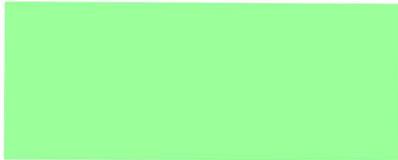


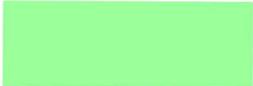


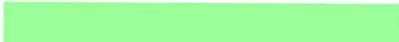
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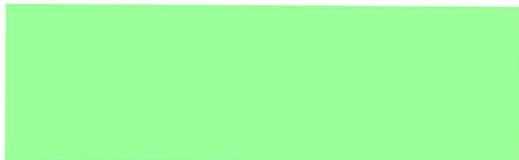
DATE: **OCT 29 2014** OFFICE: TEXAS SERVICE CENTER

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 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 operating in the United States as a restaurant. It seeks to employ the beneficiary in the United States as its president and CEO. 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 was employed abroad and that he 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 September 23, 2013 and was accompanied by a supporting statement, dated September 9, 2013, which explained that the petitioner and the beneficiary's employer abroad are affiliates. The statement did not contain a description of the beneficiary's employment abroad other than to state that the beneficiary is the foreign entity's majority owner and that the restaurant currently has five employees, including two managers and three subordinate employees. With regard to the U.S. entity, the beneficiary, on behalf of the petitioner, indicated that he invested money to lease and remodel a space to house a new restaurant. He also stated that the petitioner entered into a commercial lease for its existing restaurant and provided the following brief job description of his proposed position with the U.S. entity:

[The beneficiary] will occupy the most senior management position in the company. He will be responsible for managing and overseeing the operations of [the petitioner]. He will plan

and execute business objectives, develop and execute organizational policies and establish responsibilities and procedures for attaining objectives. [The beneficiary] will review activity reports and financial statements of the E-2 company to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions. [He] will oversee all aspects of the operations of [REDACTED] restaurant to ensure that it is running effectively and meets the highest standards including quality of beverage & food, guest interaction, service, atmosphere and cleanliness. He will be in charge of organizing marketing activities, such as promotional events and discount schemes. [He] will be responsible for hiring as well as evaluating performance of employees and contractors for compliance with established policies and objectives of the company and contributions in attaining objectives. [The beneficiary] will supervise and oversee the cooks and waiters of [the] restaurant as well as accounting, bookkeeping and lease affairs plus ensuring proper training of new employees, formulating work schedules, and maintaining good customer public relations within the community.

After reviewing the record, the director determined that the petitioner did not provide sufficient evidence to establish that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity. Accordingly, the director issued a request for evidence (RFE), dated October 22, 2013, in which he instructed the petitioner to provide additional job descriptions for the beneficiary's positions with the foreign and U.S. entities. The director stated that the job descriptions should describe the beneficiary's job duties in much greater detail, listing his specific daily tasks along with an estimate of the percentage of time the beneficiary allocated and would allocate to each job duty with the foreign entity and the prospective U.S. employer. The director also instructed the petitioner to provide each entity's organizational chart along with job descriptions for the beneficiary's subordinates and evidence of their respective educational credentials.

The petitioner's response included two statements – one from the foreign entity and the other from the petitioner – both dated December 19, 2013, describing the beneficiary's respective positions. As the director included the beneficiary's proposed list of job duties in the denial, the same information need not be repeated in this discussion. The following job description was provided with regard to the beneficiary's employment abroad:

- Making all key and important decisions regarding the company including human resources, marketing, finance, accounting, and government relations[.] 20%
- Meet with the management each day before opening to define objectives and tasks[.] 10%
- Negotiation with suppliers and verification of all orders[.] 10%
- Daily meeting with all company employees[.] 10%
- Be available to respond to any issues presented by managers that can be related to customer service, personnel, suppliers or governmental matters[.] 15%
- Oversee daily, weekly, monthly, trimester, quarterly and yearly financial matters, accounting, payroll and tax filings[.] 20%
- Review of daily activity reports to determine company progress in attaining goals and objectives and research opportunities for company growth[.] 15%

