



**U.S. Citizenship
and Immigration
Services**

(b)(6)



DATE: **APR 27 2015** 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:

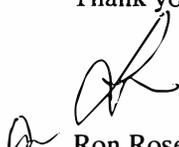


INSTRUCTIONS:

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 Texas Service Center Director revoked approval of 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 Texas corporation, is engaged in "scaffolding manufacture and distribut[ion]" and claims to be a subsidiary of [REDACTED], the beneficiary's former employer located in the United Kingdom. The petitioner seeks to employ the beneficiary in the position of President.

On June 30, 2014, the director denied the immigrant petition, finding the petitioner had failed to establish that the beneficiary 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, the petitioner 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.

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.

II. THE ISSUE ON APPEAL

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

The sole 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 offered the beneficiary the position of President. In a letter of support, dated May 7, 2013, the petitioner explained the beneficiary's executive duties in the United States are as follows:

As President, [the beneficiary] takes charge of the entire company's developing strategy to advance the company's mission and objectives and to promote revenue, profitability, and growth as a dynamic organization. Specially, [the beneficiary] establishes and approves company's rules, policies, operational procedures and standards; oversees and decides company's annual budgets and financial goals; directs company operations to ensure production efficiency, quality products and services and cost-effective management of resources; plans, develops, and implements strategies for generating resources and revenues for the company; and reviews activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions.

In addition, [the beneficiary] evaluates the performance of his subordinate professionals for compliance with contributions in attaining objectives; directs entire company's HR matters; supervises and controls the work all of the professionals; and decides promotions and bonuses. [The beneficiary] also has exclusive authorities to hire and fire employees. He functions as a very top-level officer within the organizational hierarchy; and exercises discretion over the day-to-day operations of the activities for which he has authority.

The petitioner submitted an organizational chart that indicated the beneficiary as President who in turn supervises the Vice President, who in turn supervises the Office Manager and Sales Manager. The Sales Manager supervises two Sales/Accounts Specialists.

On August 13, 2013, the director sent a request for evidence ("RFE"). 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 branch. In addition, the director requested a dated organizational chart including the names of all employees, employees' titles, a clear description of their job duties, educational level, salary, and whether they worked part-time or full-time. The director also requested Form W-2 for the relevant years for each employee.

In response to the director's RFE, the petitioner provided the beneficiary's duties in the proffered position as follows:

(1) Administration, Business and Personnel Management (60%) –

Job Duties	% Time spent
Directs establishing company's policies and rules, deciding annual budget, financial goals and additional investments for business expansion and operations.	10%
Sets up, implements and monitors budget cost & control policies and procedures.	5%
Authorizes and approves the use of annual budget for business operations and projects.	5%
Monitors and directs the training for the professionals on the policies, procedures and standards of the company.	5%
Directs and communicates to his subordinate professional team on the company's objectives and goals and the role that each one of the team members needs to fulfill in order to accomplish those goals.	5%
Directs and provides guidelines to departmental managers regarding policy implementation, budget management, cost control and	5%

performance requirements, etc.	
Reviews and approves new projects and investment; directs and prepares related reports to the President.	5%
Presides at monthly/weekly meetings with the departmental managers, to follow up the project implementation, and identify deviations or potential problems.	5%
Directs and participates in contract negotiation, and sign the contracts on behalf of [the petitioner].	5%
Conducts annual review and evaluation on employees, and decides bonus, promotion and training.	5%
Makes decisions or make recommendation to the President on the hiring or dismissing employees.	5%

(2) Financial Management (40%) –

Job Duties	% Time Spent
Directs and provides guidelines and for the implementation of financial goals and annual budgetary plans to be used in the projects.	5%
Directs and prepares reports estimating economic impact and financial profitability for the senior management of the company.	5%
Presides at monthly and weekly meetings with subordinates regarding setting up company's accounting policies and rules, and financial strategy implementation.	5%
Directs and supervises the accounting personnel in preparing and providing monthly and yearly financial statements for CPA's review and approval.	5%
Directs and trains new professional team members before they are assigned to projects in terms of financial responsibilities.	5%
Directs and supervises feasibility study for all the projects in terms of financial management.	5%
Reports and makes recommendation to the President and Board of Directors for annual budget approval and additional investment, etc.	5%
Directs and works with local bankers and financial advisors for new project estimation and bank loans, etc.	5%

The petitioner also submitted a second organizational chart that indicated the beneficiary as the President who in turn supervises the General Counsel and the Vice President. The Vice President in turn supervises an Office Manager and a Sales Manager. The Sales Manager supervises one Sales/Account Specialist. The second organizational chart only has one Sales/Accounts Specialist rather than two as listed in the first organizational chart, and it added General Counsel. The petitioner provided a brief job description for each position.

The director denied the petition, 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

Upon review, and for the reasons discussed herein, the petitioner has not established that it will employ the beneficiary in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, we will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* A detailed job description is crucial, as 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).

