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. In denying the petition, the director determined that the petitioner provided an overly broad job description that failed to convey an understanding of what the beneficiary primarily did on a day-to-day basis.

2. Analysis

When examining the executive or managerial capacity of the beneficiary, we review 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). A detailed job description is crucial, as the duties themselves will reveal the true nature of the beneficiary's foreign and proposed 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). We will then consider this information in light of other relevant factors, including job descriptions of the beneficiary's subordinate employees, the nature of the business that is conducted, the subordinate staff, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role within the foreign company. While an entity with a limited support staff will not be precluded from the

immigration benefit sought herein, it is subject to the same burden of proof that applies to a larger entity with a moderate or large subordinate staff. In other words, regardless of an entity's size or support staff, the foreign entity must be able to provide sufficient evidence showing that it had the capability of maintaining its daily operations such that the beneficiary was relieved from having to primarily perform the operational tasks.

In the present matter, upon review of the totality of the record, the evidence does not support a finding that the beneficiary allocated his time primarily to the performance of tasks that are within a qualifying managerial or executive capacity.

On review, the petitioner provided a vague and nonspecific description of the beneficiary's duties with the foreign company that fails to demonstrate what the beneficiary did on a day-to-day basis. For example, the petitioner stated vague duties such as the beneficiary would "establish company's goals, objectives and policies;" "responsible for overall management of the company;" "direct, control and manage all aspects of production including financial and personnel matters;" "analyze technical needs for the film production/development, managing and controlling the budget and making decision on purchases;" and "[the beneficiary] exercised a wide latitude and discretionary decision-making authority, responsible only to the Members." This description provides little insight into what the beneficiary primarily did on a day-to-day basis and did not explain the details of the goals or mission of the company. Furthermore, 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. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

In a letter dated November 27, 2012, the petitioner stated that the beneficiary spent 20 percent of his time as a writer, director and executive producer. However, the duties for this role are very vague such as the beneficiary "managed, controlled and worked alongside employees involved in the technical aspect of production, e.g. assistant director/lead actor, technical person, and producers to discuss, conceptualize, and create stories for film, television and commercials" and, "coordinated, directed projects, made plans to complete the major functions of the process of film production and development, and oversaw technical aspects of production." We have no information of the employees he worked with on these projects to assist the beneficiary or what were his day-to-day duties when working on these special projects. 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 the instant matter, the job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary performed abroad. While the petitioner has provided a breakdown of the percentage of time the beneficiary spent on his duties, the petitioner has not articulated whether each duty was managerial or executive.

In addition, the petitioner submitted a second organizational chart in response to the RFE that differed from the chart previously submitted. In the second chart, some positions were moved in the hierarchy and were supervised by different supervisors. In addition, the new chart now has a new producer that was not listed in the first chart. The petitioner never explained the difference in the two organizational charts. 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). Moreover, the petitioner did not provide any evidence that these individuals were employed by the foreign company such as payroll records or paystubs.

In light of the foregoing discussion, the petitioner has not established that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

III. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.