The petitioner also provided organizational charts for both entities, depicting the beneficiary at the top of each entity's organizational hierarchy. The foreign entity's chart indicates that there are two managers overseeing

two separate operations. One of the operations – [REDACTED] – shows that two employees are projected, although no position titles or employees are specifically identified. The other operation is not named and is showing as having a prep cook, cook, and sales person directly subordinate to the operation's manager. Like the foreign entity's chart, the chart of the petitioning entity also shows two separate operations – [REDACTED] – both headed by the beneficiary. The chart appears to show projections of future developments, including two retail locations belonging to [REDACTED] and future hires for the wholesale operation. The petitioner also provided a second chart, which includes the restaurant operation that existed at the time the Form I-140 was filed and businesses operating under the heading of [REDACTED], including two retail shops and a third operation named "[REDACTED]". The portion of the chart depicting the existing restaurant operation shows a restaurant manager directly subordinate to the beneficiary, followed by two cooks, two prep cooks, two dishwashers, one waiter and one "help waitress," and four additional positions – two waiters, one cook, and one prep cook/dishwasher – shown as seasonal hires from December to May.

In a separate document, the petitioner indicated that the beneficiary's only direct subordinate is the restaurant's manager, whose direct subordinate is the restaurant's head cook. The petitioner indicated that the rest of the restaurant's employees report directly to either the restaurant's manager or the head cook. The petitioner also provided its state quarterly wage report, which shows six employees were paid wages in September 2013, the month during which the instant Form I-140 was filed.

In a decision dated March 12, 2014, the director denied the petition, concluding that the petitioner failed to establish that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity. The director found that the job descriptions provided in response to the RFE were deficient in their lack of details regarding the beneficiary's day-to-day job duties. The director also observed inconsistent information regarding the number of employees the petitioner had at the time of filing and found that the petitioner failed to submit requested information to establish the beneficiary's management of professional employees in either position.

On appeal, the petitioner resubmitted the evidence that was previously provided in response to the RFE.

Based on our review of the record and for the reasons stated below, we find that the petitioner has failed to establish that the beneficiary was employed abroad and would be employed in the United States in a primarily managerial or executive capacity.

III. Issues on Appeal

As indicated above, the primary issues to be addressed in this proceeding call for an examination of the beneficiary's former and proposed positions with the foreign and U.S. entities, respectively.

A. Qualifying Employment Abroad

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 *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 foreign entity.

In the present matter, the petitioner offered a vague list of the beneficiary's responsibilities that fail to establish that the beneficiary's time in his position with the foreign entity was allocated primarily to tasks within a qualifying capacity. While the petitioner claimed that the beneficiary allocated 20% of his time to making key business decisions, the petitioner did not establish that negotiating with suppliers, meeting with restaurant staff, addressing matters concerning customer service, personnel, and suppliers, which consumed approximately 35% of the beneficiary's time, were tasks performed within a managerial or executive capacity. The petitioner also failed to establish what tasks the beneficiary performed in the course of overseeing the foreign entity's payroll and finances. Without additional information as to the specific tasks the beneficiary performed daily to meet his oversight responsibility, it cannot be concluded that such tasks went beyond the level of daily operations. In addition, while reviewing daily activity reports is a function that may be performed in a managerial capacity in certain circumstances, in the matter at hand, the petitioner did not clarify who actually generates these reports. Although the petitioner provided a document indicating that [REDACTED] handled the foreign entity's accounting, payroll, government filings, and personnel management, the record indicates that Mr. [REDACTED] did not assume these responsibilities until January 2012, approximately nine months prior to the beneficiary's arrival to the United States. It is unclear who, if not the beneficiary, was performing these administrative job duties prior to January 2012. It is also unclear how much time would have been allocated to these non-qualifying tasks if the beneficiary was performing them prior to January 2012.

Despite the director's conclusion that the petitioner failed to submit sufficient evidence to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity for the requisite time period, counsel failed to address the director's specific findings and instead resubmitted the same documentation and job descriptions that the director previously found to be insufficient. In light of the considerable shortfalls of the supporting evidence submitted in this proceeding, it cannot be concluded that the beneficiary was employed abroad in a qualifying managerial or executive capacity and on the basis of this initial conclusion, the instant petition cannot be approved.

B. Qualifying Employment in the United States

Next, turning to the beneficiary's proposed employment with the petitioning U.S. entity, we conduct a similar comprehensive analysis of the record. As indicated above, a determination of the beneficiary's managerial employment capacity starts with an analysis of the beneficiary's proposed job duties with the petitioning entity. *See* 8 C.F.R. § 204.5(j)(5).

