



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JUL 09 2015**

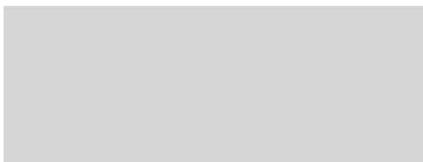
FILE #: [REDACTED]

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, Nebraska Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Alaska corporation that operates in the mining industry. It seeks to employ the beneficiary in the United States as its general foreman. Accordingly, the petitioner filed Form I-140, Immigrant Petition for Alien Worker (Form I-140) 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 based his decision to deny the petition on the conclusion that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

On appeal, the petitioner asserts that the director's decision was erroneous. Specifically, the petitioner contends that the director's decision "plainly contradicts the Petitioner's evidence on its face," and further asserts that the director's request for evidence did not provide the petitioner with adequate opportunity to address the basis the issue of the beneficiary's managerial capacity abroad.

I. The Law

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

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

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and the alien seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a

statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

II. Factual Background and Procedural History

The record shows that the petition was filed on October 10, 2013. The petition was accompanied by a supporting statement, dated September 4, 2013, in which the petitioner discussed the beneficiary's proposed position as general foreman with the petitioning entity. The letter also discussed the beneficiary's former position as process plant operations supervisor, also referred to as the process foreman, with the foreign entity.

With regard to the foreign position, the petitioner stated that the beneficiary's direct subordinates included "a supervisory team for the plant's overall operations consisting of about 17 staff member[s], including at least 15 senior operators supervising the various divisions within the plant operations, a millwright, and an electrician." The petitioner indicated that the foreign entity's supervisors were supported by a staff that included operators, plant trainees, truck drivers, utility people, and other maintenance crews. The petitioner further stated that the foreign entity had "many on location laborers and contract workers" to assist with other daily operational tasks related to the process function. The petitioner indicated that the beneficiary had authority to hire and fire his crew members and further stated that the beneficiary managed his crew, assigned their daily work, set their schedules, and reviewed their performances.

The petitioner indicated that the beneficiary's direct superior was the plant general foreman. The petitioner stated that the beneficiary's "major managerial duties" included the following:

- Ensure the process of raw coal to meet established specifications through the efficient supervision and coordination of a team of technical employees who perform control room, dryer, coarse coal processing, fine coal processing, rail loadout [sic] and other needed support functions;
- Review and evaluate the performance of assigned shift crews and recommend personnel and other corrective actions;
- Develop and maintain a safe working environment by applying the [redacted] program and ensure subordinated work crew understood and followed with the program guidelines;
- Guide/instructing/training personnel in accident prevention and reporting, and addressing issues raised in the monthly crew meetings;
- Maintain and [sic] environmentally sound processing procedure by adhering to established company environmental policy and by facilitating commitment to a health environment by all crew members;
- Monitor operating costs and reduce costs by optimizing the use of materials and equipment, and provide operations feedback to engineering and upper management; and
- Liaise with other professional and technical personnel (e.g. engineers) by applying engineered input for implementation and audit of process functions.

In addition, the petitioner provided a block organizational chart of the foreign entity's management staffing structure accompanied by the millwright's job description, indicating that the millwright was the beneficiary's immediate subordinate first-line supervisor. The chart highlights the position of operations

foreman, indicating that this was the beneficiary's former position and is currently filled by the beneficiary's replacement. In a separate document, the petitioner provided a list of the ten positions, which are filled by a crew of fourteen employees, who are subordinate to the beneficiary. The petitioner also provided a list of 28 job duties pertaining to the millwright position, indicating that the millwright is a first-line supervisory position that is immediately subordinate to the beneficiary.

On June 2, 2014, the director issued a request for evidence (RFE), informing the petitioner that the record lacked sufficient evidence to establish that the beneficiary's former employment abroad was in a qualifying managerial or executive capacity. Accordingly, the director instructed the petitioner to provide an organizational chart or diagram showing the following: the foreign organization's overall structure and staffing levels, the beneficiary's position, and the names and position titles of all employees and contractors in the beneficiary's immediate division, department or team.

