



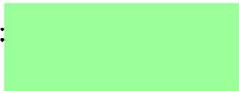
U.S. Citizenship
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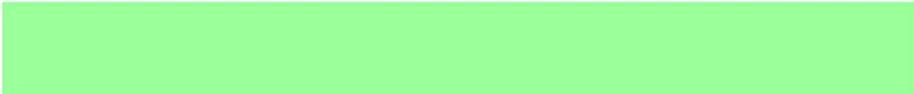


DATE: **OCT 27 2014**

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)

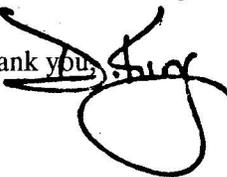
ON BEHALF OF PETITIONER:



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 preference visa petition. The matter 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 bakery, claims to be an affiliate of [REDACTED] the beneficiary's former employer, located in Mexico. The petitioner seeks to employ the beneficiary in the position of President.

On January 6, 2014, the director denied the immigrant petition, finding the petitioner had failed to establish that the beneficiary had been and would be employed within 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. Employment Abroad in a Managerial or Executive Capacity

The first issue to be addressed is whether the petitioner established that the beneficiary was employed abroad 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.

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

1. Facts

In a letter dated February 12, 2013, the petitioner explained that the beneficiary was the owner of the foreign company and his duties abroad were as follows:

[The beneficiary] has been involved in the wholesale and retail baking field in Mexico for over 25 years. He has done it all, everything from baking bread and ordering supplies to managing multiple bakeries in Mexico. For the last 3 years, [the beneficiary] has owned and managed directly [the foreign company]. This company has gross sales of over \$180,000 (US dollars). [The beneficiary] has served as an executive in the Mexican company, overseeing the general managers of various bakeries, reviewing financial reports, sales reports, profit and loss reports, recommendations for new products, advertising campaigns and other similar duties. Over 80% of his time has been involved in reviewing reports and making long and

short-term plans on behalf of the company in Mexico. [The beneficiary] nonetheless makes an effort to visit on a semi-annual basis the various components of each bakery to assure that on the ground operations are moving smoothly. [The beneficiary] reviews purchase history reports and issues decisions on suppliers, including reviewing proposed contracts for supplies, as well a reviewing and approving proposed contracts with major retailers and restaurants in Mexico. [The beneficiary] has the authority to hire and fire all personnel; however, as a general matter, he only personally hires the manager of each bakery, leaving the manager to hire others.

The petitioner also submitted an organizational chart of the foreign company that listed the beneficiary as CEO and president, who in turn supervises a vice president and a general manager. The general manager in turn supervises the following: one office manager, two office assistants, one pastry maker, two pastry assistants, a French bread maker, two bread assistants, a gelatin maker, two gelatin assistants, a cake maker and two cake making assistants.

On August 7, 2013, the director sent a request for additional evidence. In part, the director requested a detailed job description of the beneficiary's specific tasks on a normal business day including the percentage of time spent on each task when employed by the foreign company. In addition, the director requested an organizational chart including the names of all departments, employees, employees' titles, a clear description of their job duties, percentage of time spent on day-to-day duties for individuals the beneficiary supervised, and what the beneficiary's supervisor's function was while the beneficiary was employed abroad.

In a response letter dated October 17, 2013, the petitioner explained that the foreign company "owns and operates one bakery, but it is responsible for the management of bakeries established under other corporations," and that there are "two bakeries that are under the executive control of [the beneficiary]." The petitioner further explained that over "80% of [the beneficiary's] time is involved in reviewing reports and making long and short-term plans on behalf of the company in Mexico." The petitioner also resubmitted the same organizational chart submitted with the initial petition.

The director denied the petition, in part, finding that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

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 foreign company's subordinate staff, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role within the foreign 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 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 "oversees the general managers of various bakeries, reviewing the financial reports, sales reports, project and loss reports, recommendations for new products, advertising campaigns and other similar duties submitted by the bakery managers." The beneficiary also spent 80 percent of his time in "reviewing reports and making long and short-term plans on behalf of the company in Mexico." The petitioner further stated that the beneficiary approved the purchase of the bakery in the U.S., and has worked with Mexico and a grocery chain in the production, management and implementation of in-store bakeries. This description provides little insight into the beneficiary's primary day-to-day activities. In addition, the petitioner stated that the beneficiary would review several reports but did not explain who in the company would handle the market research, the marketing program, the sales program, the negotiations and the financial operations and prepare the reports for the beneficiary's review. It is unrealistic that the general manger could handle all the marketing, sales, and financial operations while also managing a bakery with several employees. Furthermore, the petitioner stated that the beneficiary is responsible for bakeries established under other corporations but the petitioner did not submit any documentation to corroborate this claim. 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 addition, the director specifically requested additional information of the beneficiary's subordinate employees such as job descriptions for each employee. Instead, the petitioner resubmitted the same organizational chart and did not provide any evidence of the foreign company's employees except for a few job titles and names. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In addition, the petitioner did not submit evidence that all of the individuals listed in the organizational were actually employed with the foreign company.

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.

