



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: APR 27 2015 OFFICE: NEBRASKA SERVICE CENTER

FILE:

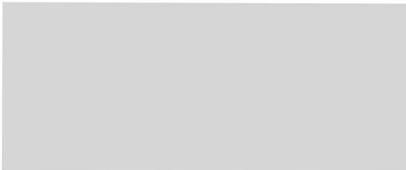


IN RE: Petitioner:
Beneficiary:



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 is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is an Illinois limited liability company that seeks to employ the beneficiary in the United States as its vice president of human resources. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

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

I. The Law

Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and the alien 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 October 2, 2013 along with supporting evidence, which included an undated supporting statement discussing the nature of the petitioner's relationship with the beneficiary's employer abroad and describing the beneficiary's foreign and proposed positions. The petitioner claimed to be the foreign entity's sole owner. The statement also included a list of the beneficiary's duties and responsibilities, indicating that the proposed position would involve preparing budgets, approving human resources activities, overseeing and recruiting dentists, analyzing operations to ensure that the company meets set objectives, visiting customer locations, reviewing reports, directing and planning policies, analyzing potential for business expansion, negotiating fee schedules, and making contacts within insurance enrollment departments. The petitioner also provided an organizational chart, which shows the company president at the top of the hierarchy with the beneficiary as his direct subordinate, overseeing an MIS and IT director, a billing and collections manager, and a human resources manager.

On May 30, 2014, the director issued a request for evidence (RFE), informing the petitioner that the record lacked sufficient evidence to establish the petitioner's eligibility for the immigration benefit sought. Among the issues addressed was that of the beneficiary's proposed employment in the United States and whether such employment would be in a managerial or executive capacity as claimed in the petitioner's supporting documents. The director found that the job description contained in the petitioner's original supporting statement was too general and thus instructed the petitioner to supplement the record with a more detailed job description containing a list of the beneficiary's proposed job duties and their individual time allocations indicating the percentage of time the beneficiary would spend performing each of his assigned tasks. The director asked the petitioner to refrain from grouping individual tasks together when describing the beneficiary's proposed employment. In addition, while the director acknowledged that the petitioner previously submitted an organizational chart, he pointed out that the chart listed only nine employees despite the fact that the petitioner claimed 78 employees in the petition. Therefore, the director instructed the petitioner to provide an organizational chart showing the petitioner's overall structure and staffing levels as well as a list of the beneficiary's subordinates and their respective job duties.

In response, the petitioner's submissions included, in part, a statement containing a supplemental description of the beneficiary's proposed position. The petitioner indicated that the beneficiary's position would be comprised of the following four components: (1) directing the human resources department to which the beneficiary would allocate 30% of his time; (2) managing the recruiting department to which the beneficiary would allocate another 30% of his time; (3) directing the operations department to which the beneficiary would allocate 20% of his time; and (4) directing and managing the budget and finance department to which the beneficiary would allocate the remaining 20% of his time. The petitioner listed the duties and responsibilities that comprise each of the above four categories.

The petitioner also provided an updated organizational chart that reflected the petitioner's claimed organizational hierarchy as of August 2014. The chart depicts the beneficiary at the top of the hierarchy, subordinate only to the company's president and owner. The chart shows the beneficiary as overseeing a provider insurance enrollment department comprised of six employees, a budgeting and finance department comprised of 33 employees, a human resources department comprised of one employee, and an operations department comprised of 106 employees.

In a decision dated September 18, 2014, the director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The director determined that the petitioner failed to provide an adequately detailed job description pertaining to the beneficiary's proposed position. The director also found that the petitioner failed to provide job descriptions for the beneficiary's subordinates or to establish that the beneficiary's subordinates would be supervisory, professional, or managerial employees.

The petitioner subsequently appealed the director's decision, asserting that the director's decision is based on an erroneous conclusion of fact. The petitioner contends that the beneficiary would direct a staff in the performance of non-qualifying tasks and further claims that the beneficiary would direct and coordinate the HR "activities for all onsite employees at each of the twenty-seven dental clinic offices" located in three states. The petitioner asserts that in light of the beneficiary's busy travel schedule, the beneficiary would be unable to assume the petitioner's operational or administrative tasks.

Upon review, and for the reasons stated below, we find that the petitioner has failed to establish that the beneficiary will be employed in a primarily managerial or an executive capacity.