In response, the petitioner provided a statement, dated July 2, 2014, listing the supporting evidence being submitted. The petitioner indicated that in 2011 the foreign entity's total work force was comprised of 1,088 employees. The petitioner pointed out that the beneficiary was included in the charts that were limited to key personnel. The petitioner's submissions included a line chart showing the three teams – plant operations, plant maintenance, and a third division comprised of a senior mechanical engineer, a senior process engineer, and a lab supervisor – all of which are directly subordinate to the plant superintendent. The beneficiary's position was depicted in the plant operations division as one of four operations foremen directly subordinate to a plant operations general foreman, who was directly subordinate to the plant superintendent. None of the employees listed in this chart were depicted as directly subordinate to the beneficiary. However, the petitioner submitted another organizational chart, which reiterated the management hierarchy above the beneficiary and also listed the names and position titles of the seventeen employees who were depicted as the beneficiary's subordinates. The chart highlights the name of the fines operator – [REDACTED] – and includes a handwritten notation indicating that this individual is "Team Lead."

After reviewing the petitioner's submissions, the director concluded that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity and therefore denied the petition in a decision dated September 2, 2014. The director found that the information provided did not establish that the beneficiary's subordinate staff was comprised of supervisory, professional, or managerial employees. While the director acknowledged the likelihood that the beneficiary's subordinates' positions "required specific skills, craftsmanship or occupational certification," he pointed out that the petitioner did not provide job descriptions or disclose the job qualifications of the beneficiary's seventeen subordinates.

On appeal, the petitioner submits a brief disputing the director's findings. The petitioner also resubmits several of the organizational charts that were provided previously with the RFE response, asserting that the charts establish that the beneficiary was a key employee and that his immediate subordinates were supervisory employees.

Upon review, we conclude that the petitioner did not provide sufficient evidence to overcome the director's conclusion. Therefore, for reasons stated below, we will affirm the denial of the petition.

III. Issue on Appeal

As indicated above, the primary issue to be addressed in this proceeding is whether the petitioner provided sufficient evidence to establish that the beneficiary was employed abroad 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 assigned job duties. 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 organizational structure of the division or department where the beneficiary was employed in his former position with the foreign entity, the job duties of the beneficiary's support staff, and any other relevant factors that may contribute to a comprehensive understanding of the beneficiary's daily tasks and his role within the foreign organization.

Turning to the beneficiary's job description, the petitioner, in its original supporting statement, stated that the beneficiary supervised and coordinated "a team of technical employees" whose performances he reviewed prior to recommending "personnel and other corrective actions." The job description did not indicate that the beneficiary's subordinates included supervisory, professional, or managerial employees. That said, on page six of the September 4, 2013 supporting statement, which preceded the beneficiary's list of job duties, the petitioner referred to the beneficiary's "supervisory team ... of about 17 staff member[s], including at least 15 senior operators supervising the various divisions." Specifically, the petitioner referred to a millwright and an electrician as the supervisory employees within the plant operations. However, Exhibit 18, titled "Job descriptions of [the] Beneficiary's immediate first line supervisors," only listed the job duties of the millwright, thus indicating that the electrician was not a supervisory subordinate as claimed in the body of the supporting statement. In fact, the millwright was the only employee whose job duties were provided in exhibit 18, thus indicating that the reference to the electrician as a supervisory subordinate was inaccurate and that the beneficiary had no subordinates, other than the millwright, who assumed a supervisory position.

Furthermore, the information contained in Exhibit 18 of the petitioner's original supporting documents is inconsistent with the information that was later provided in Exhibit 4 of the RFE response, which consists of an organizational chart that contains a handwritten note indicating that the fines operator, one of the beneficiary's seventeen subordinates, assumed the role of a team leader and was therefore a supervisory subordinate employee. While it is possible for the beneficiary to have had multiple subordinates in supervisory positions, the petitioner's supporting documents do not corroborate such an assertion. In other words, it is unclear why, if the fines operator was among the beneficiary's supervisory subordinates, the petitioner did not originally make this claim in its supporting statement and then corroborate that claim by providing the job duties of the fines operator at Exhibit 18, which was intended for the purpose

of identifying the beneficiary's immediate first line supervisors. As previously indicated, the only position whose job duties the petitioner provided in Exhibit 18 of the original submissions was that of the millwright. By virtue of not listing any other employee's job duties within Exhibit 18, the petitioner excluded the fines operator and electrician from the list of possible supervisory subordinates. While the organizational chart that was provided in Exhibit 4 of the RFE response includes both the electrician and the fines operator among the beneficiary's numerous subordinates, there is no indication that either position is supervisory or managerial. The petitioner also failed to include either position's job duties in Exhibit 18 of the originally submitted supporting documents, thus further creating doubt as to the supervisory nature of either position.