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

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

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

1. Facts

The petitioner has offered the beneficiary the position of president. In support of the petition, the petitioner provided a job description for the proffered position that states the following:

We anticipate that [the beneficiary] will meet regularly with the Bakery Manager to review Bakery operations protocols in order to ensure high quality products are delivered to customers. [The beneficiary] and the Bakery Manager will review protocols for assuring proper inventory control, equipment and machinery maintenance, and production rates. [The beneficiary] will review bread quality and baking techniques. He will meet with all current employees to evaluate their qualifications and abilities and to assure a smooth transition to [the petitioner]. [The beneficiary] will engage in team-building activities, including group exercises such as sharing cross-national baking cultures and philosophy. [The beneficiary] will also review Bakery financials with the Bakery Manager.

[The beneficiary] will review present purchasing protocols by visiting vendors and inspecting supplies as agreed under present contracts. He will review and analyze all present supply and sales contracts for possible re-negotiation. [The beneficiary] will meet with major clients to discuss brand advancement, including product placement, inventive programs, and other similar matters. It is anticipated that new sales personnel (either independent contractors or employees) will be hired to manage and grow the sales functions of the Bakery, including anticipated growth in market penetration via advertising, sponsorships and other similar methods.

The petitioner also submitted an organizational chart that indicated the beneficiary as CEO and president would supervise a general manager and vice president. The general manager supervises employees in other departments as follows: two in sales/customer service, three in production/bakery, one in packaging and one in distribution and delivery.

In response to the director's request for evidence, the petitioner explained that it purchased a bakery and in the nine months the petitioner has owned the bakery, the finances have gone from a loss to a gain. The petitioner explained the changes the beneficiary implemented in the U.S. to turn a profit in the new bakery as follows:

- **Ordering changes in bread production schedule.** By revamping the production schedule, [the beneficiary] has reduced the costs of goods by 25%, and has increased sales, since bread now appears fresher and more appetizing. Changes in the log-out procedures have increased efficiency in the use of space and equipment, and has allowed for newer, faster, more efficient equipment.
- **Ordering the revamping of bread recipes and baking techniques.** Discontinued breads were reinstated, and new products, such as Ciabatta, Focaccia, Baguette, Torpedo, and gluten free were created and have had success with customers. Original and organic ingredients were reintroduced to return the bread to its original flavor.
- **Ordering the revamping of in-store marketing.** By encouraging staff to create a "Bread of the day" with free samples and discounts for purchase, together with a loyalty card program, in-store sales have increased substantially. The step of course is in conjunction with the better appearance, fragrance and taste of the product due to the changes in the production schedule.
- **Ordering the increase in outreach to Farmers Markets and specialty grocery stores.** By increasing the contacts between [the petitioner] and Farmers Markets vendors such as those making hummus and other spreads, [the petitioner's] sales at Farmers Markets have increased, although exact numbers are hard to determine, as the previous owners would not deposit the cash received or report it as earned income. However, on-the-ground reports from vendors show that traffic to the stalls has increased. Additionally, outreach to specialty grocery markets has resulted in the placement of [the petitioner's] products in three new markets, leading to an increase in sales.
- **Ordering the revamping of employee hours and compensation.** Employee morale has improved substantially, which has a synergistic effect on other aspects of [the petitioner]. Individuals who look forward to coming to work are better sales people, both to those who walk in the store location or those who work with markets and other vendors. Individuals who believe in their products are the best salespeople of all. The employees of [the petitioner] are now earning approximately 24% more than they did under the previous owners.

The petitioner also provided a list of new clients and prospective clients of the petitioner's bakery. However, the petitioner did not submit any contracts, agreements or invoices between the petitioner and the new clients.

The petitioner also submitted a Form DE9 for the third quarter of 2013 that indicated seven employees; however, only four of the employees listed on this form are also listed on the petitioner's organizational chart. In addition, the petitioner's organizational chart indicated 10 employees and the Form DE9 only lists seven employees.

The director denied the petition, in part, finding that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

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 with the petition, we observe that the petitioner did not provide a percentage breakdown of the tasks the beneficiary will perform for the U.S. company. Instead, the petitioner provided changes the beneficiary implemented in the bakery in order to make it more successful. Reciting the beneficiary's vague job responsibilities or achievements is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide sufficient details 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.

In addition, it appears that the beneficiary will be in charge of marketing, scheduling, inventory, supplies, customer service, and negotiations rather than directing such activities through subordinate employees. 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.

Moreover, the petitioner provided very little information about the beneficiary's subordinates. The petitioner submitted an organizational chart; however, the petitioner did not explain the duties performed by each employee. In addition, the evidence regarding the petitioner's employees is

inconsistent. For example, the Form DE9 for the third quarter of 2013 indicated seven employees; however, only four of the employees listed on this form are also listed on the petitioner's organizational chart. In addition, the petitioner's organizational chart indicated 10 employees and the Form DE9 only lists seven employees, three of which are not even named in the organizational chart. 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 petitioner has failed to provide a sufficiently detailed explanation, along with credible and probative supporting documentation, establishing the U.S. entity's overall organizational structure, staffing levels, and the scope of its business activities at the time of filing. The record is unclear as to the beneficiary's actual role will be, and as to the petitioner's actual staffing levels. The petitioner did not provide any job descriptions or explanations regarding any of its other employees. Overall, the record is insufficient to establish that the beneficiary will be employed in a primarily managerial or executive capacity.

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.

III. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reason. 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.