



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **AUG 21 2015**

FILE #: [REDACTED]

PETITION RECEIPT #: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:



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 Director, Texas Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner, a subsidiary of an overseas distributor of polytetrafluoroethylene products, seeks to employ the beneficiary in the United States as its president. The petitioner filed Form I-140, Immigrant Petition for Alien Worker, on May 27, 2014, seeking to classify the beneficiary as an employment-based immigrant under 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 on December 19, 2014, concluding that the petitioner had not established that the beneficiary will work in a qualifying managerial or executive capacity in the United States, or that the beneficiary had been employed abroad for at least one year with a qualifying organization.

On appeal, the petitioner submits a legal brief. The petitioner asserts that its small staff and its use of contract workers do not diminish the executive nature of the beneficiary's work. The petitioner also contends that the director misinterpreted the requirements regarding the beneficiary's employment abroad.

I. 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 only to 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 Form I-140 to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager. The regulation at 8 C.F.R. § 204.5(j)(5) states:

No labor certification is required for this classification; however, 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 letter must clearly describe the duties to be performed by the alien.

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, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

II. Issues on Appeal

There are two issues on appeal in this proceeding. First is the question of whether the beneficiary performs qualifying executive functions. (The petitioner does not claim that the beneficiary is a manager.) The second issue concerns the question of whether the beneficiary’s overseas experience meets applicable requirements.

A. Executive Capacity in the United States

1. Facts

The petitioner filed Form I-140 on May 27, 2014. The petitioner's initial submission included an unsigned list of “[d]aily responsibilities of the President of [the petitioning company],” bearing the logo of the foreign parent company, listing the beneficiary’s duties. The list reads as follows:

1. Overall control and supervision of sales managers daily activities (setting up sales targets, regulating possible problems with the clients etc.) – 30% (executive capacity)
 - He will supervise all the managers and supervisors in general daily activities;
 - He will [be] guiding and directing the managers to the achievement of the Company's goals . . . ;
 - Receive input/reports from subordinate managers. . . .
 - Review and approve contracts with new clients
2. Supervising of accounting department in their daily activities – 20% (executive capacity)
 - He will direct and guide the accounting department in all of its activities. . . .
3. Communicating with the Head company, preparing reports and giving suggestions of further business improvements – 20% (executive capacity)
 - In consultation with the Head company, develops long-range goals and objectives of the company;
 - To prepare and send weekly to the Board of Directors in Russia a Report with the results of his management and company sales and marketing achievements on the previous week.
4. R&D [research and development] in the field of new projects in order to expand sales . . . – 10%
5. Negotiating with key clients – 10%
6. Will represent The Company before any Governmental Agency. – 5%
7. Recruitment and training [of] the staff: determines such human resources as are necessary, when hiring new personnel, takes part in their selection, hiring and training – 5% (executive capacity)

A shorter job description appeared in a September 6, 2012 letter from [REDACTED] the petitioner's interim corporate secretary, originally prepared in support of a nonimmigrant petition filed on the beneficiary's behalf:

[The beneficiary] will oversee the overall direction and sales operation of the U.S. subsidiary. He will establish company policies and oversee the initial implementation and organization of the company policies and goals. In his first year with the U.S. Subsidiary, [the beneficiary] will be recruiting and hiring the General Manager, Sales/Marketing Manager and Administrative Manager. He will have the authority to hire, train and supervise the management level personnel and will have the authority to review, promote and terminate the personnel. [The beneficiary] will report directly to the upper management of the parent company.

On Form I-140, the petitioner indicated that it currently had two employees in the United States, but this figure apparently did not count the beneficiary. The petitioner stated that the petitioning U.S. entity "is primarily a sales arm of [the foreign parent company]. While this type of a company inherently does not require many workers, petitioner is sufficiently staffed so that beneficiary is

relieved of all non-essential functions.” The petitioner indicated that it currently employs [REDACTED] as national business development manager and [REDACTED] as technical service manager, while two former employees, [REDACTED] and [REDACTED], had both held the title of sales manager. Thus, the petitioner gave managerial titles to all of the beneficiary’s current and former subordinates.