We further note that while the organizational chart in Exhibit 4 of the RFE response included a handwritten note indicating that the fines operator assumed the role of a team leader, no similar notation was included alongside the name of the person who assumed the position of millwright, despite the fact that the petitioner's original supporting documents list the millwright as the beneficiary's only supervisory subordinate. While the notation alongside the name of the fines operator in a subsequently submitted organizational chart indicates that the petitioner was claiming the fines operator as another of the beneficiary's supervisory subordinates, in addition to the millwright as noted previously, it is unclear why the petitioner failed to include the fines operator and fines operator's corresponding job duties when attempting to list the beneficiary's first-line subordinates in Exhibit 18 of the petitioner's original supporting documents. 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).

In addition, upon reviewing the job duties of the millwright, it is unclear which specific characteristics of the position were consistent with those of a supervisor. In other words, while the millwright's job duties indicate that he worked together with other employees and had oversight authority with respect to the job site and tools used therein, there was no mention of any subordinate employees that were subject to the millwright's supervision. As such, there appears to be no apparent basis for claiming that the millwright was the beneficiary's supervisory subordinate. 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)).

Lastly, while we acknowledge the numerous organizational charts, which the petitioner submitted in the RFE response and which illustrated the vast hierarchy of the employees within the foreign organization, we find that the submitted documents do not establish that the beneficiary had supervisory or professional subordinate employees. Among the numerous charts that the petitioner submitted, only two specifically named the beneficiary and of those two charts, only one actually depicted the organizational hierarchy that was in place within the beneficiary's division during the relevant time period of his employment abroad. As discussed above, the information provided in the relevant organizational chart does not establish that the beneficiary's subordinate crew was comprised of supervisory employees, as originally claimed in the petitioner's supporting statement. Rather, the chart includes the names and position titles

of the beneficiary's subordinate crew; and while the notation "Team Lead" was handwritten next to the name of the individual who assumed the fines operator position, there is no evidence to establish that this individual did, in fact, lead a team of employees. *See id.* The petitioner did not provide any relevant information, such as the fines operator's supervisory job duties or a list of the employees he purportedly led, to corroborate the handwritten notation indicating that the fines operator acted in a supervisory role.

On appeal, the petitioner recalls statements made earlier in the supporting statement dated September 4, 2013, where the petitioner claimed that the beneficiary had a supervisory staff and "15 senior operators supervising the various divisions within the plant." However, as noted above, the petitioner provided inconsistent evidence, which failed to corroborate the claims it originally made with regard to the beneficiary's supervision of supervisory subordinates. As previously discussed, a number of the petitioner's supporting documents created factual inconsistencies, which indicate that the beneficiary was not overseeing the work of supervisory employees.¹

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. 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 employee. 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 provided any information about the

¹ We further note the petitioner's assertion on appeal that the director's RFE did not provide the petitioner with "adequate opportunity" to address the basis of denial with regard to the beneficiary's foreign employment. The regulation at 8 C.F.R. § 103.2(b)(8) clearly states that a petition shall be denied "[i]f there is evidence of ineligibility in the record." If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation. Here, though not required to do so, the director afforded the petitioner the opportunity to supplement the record with additional evidence to demonstrate the beneficiary's eligibility for the requested classification.

beneficiary's subordinates to allow us to conclude that a bachelor's degree is actually necessary for any of the positions the beneficiary supervised during his employment abroad.

In short, the record is comprised of deficient and, at times, inconsistent evidence, which does not support a finding that the beneficiary's employment abroad involved managing a subordinate staff that was comprised of supervisory, professional, or managerial employees. Thus, given the numerous shortcomings catalogued above, we cannot conclude that the beneficiary was employed abroad in a qualifying managerial or executive capacity. On the basis of this conclusion, the instant petition cannot 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.