



U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE:

JUL 20 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 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, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Michigan limited liability company that operates as a manufacturer and retailer of adjustable beds. It seeks to employ the beneficiary in the United States as its director of marketing and products. 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 (1) it had a qualifying relationship with the beneficiary's former employer as of the date the petition was filed, and (2) that the beneficiary's proposed position would be 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--

- (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 August 1, 2013. The petition was accompanied by a supporting statement, dated July 16, 2013, in which the petitioner provided relevant information pertaining to its eligibility, including an overview of the petitioner's business and the beneficiary's former and proposed positions with the foreign and U.S. entities, respectively. The petitioner also provided supporting evidence in the form of corporate, tax, and business documents as well as organizational charts pertaining to beneficiary's former and proposed employers.

Following a comprehensive review of the petitioner's supporting documents, the director determined that the record lacked sufficient evidence to establish that a qualifying relationship existed between the beneficiary's former employer abroad and his proposed U.S. employer or that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. Accordingly, on February 15, 2014, the

director issued a request for evidence (RFE), instructing the petitioner to provide evidence addressing the evidentiary deficiencies discussed herein. Accordingly, the director instructed the petitioner to provide various business documents and quarterly tax returns to establish that the petitioning entity has been doing business, documents showing ownership and control of the beneficiary's former and proposed employers to establish that a qualifying relationship exists between the two entities, and evidence pertaining to the U.S. staff, including information about the position qualifications of the beneficiary's direct subordinates at the Michigan office and a description of the management structure and staff at the [REDACTED], New York office.

The petitioner's response included two statements – one dated April 28, 2014 and another dated May 8, 2014 – addressing the evidentiary deficiencies cited in the RFE. The petitioner claimed to have an affiliate relationship with the beneficiary's former employer abroad by virtue of their common owner, [REDACTED]. The petitioner also provided supporting exhibits 1-10 to establish that it has been doing business, has the requisite qualifying relationship with a foreign entity, and would employ the beneficiary in a qualifying managerial or executive capacity.

After reviewing the petitioner's submissions, the director concluded that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer or that it would employ the beneficiary in the United States in a qualifying managerial or executive capacity. The director therefore issued a decision, dated July 29, 2014, denying the petition on both grounds.

On appeal, the petitioner submits a brief, disputing the director's findings. The petitioner submits new and previously submitted evidence in an effort to establish that it and the beneficiary meet the relevant statutory eligibility requirements.

Upon conducting a comprehensive review of the petitioner's statements and submissions, we conclude that the petitioner did not provide sufficient evidence to overcome the director's adverse findings. Therefore, for reasons stated below, we will affirm the denial of the petition.

### **III. Issues on Appeal**

As indicated above, the two primary issues to be addressed in this proceeding are whether the petitioner, at the time of filing, had a qualifying relationship with the beneficiary's former employer abroad and whether the petitioner would employ the beneficiary in a qualifying managerial or executive capacity.

#### **A. Qualifying Relationship**

First we will address the evidence pertaining to the petitioner's claimed qualifying relationship with the beneficiary's former employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

*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;

\* \* \*

*Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

*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.

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. *See 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.

In the present matter, the director pointed to an anomaly in the petitioner's 2012 tax return with regard to the petitioner's ownership breakdown, noting that Schedule B-1 of the tax return made two inconsistent claims by showing Mr. [REDACTED] as 52% owner of the petitioner's profit, loss, or capital, while indicating that [REDACTED] owns 50% of the petitioner's profit, loss, or capital. The director further pointed out that Schedule B-1 was inconsistent with Schedule K-1, which indicated that [REDACTED] owned 50% of the petitioner's profits and losses and 48% of its capital, while Mr. [REDACTED] own 50% of the profits and losses, but owned 52% of its capital. 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).

On appeal, the petitioner provides a statement from its accountant, dated August 27, 2014, claiming that the anomaly was a typographical error, which would be corrected in the petitioner's 2013 tax return, which the record still currently lacks. The petitioner also provided an affidavit, executed on August 27, 2014, from [REDACTED], the petitioner's general counsel. Mr. [REDACTED] attested to Mr. [REDACTED] ownership and control of [REDACTED]. He further stated that while Mr. [REDACTED] and [REDACTED] "both possess 50% ownership" of the petitioner, the beneficiary has control over the U.S. entity. The petitioner has not, however,

provided any objective evidence, such as a stock transfer ledger or an operating agreement, to resolve the above described inconsistency.

In addition, the record remains incomplete in terms of independent documentary evidence establishing that Mr. [REDACTED] similarly owns and controls the beneficiary's former employer abroad such that the two entities meet the above cited regulatory criteria of the term *affiliate*. The current evidence includes a business registration certificate, which identifies Mr. [REDACTED] as the legal representative and [REDACTED] as shareholder of [REDACTED] the beneficiary's former employer abroad. While the petitioner had the opportunity to provide evidence to show that Mr. [REDACTED] has a controlling interest in [REDACTED], thus making him an indirect owner of [REDACTED] the only evidence that was submitted to support the ownership claim was a letter, dated May 5, 2014, from [REDACTED] accounting firm attesting to the beneficiary's ownership of that entity. As plainly and properly pointed out in the director's decision, this attestation does not constitute independent objective evidence. The petitioner did not provide evidence to establish Mr. [REDACTED] claimed ownership of [REDACTED], which would have consequently established his indirect ownership and control of [REDACTED]. As indicated above, the attestations of [REDACTED] have limited probative value in establishing the ownership and control of the beneficiary's employer abroad. 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. Comm'r 1972)). In the present matter, the petitioner's claim regarding the ownership of [REDACTED] rests entirely on third party attestations rather than government issued documents.

