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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUL 0 9 2015

FILE #:
PETITION RECEIPT #:

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:

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 employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. We will dismiss the appeal.

The petitioner, an architectural firm, seeks to employ the beneficiary in the United States as an architectural design lead. The petitioner filed Form I-140, Immigrant Petition for Alien Worker, on June 4, 2012, 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 May 28, 2014, concluding that the petitioner had not established a qualifying relationship between the beneficiary's foreign employer and the petitioning U.S. entity. The director also found that the petitioner had not established that the beneficiary's duties, abroad or in the United States, qualify as managerial.

On appeal, the petitioner submits a legal brief, asserting that the director did not consider relevant evidence, and that the denial notice contains errors of fact and law. The petitioner also submits supporting evidence including reference materials and copies of Internal Revenue Service (IRS) documents.

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

> (A) 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.

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. Issues on Appeal

A. Qualifying Relationship

The first issue under consideration concerns the relationship between the beneficiary's foreign employer and the petitioning U.S. entity. The regulation at 8 C.F.R. § 204.5(j)(2) provides the following relevant definitions:

> *Affiliate* means:
>
> > (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
> >
> > (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity; or [a third provision which relates only to certain partnerships organized in the United States to provide accounting services, along with managerial and/or consulting services.]
>
> *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

1. Facts

The petitioner submitted an introductory letter, stating that the petitioning firm has "[n]ine offices worldwide," including locations in New York and The petitioner's general counsel, in a letter dated April 4, 2012, stated that the office:

> is wholly-owned by an Ohio Limited Liability Company, which formerly operated under the name . . . and [the petitioning entity] are affiliates being 100% beneficially owned and controlled pursuant to nominee agreements by the same parent, a Washington Limited Liability Partnership. . . .
>
> To comply with New York and Ohio requirements regarding oversight of architectural firms, nominees, all of whom hold partnership interest in have been appointed to hold the ownership interest in the New York and Ohio business entities on behalf of

A January 1, 2009 nominee agreement designated two architects licensed in New York (as nominees, who "hold record title to] beneficial interest in PLLC." The nominee agreement refers to the New York entity's "Operating Agreement . . . dated June 16, 1999."

A similar agreement, dated June 30, 2008, designated three licensed Ohio architects (as nominees to hold title to interest in The nominee agreement refers to the Ohio entity's "Operating Agreement . . . dated January 31, 2003."

A 2011 IRS Form W-2, Wage and Tax Statement, identified the beneficiary's employer as ' " with a mailing address in , Washington. The Employer Identification Number (EIN) shown on the Form W-2, matches the EIN on Form I-140. Pay receipts from 2012 also identified the employer as , but with the petitioner's New York address. The legend " ' followed by the mailing address, appears at the bottom of the pay receipts.

On April 18, 2013, the director issued a request for evidence (RFE), instructing the petitioner to submit additional documentation to establish a qualifying relationship between the petitioner and the entity in The director acknowledged the petitioner's submission of nominee arrangements, but expressed concern that "the most recent nominee agreement was signed in 2009." The director stated: "If the petitioner is a limited liability company, please submit a copy of the petitioner's Articles of Organization, the Operating Agreement (OA), meeting minutes, or other documentation that establishes ownership and control."

In response, the petitioner repeated the assertion that , based in Washington, is the parent entity of both the petitioner and the Ohio-based entity that controls the beneficiary's employer in China. The petitioner asserted that Ohio law had recently changed, allowing the parent entity to take direct ownership of 99% of the Ohio entity's shares.

A copy of IRS Form 1065, U.S. Return of Partnership Income, for 2011, showed that each owned 50% of the petitioning entity. This is consistent with the earlier documentation that named those two individuals as the parent entity's nominees.

Another IRS Form 1065, for in Ohio, included copies of Schedule K-1, Partner's Share of Income, Deductions, Credits, etc., for the tax year ending January 31, 2012. These documents indicated that (the parent entity in Washington) owned a 99% share of the Ohio entity, with each owning 0.3333%.

The director denied the petition on May 28, 2014, stating "[t]he percentage amounts listed on the Schedules K-1 account for one hundred ninety-eight percent of stock." The director concluded: "The petitioner failed to submit documentary evidence to show who owns the petitioner and the foreign entity's common stock."

On appeal, the petitioner observes that the percentages shown on the referenced Schedules K-1 add up to 100%, not 198%. The petitioner also observed that, under the terms of the nominee agreements, control over the companies remains with the Washington LLP, not the nominees.

