**U.S. Department of Homeland Security**
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JAN 0 5 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 preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a limited liability company, organized in the State of Florida. At Part 5, No. 2(a) of the Form I-140, the petitioner stated that it operates as an importer and exporter of agricultural and construction machinery and provides related consulting services. The petitioner claimed six employees at the time of filing and seeks to employ the beneficiary in the United States as its general manager. 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 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.

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--
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> (i) directs the management of the organization or a major component or function of the organization;
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> (ii) establishes the goals and policies of the organization, component, or function;
>
> (iii) exercises wide latitude in discretionary decision-making; and
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> (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 petition was filed on July 22, 2013, accompanied by a supporting statement, dated July 17, 2013, in which the petitioner provided a general job description for the beneficiary's proposed employment, stating that the beneficiary would direct the petitioning organization by overseeing its growth and structural development, setting strategies and planning the company's activities and human resources. The petitioner further stated that the beneficiary represents the company in all contract negotiations at the national and

international levels, controls financial investments and technical operations, and has discretionary authority over all personnel actions, including hiring and firing of employees, evaluating employee performances, and establishing procedures for all training programs.

On September 30, 2013, the director issued a request for evidence (RFE), informing the petitioner that the record lacked sufficient evidence to establish that the beneficiary would be employed in the United States in a managerial or executive capacity. The director acknowledged the petitioner's submission of the beneficiary's job description, but found that the information provided was vague and insufficient to determine precisely what job duties the beneficiary would perform on a daily basis. The director further deemed the petitioner's claimed staff of six employees to be limited. Accordingly, the director allowed the petitioner an opportunity to overcome these deficiencies, instructing the petitioner to provide a list of the beneficiary's specific daily job duties and to indicate what percentage of time the beneficiary would allocate to each of the enumerated tasks. The director also asked that the petitioner provided a copy of its organizational chart to show the number of subordinate employees reporting directly to the beneficiary as well as their job duties and educational credentials. In addition, the petitioner was questioned about its use of contract labor and the job duties they perform. Lastly, the director asked the petitioner to provide evidence of wages paid both to its employees and any contract labor it used.

The petitioner's response contained both a percentage breakdown of the beneficiary's job duties, and an organizational chart. The former consisted of a list of 29 items comprising the beneficiary's daily, weekly, monthly, quarterly, and yearly job duties with each duty assigned a percentage breakdown to indicate what proportion of the beneficiary's overall time they would consume individually. The organizational chart depicted a three-tiered organization with the beneficiary occupying the top tier, followed by an administrative assistant, an attorney, an accounting firm, a business development specialist, and one vacant position titled "business consultant specialist." The bottom tier of the hierarchy was comprised of one sales associate, who was identified as an employee of the beneficiary's former employer in Venezuela, a freight forwarding company, and one vacant position titled "logistics import & export specialist."

After reviewing the petitioner's submissions, the director determined 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 acknowledged the beneficiary's policy-making role and elevated position within the U.S. organization, but found that a number of the beneficiary's job duties "are not higher level duties" and do not require a manager or executive for execution. The director also pointed out that the two employees who work directly for the petitioner under the beneficiary are both employed on a part-time basis, thus leading him to question whether the petitioner is able to relieve the beneficiary from having to perform non-qualifying tasks as the primary portion of her daily tasks. In light of these findings, the director issued a decision, dated February 21, 2014, denying the petitioner's Form I-140.

The petitioner now files an appeal seeking to overturn the director's decision.

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. Issue on Appeal**

As indicated above, the sole issue to be addressed in this proceeding is 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 the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that may contribute to a comprehensive understanding of a beneficiary's actual duties and role within the petitioning entity.

Turning first to the beneficiary's job description containing a percentage breakdown of the beneficiary's time allocations, we note that the beneficiary's proposed assignment would involve a number of non-qualifying administrative and operational tasks, including checking mail, paying bills, contacting clients, checking bookkeeping software, and getting new clients for consulting projects. We further note that other job duties included in the job description were not adequately defined, thus leaving open the possibility that they too may be of a non-qualifying nature. For instance, it is unclear what specific tasks would be involved in "supervising employees at the end of the day and planning any special activities." The petitioner did not explain the significance of end-of-day supervision of employees or clarify what "special activities" she would actually plan. Although the job description includes a section with the heading "Special Activities," which allocates time to managing marketing consulting projects, getting new clients for consulting projects, and directing and supervising company websites, the record is unclear as to whether there is any relation between the items listed under the heading "Special Activities" and the "special activities" the beneficiary would plan with her subordinates. The petitioner also failed to clarify the beneficiary's role in planning any of the unspecified activities. In addition, the record is unclear as to whether the beneficiary's role with regard to marketing consulting projects and overseeing company websites would be limited to managing and directing these activities. Given that the petitioning organization does not employ, nor is there evidence that it contracts, any marketing or information technology professionals, it is unclear who, if not the beneficiary would actually carry out the underlying marketing tasks or tasks necessary to oversee and update the company's websites. 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)).