III. Issues on Appeal

As indicated above, the primary issue to be addressed in this proceeding is the beneficiary's proposed employment with the U.S. entity and whether the evidence provided established that the beneficiary would be employed in the United States 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 law has determined that the duties themselves will reveal the true nature of the beneficiary's employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). We then consider the beneficiary's job description in the context of other relevant evidence to determine which employees comprised the petitioner's organizational hierarchy at the time of filing, what duties they carried out, and how the petitioner's staffing composition at the time of filing functioned to relieve the beneficiary from having to carry out the petitioner's daily operational tasks. As such, the petitioner's organizational chart and evidence pertaining to the petitioner's employees and contractors are highly relevant, as this evidence facilitates in allowing us to understand how the petitioner's organization was able to maintain its daily activity without the beneficiary's involvement in the non-qualifying operational and administrative tasks.

In the present matter, while the petitioner provided a job description that broadly defines the beneficiary's proposed employment, indicating that a considerable staff of employees would be available to relieve the beneficiary from having to allocate his time primarily to non-qualifying tasks, the record lacks certain critical information and contains anomalies that preclude a favorable determination regarding the beneficiary's managerial or executive capacity in his proposed position with the petitioning U.S. entity. First, we observe that while the petitioner originally claimed (at Part 5, No. 2(c) of the Form I-140) that it employed 78 people at the time of filing, the quarterly wage report for the fourth quarter of 2013, which the petitioner has provided on appeal, lists 166 total employees. Second, we note that the petitioner failed to formulate a description of the beneficiary's proposed employment in compliance with the specific instructions stated in the RFE. Namely, the director instructed the petitioner to list the beneficiary's proposed job duties and to assign a time allocation to each item on the list. As indicated above, the director expressly cautioned the petitioner to refrain from grouping job duties together when providing the percentage breakdown. Despite these instructions, the petitioner allocated time constraints to each of four categories – human resources, recruiting, operations management, and budget and finance – thus failing to establish the specific percentage of time the beneficiary would allocate to the individual job duties that comprise those categories.

Next, while the petitioner expressly stated (in the same job description) that the IT department would be among the various departments the beneficiary would manage, the percentage breakdown did not allocate any of the beneficiary's time to managing an IT department or indicate what tasks such management would involve. Additionally, while the organization chart submitted in support of the petition indicated that the beneficiary would supervise a MIS and IT Director, the chart provided in response to the RFE failed to include any mention of an IT department. In addition to this discrepancy, the petitioner created an anomaly by adding an enrollment department to the organizational chart it submitted in response to the RFE, where the beneficiary was depicted as the enrollment department manager; yet, the petitioner failed to include the

enrollment department in the beneficiary's job description. It is unclear why, if the beneficiary is assigned to head the enrollment department, as claimed in the organizational chart, the petitioner would exclude this management component from the beneficiary's job description and offer no information discussing how much time the beneficiary would allocate to managing the enrollment department or describe the specific job duties that would be entailed in this role. The fact that the beneficiary's job description and the petitioner's organizational chart are not consistent in their respective portrayals of the beneficiary's managerial responsibilities gives rise to question which, if either, is the more accurate portrayal of the beneficiary's proposed position. It is unclear whether the beneficiary would, in fact, manage the enrollment department, as indicated in the organizational chart, and if so, what job duties he would perform. 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). Here, the record does not reconcile the anomaly regarding the existence of an IT department or the beneficiary's role therein; nor did the petitioner resolve the inconsistency between the beneficiary's job description and the petitioner's organizational chart with regard to the beneficiary's role, if any, in the enrollment department.

Furthermore, in comparing of the original job description, which the petitioner provided in a Form I-140 supporting statement, with the subsequent job description, which the petitioner provided with the RFE response, we note another considerable discrepancy. Namely, while the original job description indicated that the beneficiary himself would assume the responsibility of actually preparing the petitioner's budget, the statement provided with the RFE response indicated that the beneficiary's role with respect to budget preparation would be limited to one of oversight, claiming that the actual budget preparation would be executed by "accounting and budget professionals." In other words, the petitioner altered the beneficiary's original job description, replacing the beneficiary's active role in preparing the petitioner's budget with a supervisory role, such that the beneficiary went from actually performing an operational task, as indicated originally, to overseeing the completion of that operational task. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