2. Analysis

The record supports the petitioner's assertion that the director did not give sufficient attention to the nominee agreements, which do not confer actual control of the entities to the nominees. Section 5(b) of each agreement requires the nominees to "vote . . . in accordance with instructions delivered by Owner." The petitioner is also correct in asserting that the director's discussion of the tax documentation contains arithmetical errors. A more fundamental issue, however, remains unresolved.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm'r 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, a certificate of formation or organization of a limited liability company (LLC) alone is not sufficient to establish ownership or control of an LLC. LLCs are generally obligated by the jurisdiction of formation to maintain records identifying members by name, address, and percentage of ownership and written statements of the contributions made by each member, the times at which additional contributions are to be made, events requiring the dissolution of the limited liability company, and the dates on which each member became a member. These membership records, along with the LLC's operating agreement, certificates of membership interest, and minutes of membership and management meetings, must be examined to determine the total number of members, the percentage of each member's ownership interest, the appointment of managers, and the degree of control ceded to the managers by the members. Additionally, a petitioning company must disclose all agreements relating to the voting of interests, the distribution of profit, the management and direction of the entity, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, we cannot find that the petitioner has established common ownership of the entities involved.

The nominee agreements address the issue of control, to the extent that they limit the authority of the nominees. They do not, however, settle the underlying issue of ownership. The nominee agreements mention the existence of operating agreements, and the director, in the RFE, specifically

requested a copy of the petitioner's operating agreement as evidence of ownership. The petitioner, however, neither submitted the operating agreement nor explained its failure to do so.

The regulations give the director discretion to issue an RFE in order to elicit further information that clarifies whether the petitioner has established eligibility for the benefit sought as of the petition's filing date. *See* 8 C.F.R. §§ 103.2(b)(8) and (12), 204.5(j)(3)(ii). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The letter from the petitioner's general counsel sets forth the petitioner's claim, but is not evidence in support of that claim. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). That letter cited an organizational chart in the record, but no primary documentation to establish the ownership arrangement described on that chart.

The petitioner notes the approval of several nonimmigrant petitions that it had previously filed on the beneficiary's behalf. The director's decision does not discuss these prior approvals of the other nonimmigrant petitions, and the record does not include or identify the evidence submitted in support of those approved nonimmigrant petitions. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988).

While the director erred by giving insufficient consideration to the nominee agreements, those agreements do not establish the required qualifying relationship between the foreign employer and the petitioning U.S. employer. Rather, they presume that relationship, based on reference to primary documents that are absent from the record even after the director specifically requested them. Accordingly, we cannot conclude based on the evidence of record that the petitioner has a qualifying relationship with the foreign entity.

B. U.S. and Foreign Employment in a Managerial Capacity

The second and final stated ground for denial concerns the finding that the beneficiary's duties, both in the offered U.S. position and in his last position abroad, are not in a managerial capacity as defined at section 101(a)(44)(A) of the Act. The petitioner does not claim that the beneficiary has served, or will serve, in an executive capacity, and therefore we need not consider that question.

1. Facts

The petitioner's introductory letter of May 31, 2012 indicated that the beneficiary "served as the Architectural Design Lead for . . . substantial projects" in [redacted] from May 2006 to September 2007 and thereafter in the United States. The petitioner further stated that the individuals reporting

to the beneficiary for each project included "an average of 3 to 4 professional architects," "an average of 4 architectural interns," and various others including engineers, consultants, and others. The petitioner asserted: "state licensure is not necessary for this position as all drawings are approved and signed by the Principal or Managing Partner."

The beneficiary's résumé identified six projects that he undertook since arriving in the United States. The document indicates that he served as "Design Lead" on two of the projects; "Design Lead/Project Manager" on two others; and as "Project Architect" on the remaining two. The résumé indicated that the beneficiary "is now part of the Senior Design Leadership." The résumé also identified eight projects that the beneficiary undertook while employed by the foreign entity in He served as a "Design Lead" on four of the projects, "Architectural Design Lead" on one, and "Project Architect" on two. The remaining project showed no title for the beneficiary, but indicated that he provided the "Concept & Schematic Design."

A capsule biography provided by the petitioner shows the word "Associate" next to the beneficiary's name, and the word "Architect" on the line below; it is not clear if these two words are separate or intended to form the title "Associate Architect." The document's list of "Relevant Project Experience" identified nine projects. Of those, the document indicated that the beneficiary was a "Designer" on seven projects, "Architect, Designer" on the eighth, and served in "Construction Administration" in the remaining project.

The petitioner indicated that each project has its own hierarchy. The petitioner submitted "Team Structure" organizational charts for the petitioning entity and the entity in showing four levels. The top level included a "Design Principal" and a second official, identified as "Partner in Charge" on the petitioner's chart and as "Managing Partner (U.S.)" on the chart. On the second level, reporting to the "Design Principal," were the beneficiary, a "Technical Delivery Lead" and a "Project Manager." The beneficiary supervised a three-member "Design Team" which, in turn, oversaw five specialized design teams comprising architects, engineers, and others, based variously in the United States and China.

Other organizational charts, arranged in levels but not specifying who reports to whom, pertain to individual, identified projects. These project-specific charts did not strictly conform to the standardized charts submitted with them. The chart for " Residential Masterplan," for example, placed a "Principal" at the top of the chart, with the beneficiary and a "Delivery Lead" on the second level, followed by two "Project Architects" and a "Landscape Design[er]," with the bottom row comprising three "Architect[s]" and one "3D Model, B/M Designer."

