



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **SEP 08 2014**

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

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 petitioner appealed the director's decision to the Administrative Appeals Office (AAO). The AAO withdrew the director's decision and remanded the matter to the service center for further action and a new decision, with instructions to certify the decision to the AAO if the decision is adverse to the petitioner. *See* 8 C.F.R. § 103.4(a)(1). The director complied with those instructions and issued a new decision, which has been certified to the AAO for review. The AAO will affirm the director's decision.

The petitioner is a Delaware corporation that operates as a provider of software development and consulting services. It seeks to employ the beneficiary in the United States in the position of consultant. 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 originally denied the petition on July 22, 2013, concluding that evidence submitted by the petitioner in support of the instant Form I-140 was inconsistent with a previously filed nonimmigrant petition, which the petitioner filed in order to employ the beneficiary temporarily in the classification of an H-1B nonimmigrant worker in a specialty occupation.

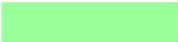
On August 14, 2013, the petitioner filed an appeal with this office, where, upon further review of the matter, the director's decision was withdrawn and the matter was remanded for further action. The director complied with the director's instructions by issuing a notice of intent to deny (NOID), dated April 7, 2014, informing the petitioner of his adverse findings and the reasons therefore.

After reviewing the petitioner's response to the NOID, the director determined that the petitioner failed to overcome the adverse findings and therefore proposed a new adverse decision, dated May 28, 2014, which has been certified to this office for review. Having reviewed the petitioner's supporting evidence, the director acknowledged the petitioner's claim that the proposed position that serves as the basis for the instant immigrant petition is the same as the position that the beneficiary currently holds and which served as the basis for his H-1B nonimmigrant classification. Accordingly, the director compared evidence that the petitioner submitted in support of the nonimmigrant H-1B visa petition (which was previously filed on behalf of the same beneficiary) with supporting evidence that pertains to the instant immigration petition and found inconsistencies with regard to the beneficiary's associated job duties. In light of the inconsistent job descriptions, the director concluded 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 or managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

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. The Issue on Certification

As indicated above, the primary issue in this proceeding is the beneficiary's employment with the petitioning entity and whether the petitioner provided sufficient evidence to establish that the job duties to be performed during the course of the proposed employment would be primarily in a qualifying managerial or executive capacity.

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 proposed job duties with the petitioning entity. See 8 C.F.R. § 204.5(j)(5). Published case 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). Beyond the required description of the job duties, USCIS reviews the totality of the record, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that may contribute to a comprehensive understanding of a beneficiary's actual duties and role within the petitioning entity.

In the present matter, counsel attempts to demonstrate that the differences in job descriptions were not substantive, but rather that they were the result of the petitioner's attempt to tailor its focus to regulatory requirements that were specific to each visa category. Counsel explains that because the H-1B regulatory provisions do not require the beneficiary to be employed in a managerial or executive capacity, the petitioner did not focus on the beneficiary's managerial job duties when submitting evidence in support of the nonimmigrant visa petition. Counsel further explains that given the statutory requirements that apply to petitions filed under section 203(b)(1)(C) of the Act, the petitioner actively focused on the beneficiary's managerial job duties.

However, based on our review of the record in its entirety, we find that there are substantive differences between the information submitted in support of the nonimmigrant H-1B petition and the current immigrant petition. First, while the petitioner's organizational chart, which was submitted in response to the RFE, shows a hierarchy where the beneficiary would oversee other professional employees, the job description submitted in support of the H-1B petition cites tasks that are primarily non-qualifying and are entirely unrelated to employee oversight. In fact, the job description indicates that the beneficiary has been performing tasks that are necessary to provide the numerous services the petitioner offers to its corporate clients. More specifically,

in a November 30, 2012 statement, which was submitted in support of the H-1B petition, the petitioner described the beneficiary's job duties as follows:

[The beneficiary]¹ will analyze, design, develop, implement, and enhance customized applications, and modify existing applications to meet user's changing needs and train users in the application as necessary. In performing his duties, [the beneficiary] will use an array of languages such as [REDACTED] Server, and others depending on specific requirements, in analyzing, testing, and/or modifying application software for enhanced functionality and productivity on operating systems. He will direct sessions with key business users to elicit business/user requirements; convert business/user requirements into functional requirements; identify, manage and validate system requirements. He will demonstrate approaches to problem-solving and strategy development to achieve business goals; consolidate multiple channels of customer communication to ensure consistency of servicing and marketing communications; and conduct market studies.