On appeal, the petitioner disputes the director's findings, asserting that the petitioner provided a comprehensive job description that included a percentage breakdown showing how much time the beneficiary would spend on each of his assigned tasks. However, as previously discussed, the petitioner did not assign a percentage of time to the beneficiary's specific job duties and instead assigned a percentage of time to four of the departments the beneficiary would purportedly manage without ensuring that the job description corresponds with the petitioner's organizational chart in terms of conveying the same information with regard to the departments that are under the beneficiary's purview. In addition, neither of the petitioner's organizational charts on record corroborates the petitioner's claim that the beneficiary would be responsible for "the direction and coordination of [HR] activities for approximately 60 employees including [d]entists, [o]rthodontists, [c]linical [d]irectors, [d]ental [a]ssistants, [o]ffice [m]anagers, and [r]eceptionists in multiple clinic locations across Texas, New Mexico[,] and Illinois." 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Given that the petitioner's original organizational chart indicates that the petitioner had a human resources manager at the time of filing, it is unclear how the beneficiary's direction and coordination of human resources activities would be different from the activities carried out by the human resources manager the petitioner employed at the time of filing.

Further, while the job description that was provided in response to the RFE indicates that the beneficiary oversees activities of the dental clinics, the job description indicates that the petitioner had six employees working in the human resources department, while the organizational chart, which was also provided with the RFE response, indicates that as of August 2014, the petitioner had a single employee – [REDACTED] – working in the HR department as the recruiting lead and HR assistant manager overseeing 25 dental clinics. Not only did the petitioner create a discrepancy between the beneficiary's job description, which indicates that there are six employees in the HR department, and the organizational chart, which depicts a single employee and 25 dental clinics, but the petitioner also failed to provide a job description for the single HR employee that would enable us to distinguish between the beneficiary's role and that of his subordinate.

In order to establish that the beneficiary's employment would be within a qualifying managerial or executive capacity, it is critical for the petitioner to provide a list of the specific tasks the beneficiary would perform and indicate what portion of the beneficiary's time would be allocated to tasks of a qualifying nature. While no beneficiary is required to allocate 100% of his 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). In the instant matter, the petitioner fails to maintain consistency in terms of where the beneficiary would assume an active role and where the beneficiary's involvement would be limited to oversight. The petitioner also creates additional discrepancies regarding the specific managerial components of the proposed position and the staffing composition of the petitioner's individual departments. Given these considerable deficiencies, the petitioner has effectively undermined the credibility of its claims with regard to the beneficiary's qualifying employment. The further lack of sufficient probative evidence to clarify certain facts and resolve the numerous anomalies discussed above precludes us from being able to affirmatively conclude that the beneficiary would primarily allocate his time to managerial or executive tasks, as claimed.

Accordingly, we find that the petitioner has failed to establish that the beneficiary's proposed employment would be within a qualifying managerial or executive capacity and on the basis of this adverse finding the instant petition cannot be approved.

IV. Beyond the Director's Decision

Beyond the decision of the director, the record fails to document the petitioner's claimed qualifying relationship with the beneficiary's foreign employer. In the present matter, the petitioner made two inconsistent claims with regard to the foreign entity's ownership. In the initial supporting statement the petitioner claimed that it is the owner of [REDACTED], the beneficiary's employer abroad, and that the two entities had a parent-subsidiary relationship. However, in response to the RFE, the petitioner provided a flow chart to support the more recent claim that it has an affiliate relationship with [REDACTED]. The petitioner has not provided sufficient probative evidence to establish that either claim is true. Namely, while the petitioner provided evidence to establish that [REDACTED] is majority owner of the petitioning entity, the record lacks sufficient evidence to establish ownership of the foreign entity. The petitioner submitted the foreign employer's articles of incorporation, which identified [REDACTED] as the "legal person acting as founder" of [REDACTED]. The document was silent as to who actually

owns the foreign entity. The petitioner's submission of a document issued by the Canada Revenue Agency is also insufficient, as it did not specifically identify an owner; it merely named the beneficiary in the section titled "Owner/ partner/ director information," thus leaving open the possibility that the beneficiary would be owner of the foreign entity. The documents submitted do not corroborate the petitioner's claims that either the petitioner owns the foreign entity, such that would constitute a parent-subsidiary relationship, or that the [REDACTED] is majority owner of the foreign entity, such that the petitioner and the foreign entity can be deemed affiliates owned by one common parent entity. See 8 C.F.R. 204.5(j)(2) (for definition of the term *affiliate*.) Thus, not only did the petitioner fail to provide evidence to support either of its claims, the petitioner also made two conflicting claims as to the ownership of the foreign entity. As previously stated, the petitioner maintains the burden of resolving factual inconsistencies through the submission of 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. at 591-92.

For this additional reason, the petition cannot be approved. We may deny an application or petition that fails to comply with the technical requirements of the law even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1037 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a de novo basis).

V. 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.