At the time of filing, the petitioner provided a list of duties that described the beneficiary's position in very generalized terms, noting that he "establishes and approves company's rules, policies, operational procedures and standards; oversees and decides company's annual budgets and financial goals; directs company operations to ensure production efficiency, quality products and services, and cost-effective management of resources; plans, develops, and implements strategies for generating resources and revenues for the company; and reviews activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions." The duties were overly broad and lacked any specific references to the petitioner's scaffolding manufacturing and distribution business or to the specific tasks the beneficiary performs on a day-to-day basis. For example, the petitioner did not provide any further information regarding strategies for generating resources and revenues for the company, who the beneficiary supervises in this regard, or what specific activities the beneficiary must perform when "attaining objectives and revis[ing] objectives and plans in accordance with current conditions." 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 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In response to the director's request for a definitive statement of the beneficiary's duties and the percentage of time he allocates to specific tasks, the petitioner stated that the beneficiary allocates 60% of his time to "Administration, Business and Personnel Management" and 40% of his time to "Financial Management," and included a further breakdown of job duties under each section. On review, the petitioner provided a vague and nonspecific description of the beneficiary's duties with the petitioner that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the beneficiary "directs establishing company's policies and rules, deciding annual budget, financial goals and additional investments for business expansion and operations." "sets up, implements and monitors budget cost & control policies and procedures," and "directs and provides guidelines to departmental managers regarding policy implementation, budget management, cost control and performance requirements, etc." This description provides little insight into what the

beneficiary primarily will do on a day-to-day basis and did not explain the petitioner's strategies, financial goals and operational policies and goals. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

The job description also includes several non-qualifying duties such as the beneficiary "directs and participates in contract negotiation, and sign the contracts on behalf of [the petitioner];" "directs and prepares reports estimating economic impact and financial profitability for the senior management of the company;" and, "directs and trains new professional team members before they are assigned to projects in terms of financial responsibilities." It appears that the beneficiary will provide the services such as preparing the financial budgets and reports, training new employees and negotiating contracts rather than overseeing other employees that will perform the day-to-day tasks of running the business operations. An employee who "primarily" performs the tasks necessary to produce a product or provide a service 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).

Moreover, as noted by the director, the job duties of the proffered position mentions three times that the beneficiary, as President, will report to the President. For example, the beneficiary "reviews and approves new projects and investment; directs and prepares related reports to the President;" "makes decisions or make recommendation to the President on the hiring or dismissing employees;" and, "reports and makes recommendation to the President and Board of Directors for annual budget approval and additional investment, etc." On appeal, the petitioner states that these duties were erroneous and the "intent was to evidence the nature of [the beneficiary's] position, his authority, and that all of these matters are within the domain of the President." However, citing clerical error still puts into question as to whether the job description is accurate. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Furthermore, 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 definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, 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 will contribute to understanding a beneficiary's actual duties and role in a business.

The Form I-140, submitted on June 19, 2013, stated that the petitioner employs five individuals. According to the organizational chart, the petitioner employed the beneficiary as President; [REDACTED] as Vice President; [REDACTED] as Office Manager; [REDACTED] as Sales Manager; and [REDACTED] and [REDACTED] as Sales/Accounts Specialists. The petitioner also submitted Form W-2 for 2012 for all of these employees except [REDACTED]. In response to the RFE, the petitioner stated that the beneficiary started his employment in mid-October of 2012 and thus, received a salary in 2012 of \$12,600 which is an annual salary rate of \$60,000. In 2012, the Vice President received a salary of \$82,400. It is not clear why the beneficiary's position as President receives a lower salary than the Vice President, a position which is supervised by the beneficiary. 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. at 582.

In response to the RFE, the petitioner provided a second organizational chart which added a part time general counsel and new employees in the positions of office manager and sales manager. In addition, the new chart only shows one Sales/Accounts Specialist rather than the two as depicted in the first organizational chart. The petitioner also submitted Form 941, Employer's Quarterly Federal Tax Return, for the first, second and third quarters of 2013. The petitioner employed six employees during the first quarter of 2013, and four employees in the second and third quarters of 2013. Thus, at the time of filing the instant petition, the petitioner only employed four employees as evidenced on the Form 941, but the organizational chart indicated six employees. It is not clear which positions were filled at the time of filing. Again, 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 stated that it is "one of the leading distributors for scaffolding systems, scaffolding couplers, props and formwork accessories in the United States," and the petitioner projects "annual sales of scaffolding related products and services at US\$1,000,000.00." As noted above, at the time of filing, the petitioner employed four individuals. It is not clear which positions these four individuals held since the organizational chart submitted by the petitioner indicates six positions. The evidence of record does not demonstrate that the petitioner has sufficient employees that would perform the various operational tasks inherent in operating a business on a daily basis, such as purchasing inventory, handling customer transactions, handling the financial operations, manufacturing, shipping, customs, and negotiating contracts. 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.

On appeal, the petitioner contends that the beneficiary has already met regulatory and evidentiary criteria with USCIS previous granted L-1A classification to the beneficiary. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant I-129 L-1 petitions. See, e.g., *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. Cf. §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427. Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; see also 8 C.F.R. § 214.2(l)(14)(i) (requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988).

Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, we would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), aff'd, 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S.Ct. 51 (2001).

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See sec. 291 of the Act, 8 U.S.C. 1361; see also *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. at 376 (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.



Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. See *U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (discussing "more likely than not" as a greater than 50 percent probability of something occurring).

Here, the submitted evidence does not meet the preponderance of the evidence standard. As noted in the director's decision, the petitioner did not provide sufficient evidence to establish the petitioner meets the regulatory requirements to establish eligibility for the I-140 immigrant visa petition.

III. BEYOND THE DECISION OF THE DIRECTOR

Beyond the decision of the director, the petitioner failed to establish that in the three years immediately preceding the filing of this petition, the beneficiary has been employed outside the United States for at least one year in a managerial or executive capacity by a qualifying organization. The petitioner indicated in a letter dated May 7, 2013, that the beneficiary was employed from April 2009 to October 2012 for the petitioner's parent company, [REDACTED], located in the United Kingdom. However, according to government records, it appears that the beneficiary may have worked for another company, located in [REDACTED]. 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). Doubt cast on any aspect of the petitioner's proof may, of course, 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. 582, 591 (BIA 1988). For this additional reason, the appeal will be dismissed.

IV. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. 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.