Nowhere in the above description did the petitioner indicate that overseeing the work of others has been in any way among the beneficiary's responsibilities in his position with the petitioning entity. Rather, the petitioner previously indicated that the focus of the beneficiary's job has been to develop and alter software products and provide software solutions to fit client needs, thus focusing primarily on executing key operational tasks that require little, if any, aspects of employee supervision.

Furthermore, the above job duties vary considerably from those used to describe the same position when introduced in the context of the current immigrant petition, which the petitioner claimed would be in a managerial capacity and thus would be primarily comprised of managerial tasks. Namely, the petitioner indicated that more than 65% of the beneficiary's time would be allocated to managerial components, including resource management, module management, quality management, contract management, and budget management. The petitioner indicated that several of these components would focus on managing teams of professional workers, who would carry out the various underlying tasks required by the specific client-driven projects. In other words, the petitioner clearly indicated that a majority of the beneficiary's time would be spent overseeing others, who would execute the non-qualifying, albeit professional-level, tasks.

In light of the above discrepancies, counsel's claim on appeal – that the beneficiary's current job description in connection with the immigrant petition "simply contain[s] more detailed . . . descriptions of the same job duties" – is not credible. While counsel is correct in pointing out that the regulatory criteria pertaining to H-1B petitions does not require that the beneficiary perform managerial or executive tasks in his position with

¹ Although the petitioner properly referred to the beneficiary by the name as shown in his Form I-129, the name "Mr. [REDACTED]" was erroneously used to refer to the beneficiary in one of the paragraphs when discussing the proposed employment. Based on the context of the remainder of the petitioner's statement with regard to the beneficiary's proposed employment, it appears that the name "Mr. [REDACTED]" was an unintentional error and that the person to whom the above job description pertains was the beneficiary, [REDACTED]

the U.S. entity, it is not reasonable to claim that the petitioner avoided discussing, or even mentioning, the beneficiary's managerial role, which the petitioner now claims is the foundation of the beneficiary's U.S. employment, simply because management is not an element of the H-1B eligibility criteria. If, management was actually a key focus of the beneficiary's U.S. employment, as the petitioner and counsel now claim, the petitioner's failure to mention the beneficiary's managerial responsibilities would have provided an inaccurate and incomplete depiction of the beneficiary's H-1B employment. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Moreover, the mere fact that the beneficiary's U.S. employment would encompass the management of IT employees is not inconsistent with the H-1B petition requirements and thus would not render the beneficiary ineligible for the H-1B nonimmigrant visa classification. As such, the petitioner created further doubt as to the veracity of counsel's explanation regarding the discrepancies between the beneficiary's current job description regarding the immigrant petition and the prior job description in connection with the nonimmigrant petition. If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In summary, the petition does not dispute that the beneficiary's proposed position in the immigrant classification of multinational manager or executive is the same position that the beneficiary has held under an approved Form I-129 petition classifying the beneficiary as an H-1B nonimmigrant. It was therefore reasonable for the director to question the considerable distinctions between the job descriptions submitted in support of these two petitions, respectively. 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). As previously indicated, the supporting evidence with regard to the instant immigrant petition includes the petitioner's organizational chart, which depicts the beneficiary in a supervisory role where he oversees the work of two senior software consultants and one software consultant. As discussed above, the description of the beneficiary's proposed employment under the immigrant classification of multinational manager or executive also places heavy emphasis on the beneficiary's managerial role with respect to individual projects of the petitioner's corporate clients. Despite the claim that the beneficiary's proposed employment is a continuation of the current position he holds with the petitioner in the H-1B nonimmigrant classification, the evidence on record shows that the job description the petitioner submitted with the nonimmigrant petition was considerably different from the job description the petitioner provided in support of the Form I-140, which is the subject of this proceeding. As discussed above, the explanation counsel provided on appeal in his effort to reconcile the information provided in support of the nonimmigrant and immigrant petitions, respectively, with regard to the beneficiary's U.S. employment was insufficient and does not resolve the inconsistencies regarding the beneficiary's job duties. We note that

doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

Lastly, 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. The supporting evidence provided in the matter at hand is not sufficient to establish that the beneficiary would assume a managerial role with regard to subordinate employees or a key organizational function. As such, we find that the petitioner has failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity and on the basis of this conclusion, the instant petition does not warrant approval.

Accordingly, denial of the petition is warranted. 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 director's decision, dated May 28, 2014, denying the visa petition is affirmed.
The petition will be denied.