The petitioner submitted two organizational charts, both of which showed the company divided into three departments (Accounting, Marketing, and Administration). The first chart, labeled “Current structure as of 2013,” indicated that two departments consisted entirely of contractors: the Accounting Department consisted of [REDACTED] the Administration Department included [REDACTED] and an attorney (who serves as counsel in this proceeding). The remaining department, Marketing, listed [REDACTED] as “Manager” and [REDACTED] below him as “Sales staff.” As noted above, by the time the petitioner filed the petition in 2014, both [REDACTED] and [REDACTED] had left the company.

The second organizational chart bore the marking “Proposed,” indicating that the petitioner did not yet have the structure described therein. The chart showed the same three departments as the other chart (Accounting, Marketing, and Administration), but implied that each department would be staffed internally. The chart also showed a “General Manager” who would oversee all three departments and report to the president.

The petitioner asserted that “numerous sub-contractors help relieve [the beneficiary] of non-executive responsibilities. . . . Nearly all of its administrative and support functions have been outsourced.” As “evidence that [the beneficiary] . . . supervises a vast network of subcontractors,” the petitioner submitted copies of an “Office Service Agreement” with [REDACTED]; a one-year regional “Sales Representation Agreement” with [REDACTED] to represent the petitioner in Texas, Oklahoma and Louisiana; a “Transportation and Logistics Services Agreement” with [REDACTED] and a “Management Services Agreement” in which the foreign parent company agreed “to furnish to [the petitioner] all services to perform the work of managing its operation in the United States.” The petitioner submitted no documentation from [REDACTED] to establish its relationship to the petitioner, but copies of the petitioner’s tax documents identified [REDACTED] as the preparer.

The petitioner’s 2013 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, indicated that the petitioner paid \$211,243 in compensation of officers (all paid to the beneficiary) and \$18,722 in salaries and wages (all paid to [REDACTED]). On the accompanying IRS Form 1125-A, Cost of Goods Sold, the petitioner left blank the line for “Cost of labor.”

The director issued a request for evidence (RFE) on October 15, 2014. The director quoted the petitioner’s description of the beneficiary’s duties, and stated that the petitioner had provided “a set of broad job responsibilities, which suggest a general sense of the beneficiary’s heightened degree of discretionary authority, but fail to convey an understanding of the beneficiary’s duties on a daily basis.” Regarding the assertion that the beneficiary will “direct and guide the accounting department,” the director noted the lack of evidence that the petitioner employs “accounting professionals” to perform the duties of that department. The director stated that the petitioner’s IRS

documentation did not support the petitioner's claim that it relies on contractors. The director noted that the petitioner claimed no "Cost of labor" expense on its 2013 tax return, and that the petitioner did not submit copies of IRS Form 1099-MISC, Miscellaneous Income, which would reflect payments made to independent contractors. Observing that the petitioner paid only \$18,722 in salaries and wages in 2013, the director found that figure to be more consistent with employment of "part-time, seasonal or temporary, nonprofessional" workers than of "full-time, professional employees."

In response, the petitioner submitted a new list of the beneficiary's claimed daily responsibilities. The new list was similar to the earlier list, except that it did not mention research and development, and instead added that portion of the beneficiary's time to the section marked "Communicating with the Head company."

The petitioner submitted a new organizational chart, showing the entity's "[c]urrent structure as of 2014." The chart now showed four departments – the Accounting, Marketing, and Administrative departments claimed before, and a new Technical department, organized as follows:

Technical

B. [REDACTED] until April 2014; search for replacement is underway

Accounting

[REDACTED]

Marketing

[REDACTED] – business development manager (also called sales manager)

[REDACTED] – marketing in Texas/Louisiana/Oklahoma

Administration

[REDACTED] - Office

Counsel – Law office

[REDACTED] - recruiting agency

The latest organizational chart indicates that the petitioner had two employees (the beneficiary and Mr. [REDACTED] at the time it responded to the RFE. This is consistent with IRS Form 941, Employer's Quarterly Federal Tax Return, which indicated that the petitioner had two employees during the second quarter of 2014.