In the April 2013 RFE, the director stated that the petitioner had not established that the beneficiary's duties in the United States qualify as managerial. The director requested "definitive statement[s]" from the petitioner and from the foreign employer, addressing the regulatory and statutory requirements of a managerial position.

The petitioner's response included statements from two current or former officials of the entity in , principal and operations leader at , stated:

> As is standard within . . . , as an Architectural Design Lead [the beneficiary] would typically have at least 3 professional architects reporting to him for each project. . . .
>
> Further, 2-4 design interns with Bachelor's degrees reported to each of these professionals who in turn reported to [the beneficiary]. In his position, [the beneficiary] was responsible for supervising and controlling the work of these professional design staff. He also had the authority to recommend and approve personal [*sic*] actions including promotions, discipline and leave.

now a senior associate/architect at office, stated that he supervised the beneficiary's work in during which time the beneficiary "had an average of 3 to 4 professional architects reporting to him for each project." Mr. provided the following breakdown of the beneficiary's daily duties:

> ~4 hours Exercise discretion over the day-to-day operations of 2-3 large-scale commercial agricultural design projects including determination of time-lines, budgets, staffing requirements, assignment of specific architectural duties, oversight of design work, and direct supervision of 9-12 architects.
>
> ~2 hours Mentor project architects, conduct performance audits on design work, evaluate performance.
>
> ~2 hours Interact with clients concerning project details.

The petitioner did not submit comparable statements from any identified official of the petitioning U.S. entity. The petitioner did, however, submit an unattributed list of specific duties, titled "Job responsibilities in China & United States (Architectural Design Lead / Lead Architect / Project Manager)." The list contained three broad categories, each with several subsections. The list indicated that an individual in the named position devotes 50% of his time to "managing large scale commercial projects," which encompassed eight activities such as "[n]egotiating with contractors, consultants, engineers and manufacturers" and "devising Dynamic Project Calendar and accountable for controlling workload to reach project milestones governing team members, consultants and contractors." The individual devotes 30% of his time to "supervising professional project team members and instructing consultants." This function is subdivided into nine categories, including "[a]ssess deliverables & divide workload accordingly and continuously monitor progress" and "[o]verse the drafting of specifications for the nature and quality of materials required." The remaining 20% of the responsibilities involve "interacting with client," which encompasses five tasks, including "[p]rovide advice and counsel to determine appropriate contracting with clients and

guiding contract negotiations" and "[r]egular video conferences & conference calls for client design presentations & progress updates." By grouping 22 different functions together under three broad headings, the petitioner did not establish the amount of time allocated to each specific duty.
The petitioner submitted copies of IRS Form W-2 Wage and Tax Statements for individuals named as the beneficiary's subordinates, some working in New York, others in Ohio. The petitioner has heavily redacted the copies to remove most of the salary information. The petitioner also submitted copies of diplomas and other credentials held by subordinate architects.

In the May 2014 denial notice, the director stated that the organizational charts were not consistent with one another, and that "[t]he petitioner failed to submit any evidence to show that the beneficiary manages subordinate personnel." The director also found that "the beneficiary spent and will spend the majority of his time performing non-managerial activities" involving budgets, negotiations, and other "operational tasks necessary for the success of the petitioner's business." The director also stated: "There is no evidence that the . . . personnel mentioned on the organizational charts . . . are professionals." The director concluded that the petitioner had not established that the beneficiary's duties, either abroad or in the United States, qualify as managerial or executive.

On appeal, the petitioner observes that the statutory definition of "professional" at section 101(a)(32) of the Act includes architects. The petitioner contends the majority of the beneficiary's "duties consist specifically of supervision and controlling the professional and supervisory employees under him." The petitioner also asserts that director was wrong to conclude that "[m]anagers cannot create work plans, budgets, [or] control assignments and calendars."

2. Analysis

The percentage breakdown that the petitioner submitted in response to the RFE does not include any time spent actually executing architectural designs, but materials in the record, including the beneficiary's own résumé, indicate that the beneficiary's role has changed from project to project, both in New York and in Specifically, this evidence shows that the beneficiary sometimes serves as a "Project Architect" as distinct from a "Design Lead" and/or "Project Manager." Work performed as an architect or designer involves performing a function of the architectural firm rather than managing that function. By focusing only on projects for which the beneficiary was a design lead or project manager, the petitioner has not shown that the beneficiary has worked or will work primarily as a manager rather than as an architect.

Furthermore, the petitioner indicated that the beneficiary has the authority to "[r]ecommend and/or approve personnel actions including promotions, discipline and leave," but the petitioner has not claimed or established that the beneficiary had the authority to hire and fire his subordinates, or to recommend those actions, as required by section 101(a)(44)(A)(iii) of the Act and the regulation at 8 C.F.R. § 204.5(j)(2)(C).

Based on the current record, we are unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs

non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

While the petitioner has established some shortcomings in the director's decision, the petitioner has not established that the beneficiary works or has worked primarily in a managerial capacity rather than as a provider of architectural services, either abroad or in the United States.

III. Conclusion

We will dismiss the appeal for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.