Reviewing the evidence in the matter at hand, the description of the beneficiary's proposed employment is overly general and fails to convey a meaningful understanding of the beneficiary's daily tasks. Namely, the petitioner broadly states that the beneficiary allocates 30% of his time to "managing accounting matters" and meeting with the manager "to supervise wage and hour" and oversee pricing negotiations. However, the petitioner did not adequately define the specific underlying tasks involved in such management and supervision. In other words, if the manager would actually carry out the tasks associated with "wage and hour" and pricing negotiations, it is unclear what specific tasks the beneficiary would perform or what role he would assume in the course of his supervision. Specifics are clearly an important indication of whether a

beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103.

The petitioner also indicated that the beneficiary would be directly involved in preparing to open new business locations, conducting research to find additional business locations, and looking for investors for additional business opportunities. However, the petitioner did not establish that any of these tasks, which would be performed in the course of commencing new businesses, are tasks that would be performed within a qualifying managerial or executive capacity. Rather, these tasks are more closely associated with the needs of a new business that is still in the developmental phase of operation, as opposed to tasks performed within the scope of an established business that has advanced beyond the initial stages of operation and has the need and capability to employ an individual whose primary focus would be to perform tasks that are within a qualifying managerial or executive capacity.

In addition, despite the petitioner's submission of a supplemental job description in response to the director's RFE, we cannot overlook the petitioner's original supporting statement in which the beneficiary indicated that he would assume the responsibility of marketing and promotional events and overseeing, hiring, and evaluating restaurant staff and contractors whose job duties and educational credentials were not provided thus precluding the determination that these would be professional or managerial employees. The beneficiary also indicated that he would undertake administrative tasks, such as accounting and booking and formulating employee work schedules. It is unclear how much time the beneficiary planned to allocate to these non-qualifying tasks at the time the petition was filed. 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). Here, the petitioner has failed to establish that the beneficiary was prepared to focus his time primarily on the performance of qualifying managerial or executive tasks at the time the petition was filed.

Furthermore, looking to the petitioner's organizational hierarchy, it is not apparent that the petitioner was adequately staffed at the time of filing such that it had the ability to relieve the beneficiary from having to allocate his time primarily to administrative and operational tasks that would otherwise be performed by subordinate employees. As noted in the director's decision, the petitioner provided inconsistent information as to the number of employees it had at the time of filing. Namely, while the petitioner's Form I-140 indicates that the petitioner had 15 employees at the time of filing, it listed a total of ten restaurant employees in the organizational chart that was provided in response to the RFE, while the petitioner's state quarterly wage report for the 2013 third quarter indicates that the petitioner had only six employees in September of 2013 when the petition was filed. While all of the restaurant employees listed in the petitioner's organizational chart were included in the state quarterly wage report that accounts for the relevant time period, it appears that not all ten employees were employed simultaneously throughout the quarter. Despite the fact that the director discussed inconsistencies pertaining to the petitioner's staffing at the time of filing, this issue was not addressed on appeal, which, as noted above, was entirely comprised of evidence that had been previously submitted in response to the RFE. 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). Given the petitioner's failure to resolve or even to acknowledge these anomalies on appeal, the petitioner has failed to establish precisely who was part of its organizational hierarchy at the time of filing.

Furthermore, while the petitioner included [REDACTED] in its organizational chart, the fact that it was organized as a limited liability company indicates that it is an entity separate and apart from the petitioner itself, despite the petitioner's ownership of the entity. It is therefore unclear that the evidence pertaining to the business operations of the business established by [REDACTED] is relevant in this proceeding, as it does not directly concern the beneficiary's employment specifically within the entity filing the petition, but rather another of the petitioner's business interests.

In summary, the above analysis indicates that the petitioner has failed to provide sufficient probative evidence to properly support the claim that the beneficiary would be employed in a qualifying managerial capacity where the primary portion of his time would be spent managing a staff of supervisory, professional, or managerial employees. Therefore, the petitioner has failed to meet the preponderance of the evidence standard with regard to the beneficiary's proposed employment and on the basis of this second adverse conclusion, this petition cannot be approved.

IV. Conclusion

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.