Lastly, the petitioner partly relies on the service's prior approval of the petitioner's nonimmigrant L-1 petition, which was filed on behalf of the same beneficiary. The petitioner asserts that such approval should serve as evidence that it met its statutory requirement pertaining to the issue of a qualifying relationship with a foreign entity. However, we disagree with the petitioner's reasoning. Despite the petitioner's assertions, we stress that each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof. As such, each petition must stand on its own individual merits. There is no statute or case law precedent that requires USCIS to assume the burden of searching through previously provided evidence that was submitted in support of other petitions to determine the approvability of the petition at hand in the present matter. The prior nonimmigrant approvals do not preclude USCIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Similarly, the approval of a nonimmigrant petition in no way guarantees that USCIS will approve an immigrant petition filed on behalf of the same beneficiary.

Furthermore, if the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. 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. at 597. It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). In addition, we note that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22, 23 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103, 1104 (E.D.N.Y. 1989). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa

classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427. USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, therefore, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; see also 8 C.F.R. § 214.2(l)(14)(i) (requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

Finally, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, we would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

In light of the petitioner's failure to provide independent objective evidence to support the claim that Mr. [REDACTED] owns and controls the petitioner and also owns [REDACTED] thus giving him an indirect ownership interest in [REDACTED] we are unable to conclude that the petitioner and the beneficiary's former employer abroad are owned and controlled by the same individual. As such, we find that the petitioner has failed to establish that it has the requisite qualifying relationship with the foreign entity and on the basis of this initial adverse finding, this petition cannot be approved.

#### B. Qualifying Employment in the United States

Next, we will address the beneficiary's proposed position with the petitioning entity for the purpose of determining whether the petitioner submitted sufficient evidence to establish that the beneficiary would be employed 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 job duties with the entity in question. 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 would be employed, the job duties and job requirements of the positions under the beneficiary's immediate control, and any other relevant factors that may contribute to a comprehensive understanding of the beneficiary's daily tasks and his role within the petitioner's organization.

Turning to the beneficiary's job description, the record indicates that the beneficiary's prospective position is comprised of both qualifying and non-qualifying tasks. While we acknowledge that no beneficiary is required to allocate 100% of his time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform would only be incidental to his 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. at 604. In the present matter we are unable to determine what portion of the beneficiary's time would be allocated to tasks of a managerial or executive

nature. Unlike the job description offered with regard to the beneficiary overseas employment, which included a percentage breakdown showing how the beneficiary's time was distributed among his numerous job duties, the job description offered with regard to the beneficiary's proposed position listed the beneficiary's various job duties without time restraints describing how the beneficiary's time would be allocated. Thus, while we do not dispute that planning and administering the company's marketing operating budget is a qualifying task that rises to the level of managerial capacity, we find that tasks such as developing sales aids, providing concept sketches, developing prototypes, assisting in the development of marketing materials, and attending trade shows cannot be readily deemed as qualifying tasks performed in a managerial or executive capacity. The petitioner does not adequately clarify the beneficiary's specific role with regard to these seemingly operational tasks; nor does the record establish the role of the beneficiary's subordinates in relieving him from having to allocate his time primarily to non-qualifying operational job duties.

Next, we focus on information provided in the petitioner's organizational charts – one chart depicting the hierarchy of the Michigan office and a second chart depicting the hierarchy of the two New York offices – and the petitioner's quarterly tax returns and corresponding wage reports for the third and fourth quarters of 2013. After fully reviewing and the contents of these documents, we find that there are inconsistencies that preclude us from being able to verify and reconcile the information put forth in the petitioner's organizational charts with the information provided in the petitioner's quarterly tax returns and wage reports. Namely, it is unclear whether the combined staff of 34 employees, who are named in the two organizational charts combined, is an accurate depiction of the petitioner's personnel structure as it existed at the time of filing, as the petitioner's third quarterly tax return for 2013 indicates that the petitioner paid wages or other compensation to a total of 41 employees. We further note that [REDACTED] whom the Michigan chart identified as the beneficiary's marketing strategist was not named either in the third or the fourth quarterly wage report for 2013, thus leading us to question why Ms. [REDACTED] was included in the chart if she was not a paid employee at the time of filing the Form I-140 and who, if not Ms. [REDACTED] was carrying out the tasks assigned to the marketing strategist. In other words, in the absence of a marketing strategist within the division the beneficiary would manage, it is unclear how the job duties would be redistributed and how such redistribution would affect the beneficiary in terms of relieving him from having to allocate more of his time to compensating for the tasks of a vacant subordinate position. Despite evidence showing that the Michigan office experienced a staffing increase during the 2013 fourth quarter, it is worth noting that a petitioner's eligibility must be established 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'r 1971).

Accordingly, given the petitioner's inability to establish that the beneficiary would be employed in a position where he would allocate the primary portion of his time to managerial- or executive-level tasks, we cannot conclude that the beneficiary would be employed in a qualifying managerial or executive capacity and on the basis of this second adverse conclusion this petition cannot be approved.

#### IV. Conclusion

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

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*NON-PRECEDENT DECISION*

**ORDER:** The appeal is dismissed.