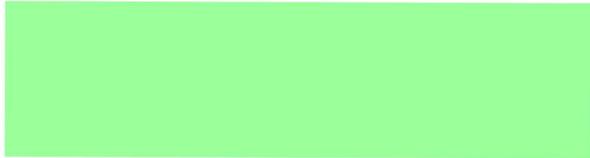


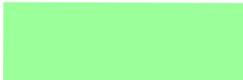
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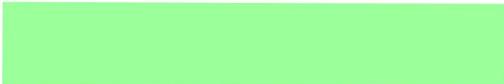


U.S. Citizenship  
and Immigration  
Services



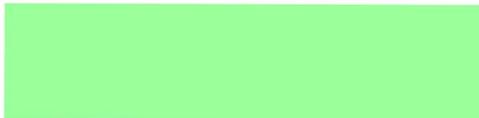
DATE: **JAN 05 2015** OFFICE: TEXAS SERVICE CENTER

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Texas Service Center Director denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a "high thrill amusement park." It claims to be a subsidiary of the beneficiary's foreign employer, [REDACTED], located in Australia. The petitioner seeks to employ the beneficiary as its General Manager and Site Controller.<sup>1</sup>

The director denied the petition on February 25, 2014, concluding that the petitioner failed to establish that the beneficiary would be employed within a qualifying managerial or executive capacity.

The petitioner subsequently filed an appeal, which the director treated as a motion. The director again denied the petition on April 28, 2014 and declined to treat the subsequent appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that it provided sufficient evidence to establish that the beneficiary would be employed in the U.S. in a qualifying managerial capacity. The petitioner submits a brief and additional evidence in support of the appeal.<sup>2</sup>

#### 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

<sup>1</sup> The Form I-129 stated the proffered position as "General Manager" but all of the supporting documentation indicated the position as "General Manager and Site Controller."

<sup>2</sup> We conduct appellate review on a *de novo* basis (See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)).

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.

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. ISSUE ON APPEAL

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

The issue to be addressed is whether the petitioner established that the beneficiary would be employed in a qualifying managerial or executive capacity.

The petitioner offered the beneficiary the position of General Manager and Site Controller. In a letter of support, dated May 22, 2013, the petitioner explained the duties of the proffered position as follows:

- Oversee and direct the business operations of commercial amusement and recreation enterprise (35%)
- Define and implement company's policy, goals and procedures (15%)
- Hire and fire managerial staff (2.5%)
- Approve/disapprove the hiring and firing of lower level employees (2.5%)
- Conduct regular and routine inspections of premises (5%)
- Discuss inspection discrepancies and solutions with appropriate subordinate managers (2.5%)
- Ensure full compliance with governmental safety regulations (2.5%)
- Develop management team through weekly meetings, weekly one-on-ones, semi-annual performance reviews, delegation of various responsibilities and projects within both of the amusement/recreation businesses (5%)
- Review and monitor expenditures to ensure that they conform to budget limitations, continually strive to improve performance through subordinate managers (5%)
- Control profit & loss, by implementing control/security procedures for products and cash, managing inventory, managing labor, reviewing financial information and implementing appropriate actions (2.5%)
- Implement safety training and procedure instructions (5%)
- Manage staff rosters and onsite procedure instructions (5%)
- Supervise/oversee payment of accounts and orders through accountant (who is a subcontractor accountant and bookkeeper) (5%)

- Coordinates with managers of other [REDACTED] locations to ensure uniformity of safety, procedures, personnel policy and profitability schedule (5%)
- Report to owner/CEO in Australia (5%)<sup>3</sup>

The petitioner also stated that the beneficiary would supervise two managers: an Assistant General/Sales and Marketing Manager and a Maintenance Manager. The Assistant General/Sales and Marketing Manager's duties are as follows:

- Prepare staff rosters and schedules and onsite placement for [REDACTED] Manager's approval. (15%)
- Sets up staff meeting and prepare meetings agenda. (5%)
- Handle all correspondence and communications between [REDACTED] Manager, staff, and outside accounts. (10%)
- Oversee and direct sales and customer relations staff. Assign tasks and ensure duties are carried out. (30%)
- Develop and implement sales strategies. (25%)
- Direct interface with customers. (10%)
- Report to [the petitioner's] General Manger and Site Controller. (5%)

The Maintenance Manager's duties include the following:

- Supervise maintenance assistant (20%)
- Define and implement safety measures and procedures in a manner to comply with all State and Federal laws (20%)
- Coordinate with other locations maintenance managers to ensure uniformity of safety standards (15%)
- Inspect fixed-mast towers, flange connections and steel maintenance cables (20%)
- Prepare annual budget concerning expenditures for maintenance and new part purchases (10%)
- Ensure customer safety. (AT ALL TIMES)

The petitioner also submitted an organizational chart that indicated that the Owner/Chief Executive Officer supervises the beneficiary as General Manager and Site Controller. The beneficiary will supervise the Maintenance Manager who in turn supervises two Maintenance Assistant/Operators. The beneficiary will also supervise the Assistant General/Sales and Marketing Manager, who in turn supervises four [REDACTED] Operator/Salespersons, four [REDACTED] Operator/Salespersons, and five Customer Relations/Salespersons/Trampoline Operators.