To support the assertion that [REDACTED] handles the petitioner's accounting, the petitioner submitted a printout from [REDACTED] web site, identifying the petitioner as a client.

The petitioner asserted that the low salaries reflected on the petitioner's IRS documentation were due not to the employment of low-wage workers, but to the timing of [REDACTED] employment. The record shows that the petitioner hired Mr. [REDACTED] in December 2012 and terminated his employment in February 2013, so that each year's tax documents would show no more than two months of

compensation. The petitioner also noted that the record shows that the petitioner paid Mr. [REDACTED] \$170,584 in 2012.

In the denial notice, the director stated that the petitioner's broad and general job description did not "convey an understanding of the beneficiary's duties on a daily basis." The director also determined that the petitioner had provided inconsistent information and evidence regarding the beneficiary's subordinates. The director stated that the petitioner's small staff size indicated that the beneficiary might need to personally conduct day-to-day business functions. The director noted the beneficiary's claimed responsibility over an accounting staff that the petitioner does not employ. With respect to the petitioner's asserted reliance on contractors, the director repeated the finding that the petitioner claimed no "Cost of Labor" on line 3 of IRS Form 1125-A, and submitted no IRS Forms 1099 to show remuneration of contractors.

On appeal, the petitioner states that it had previously submitted a "detailed breakdown of the [beneficiary's] actual work" and ample evidence to support the petitioner's claims.

2. Analysis

The petitioner raises a number of valid points on appeal. The record supports the petitioner's assertion that the beneficiary's subordinates earned high rates of pay, which only seemed low owing to the timing of their hiring and firing. Also, the record contains sufficient documentation to establish, by a preponderance of evidence, that the petitioner has relied on contractors to perform a number of the company's functions. The issue of whether the petitioner properly reported the costs of these contractors on its income tax return is a question for the IRS, not USCIS. The petitioner documented arrangements with several contractors, including [REDACTED] and [REDACTED]. The record does not directly establish the petitioner's relationship to [REDACTED] but the record does show that the petitioner is an [REDACTED] client.

The petitioner stated that, given the evidence that the petitioner employs the services of contractors, the director should have considered "the beneficiary's eligibility under the [REDACTED] decision." The petitioner refers to an unpublished appellate decision from 1989 in which we determined that a beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. The petitioner contends that the facts of the instant petition are analogous to those in the unpublished decision. The record, however, does not contain copies of the evidence from the 1989 decision, and therefore the petitioner has not supported this claim. Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

While we acknowledge the general point that a reliance on contractors rather than employees does not inherently disqualify the petitioner, the petitioner must still establish the beneficiary's eligibility for the classification sought. 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).

In this context, it is significant that one of the petitioner's contractors is the foreign parent entity, contracted to provide "Management Services" including "Management Information Systems," "Strategic PI[a]nning," and "Marketing and Public Relations Services." This agreement indicates that these management activities reside not with the petitioner, but with its overseas parent. If these functions are "management services" as described, then their delegation to a contractor means that the beneficiary does not perform them.

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. § 214.2(l)(3)(ii). The petitioner has not overcome the director's finding that the petitioner's description of the beneficiary's duties is vague and general. The petitioner maintains that the description was "detailed" and "comprehensive," but the record does not support this assertion.

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, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). 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 not provided 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 regulation at 8 C.F.R. § 204.5(j)(3)(i) requires the petitioner to submit a statement from an authorized official of the petitioning United States employer, describing, among other things, the nature of the beneficiary's proposed duties. The percentage breakdowns of the beneficiary's duties do not meet this requirement, because they do not identify the authorized official who prepared them. The letter from [REDACTED] provided little information beyond paraphrasing the regulatory language. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. See *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Furthermore, that letter indicated that the beneficiary would hire a general manager and an administrative manager during "his first year" with the company, whereas the record shows that the petitioner has not hired either of those officials more than two years later. Therefore, the record does not support one of the few specific details in [REDACTED] letter.

The petitioner maintains that it did not rely on unsupported assertions, but rather "the submission . . . was extraordinarily voluminous," comprising approximately 900 pages between the initial filing and the RFE response. The majority of the exhibits are materials such as tax documents that do not directly address the nature of the beneficiary's work for the company.