Next, we review the beneficiary's job description in light of information that pertains to the petitioner's staffing. Having done so, we find that the record does not establish that the petitioner has the human resources necessary to relieve the beneficiary from having to allocate her time primarily to performing non-qualifying job duties. As previously indicated, the petitioner's staff consists primarily of the beneficiary and two part-time employees. Although the record shows that the petitioner uses the services of an accounting firm to address its tax filing and related administrative needs, as well as immigration attorney to address its immigration needs, neither of these service providers addresses the specific operational tasks, required within

the scope of petitioner's import-export and consulting business. In fact, the petitioner has provided no evidence to establish that anyone other than the beneficiary herself is available to provide consulting services to meet the needs of its clients. While the petitioner's organizational chart includes the position of a business consultant specialist who would operate within a consulting services division, the chart clearly indicates that this position was vacant at the time of filing. Similarly, despite the fact that the petitioner's organizational chart includes a position for a logistics import and export specialist, this position was also vacant at the time of filing. Precedent case law states that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Further, we note that artificial tiers of subordinate employees are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. Given that the petitioner had two vacancies within its organization, it is unclear who, if not the beneficiary, was available to carry out the job duties that would normally be assigned to a business consultant specialist and a logistics import and export specialist had those positions been filled at the time of filing. Given the fact that both of the beneficiary's subordinates were employed on a part-time basis, we cannot assume that either individual was available to carry out job duties of a position other than their own.

While no beneficiary is required to allocate 100% of his or her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Here, in the absence of sufficient evidence establishing that the petitioner was adequately staffed at the time of filing we cannot assume that the only non-qualifying employees the beneficiary would perform are those that were expressly identified in the percentage breakdown provided in the RFE response.

On appeal, counsel offers an expert opinion testimony from , a marketing professor at School of Continuing Education, who conducted an assessment of the beneficiary's job description and concluded that the beneficiary's proposed position with the U.S. entity is that of a multinational manager. However, Mr. testimony indicates that he is unfamiliar with the Act's definitions of managerial and executive capacity and thus his professional opinion has no probative value in supporting the petitioner's claim. A number of Mr. findings indicate that his assessment of the beneficiary's proposed employment was done outside the scope of immigration law and without due consideration to applicable statutory and regulatory criteria. One example of Mr. lack of familiarity with relevant statutory and regulatory provisions was his reliance on "current industry standard" as a basis for concluding that the beneficiary would be employed in a managerial capacity.[1] There is no indication that Mr. was aware of and thoroughly understood the applicable statutory definitions. Mr. was similarly unaware of the applicable regulatory definition of the term *multinational*, which, within the context of the instant immigrant petition, is exclusively reserved to apply to any qualifying entity, or its affiliate, or subsidiary that conducts business in two or more countries, one of which is the United States. 8 C.F.R. § 204.5(j)(2). Mr. on the other hand, employed the term *multinational* in reference to "companies that produce or sells [sic] goods in various countries," which overlooks the qualifying relationship component that

[1] See assessment, p. 2, paragraph 1 of section titled "Position in Question."

is implied within the regulatory definition.[2] Lastly, Mr. points to the beneficiary's "ability and expertise," despite the fact that neither, even when adequately demonstrated, would automatically result in the conclusion that a position is one of a multinational manager or executive.

U.S. Citizenship and Immigration Services (USCIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron Int'l.*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. *Id.*; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). In light of the considerable deficiencies in Mr. expert opinion, i.e., his overall lack of knowledge or familiarity with the immigration law concepts that are applicable in the matter at hand, we find that the opinion lacks probative value and thus will not be given evidentiary weight in this proceeding.

As previously discussed, a determination of whether the beneficiary's proposed position fits the statutory criteria requires a comprehensive analysis of the beneficiary's proposed job duties and the organizational framework, i.e., staffing and management structure, within which the beneficiary would carry out her assigned list of tasks. In the present matter, the record contains a deficient job description and points to an understaffed organization that is unlikely to possess the ability of relieving the beneficiary from having to allocate her time primarily to performing operational tasks that are outside the realm of what is deemed to be within a qualifying managerial or executive capacity. Therefore, in light of these findings, we conclude that the petitioner has failed to overcome the director's decision and the petition will not be approved.

## IV. Conclusion

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.

[2] See assessment, p.3, paragraph 2 of section titled "Multinational Classification and Role of Multinational Manager."