On August 13, 2013, the director sent a request for evidence ("RFE"). The director requested, in part, a detailed job description of the beneficiary's specific tasks on a normal business day including the percentage of time spent on each task. In addition, the director requested an organizational chart

<sup>3</sup> The percentage total is 102.5.

including the names of all employees, employees' titles, a clear description of their job duties, educational levels, and whether they work full or part-time. The petitioner also requested Forms W-2, Wage and Tax Statements, for all employees.

In response to the RFE, the petitioner submitted, inter alia, a statement from an authorized official of the petitioner, a letter from the foreign entity, organizational charts, job descriptions, payroll records for the beneficiary and a letter from the petitioners' payroll company.

The director denied the petition, concluding that that the petitioner failed to establish that the beneficiary would be employed within a qualifying managerial or executive capacity. On appeal, the petitioner discusses all of the documentation submitted to show that the beneficiary would be employed in a qualifying managerial capacity. The petitioner also stated that the beneficiary is:

in charge of managing a \$1.2 Million operation amusement park which [sells] 60,000 tickets a year with an average of 130 visitors a day during the low season and over 500 during the high season, which has 10 full time employees and 8 part time employees, and which operates some of the most advanced amusement rides in the world.

#### 1. Analysis

When examining the executive or managerial capacity of the beneficiary, we review the totality of the record, starting first with the petitioner's description of the beneficiary's job duties. *See* 8 C.F.R. § 204.5(j)(5). A detailed job description is crucial, as the duties themselves will reveal the true nature of the beneficiary's foreign and proposed 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 will then consider this information in light of other relevant factors, including job descriptions of the beneficiary's subordinate employees, the nature of the business that is conducted, the foreign company's subordinate staff, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role within the foreign entity. While an entity with a limited support staff will not be precluded from the immigration benefit sought herein, it is subject to the same burden of proof that applies to a larger entity with a moderate or large subordinate staff. In other words, regardless of an entity's size or support staff, the petitioning entity must be able to provide sufficient evidence showing that it has the capability of maintaining its daily operations such that the beneficiary was relieved from having to primarily perform the operational tasks.

In the present matter, upon review of the totality of the record, the evidence does not support a finding that the beneficiary will allocate his time primarily to the performance of tasks that are within a qualifying managerial or executive capacity.

On review, the petitioner provided a vague and nonspecific description of the beneficiary's proposed duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner stated vague duties such as the beneficiary will spend 35 percent of his time to "oversee and direct the business operations of [a] commercial amusement and recreation enterprise." The beneficiary will also "define and implement company's policy, goals and procedures;" and, "review and monitor

expenditures to ensure that they conform to budget limitations, continually strive to improve performance through subordinate managers." The petitioner did not, however, define the petitioner's vision, mission, goals and policies, or clarify the strategy plan and the financial and operations responsibilities of the organization. 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 sufficient details about 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 petitioner's descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature.

In addition, the petitioner does not explain who will handle all of the financial and accounting operations. The petitioner stated that it employed an accountant but did not provide any evidence to corroborate that claim. It is not clear who is performing the budgeting, bookkeeping, and financial reporting for the petitioner. It appears that the beneficiary may be in charge of the financial operations rather than directing such activities through subordinate employees. 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 Intn'l.*, 19 I&N Dec. at 604.

In the instant matter, the job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will perform. While the petitioner has provided a breakdown of the percentage of time the beneficiary will spend on various duties, the petitioner has not articulated whether each duty is managerial or executive.

In light of the foregoing discussion, the petitioner has not established that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity and on the basis of this second adverse conclusion, this petition cannot be approved.

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, we must focus on the level of education required by the position, rather than the degree held by subordinate employees. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary, for example, to perform the duties of the [REDACTED] Assistant General Manager who will: "prepares staff rosters and schedules and onsite placement for [REDACTED] Manager's approval;" "sets up staff meetings and prepares meeting agenda;" "handles all correspondence and communications between [REDACTED] Manager, staff, and outside accounts;" and, "develops and implements sales strategies." In addition, the Maintenance Manager will: "supervise [a] maintenance assistant;" "define and implement safety measures and procedures in a manner to comply with all State and Federal laws;" and "ensure customer safety." It appears that the two managers are performing administrative tasks and maintenance operations and the petitioner has not established that a bachelor's degree is necessary to perform these duties.

Moreover, the documentation is not clear as to whether the petitioner actually employs the individuals listed on its organizational chart. In response to the RFE, the petitioner submitted a letter from [REDACTED] dated August 24, 2011, that states that [REDACTED] is a Professional Employer Organization (PEO) and that "all federal and state payroll taxes are funded under [REDACTED] Federal Tax Identification number & State Unemployment number for all leased employees." The letter also stated that the petitioner "has been a client of [REDACTED] since 02/11/2008 and is currently processing their payroll with us." However, upon review of the Forms W-2 for 2012 submitted by the petitioner, the employer's name is [REDACTED]. None of the documentation mentions [REDACTED] or the petitioner. 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 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. Overall, the record is insufficient to establish that the beneficiary will be employed in a primarily managerial or executive capacity.

### III. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

(b)(6)

NON-PRECEDENT DECISION

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In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *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). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.