Among the submitted documents are copies of purchase orders, which originated from different customers and therefore contain varying details. A May 8, 2014 purchase order from [REDACTED] includes the phrase “Order Placed With:” followed by the beneficiary’s name, indicating that the beneficiary himself took the order, which is not a qualifying executive function. Several other purchase orders show the beneficiary’s name as well. Evidence that the beneficiary himself took sales orders argues against the conclusion that other workers relieved the beneficiary from having to perform those non-qualifying functions himself.

The petitioner asserts that there are no inconsistencies regarding the company’s staffing, and that any appearance of such discrepancies results from the director’s misreading of the evidence rather than the evidence itself. The petitioner acknowledges that the petitioner claimed two employees on Form I-140, and submitted an organizational chart showing three employees, but the petitioner states that this is not a true discrepancy because the organizational chart was an outdated one that had accompanied an earlier nonimmigrant petition. The petitioner does not explain why it submitted an outdated organizational chart instead of one that accurately reflected the petitioner’s organizational structure at the time of filing.

The 2013 organizational chart, which listed [REDACTED] as “Manager” and [REDACTED] as subordinate “Sales staff,” is not consistent with the claim that [REDACTED] and [REDACTED] were both “sales managers” with the same responsibilities. The proposed organizational chart did not show positions for a “national business development manager” or a “technical service manager,” although the petitioner claimed that those two individuals were the beneficiary’s only subordinates in mid-2014. The director was correct in finding that the petitioner has made inconsistent claims regarding the structure of the petitioning organization, sometimes referring to the same employee by different titles, and by providing several different versions of the entity’s organizational structure with no supporting evidence to show which of them accurately reflected the true structure.

For the reasons discussed above, we find that the petitioner has not provided reliable, probative evidence sufficient to establish that the beneficiary will be employed in the United States in a qualifying managerial or executive capacity. For this reason, USCIS cannot approve this petition.

B. Employment Abroad

The second and final issue concerns the question of whether the beneficiary accumulated the required year of qualifying employment abroad during the three years immediately preceding his entry as a nonimmigrant.

1. Facts

The beneficiary began working for the foreign parent company on March 29, 2010. The record indicates that the petitioning U.S. entity incorporated on March 16, 2012 and issued all of its shares to the foreign entity on that same day, thereby establishing a qualifying relationship between the two entities. The director concluded that the qualifying relationship between the petitioner and its parent

began on that date. The beneficiary entered the United States on September 27, 2012 to work for the petitioning U.S. entity as an L-1A nonimmigrant.

In the October 2014 RFE, the director stated that the petitioner had not shown that the beneficiary worked for the foreign parent company for at least one year while a qualifying relationship existed between the two companies. In response, the petitioner cited prior submissions to show that the petitioner had already demonstrated the foreign entity's ownership of the petitioning entity, and the beneficiary's qualifying experience with the foreign entity.

The director, in the denial notice, concluded that the qualifying relationship existed between the two companies for only 196 days before the beneficiary entered the United States, and therefore the beneficiary had not accumulated the required year of experience abroad.

On appeal, the petitioner states that the beneficiary's overseas experience meets all applicable requirements, and that the denial rests on a novel requirement that arose from a misinterpretation of the statute and regulations.

2. Analysis

This second basis for denial revolves around the conclusion that, because the petitioning U.S. company did not exist until March 16, 2012, there was not a qualifying relationship between the petitioner and its parent company for at least one year when the beneficiary entered as an L-1A nonimmigrant on September 27, 2012. We agree with the petitioner's assertion on appeal that there is no requirement for the qualifying relationship to have existed for at least a year prior to the beneficiary's entry as a nonimmigrant. The beneficiary worked for the foreign employer for more than a year prior to his 2012 entry, and a qualifying relationship existed at the time the petitioner filed the petition in 2014. These facts suffice to warrant withdrawal of the stated ground for denial.

Accordingly, we withdraw this ground for denial, but the other stated ground remains.

III. Conclusion

We will dismiss the appeal for the above stated reasons. 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, the petitioner has not met that burden.

ORDER: The appeal is dismissed.