



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE:

JUN 05 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 immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. We will dismiss the appeal.¹

The petitioner, a real estate development and operation company, and building contractor, seeks to employ the beneficiary in the United States as its president. The petitioner filed Form I-140, Immigrant Petition for Alien Worker, on September 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 November 14, 2013, concluding that the petitioner had not established that the beneficiary's duties in the United States and abroad were those of a manager or executive.

On appeal, the petitioner asserts that it has submitted sufficient information regarding the beneficiary's employment in the United States. The petitioner submits a short statement and supporting evidence such as copies of employment contracts, bank statements, and documentation from the petitioner's business transactions.

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.

¹ Publicly available information suggests that counsel, [REDACTED] died on [REDACTED] 2014. The petitioner has not retained new counsel in connection with the instant appeal.



A United States employer may file Form I-140, Immigrant Petition for Alien Worker, 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.

(B) The term “executive capacity” means an assignment within an organization in which the employee primarily—

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;

- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

Finally, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

II. Issues on Appeal

A. Executive or Managerial Duties Abroad

1. Facts

An introductory letter submitted with the petition indicated that the petitioner is a subsidiary of [REDACTED], a Canadian firm where the beneficiary had worked for five years prior to his 2010 arrival in the United States as an L-1A nonimmigrant. A printout from the Canadian firm's web site described the company as "a firm specialized in the field of property valuation."

An organizational chart for the Canadian entity showed [REDACTED], president, at the top of the organization, immediately above the beneficiary as vice president. Below the beneficiary were five departments (Residential, Commercial, Expropriation, Accounting and Construction), each with three to twelve subordinate employees. The petitioner submitted no other information about the beneficiary's subordinates at the Canadian firm.

The director issued a request for evidence (RFE) on March 12, 2013. The director stated that the information submitted with the petition "was vague and general" and did not establish that the beneficiary performed qualifying functions abroad. In response, the petitioner submitted a copy of an October 19, 2011 letter, previously submitted in support of a nonimmigrant petition on the beneficiary's behalf. That letter stated that the beneficiary, as vice president of the foreign entity,

manages the various projects and ensures that policies and procedures are adhered to. He coordinates activities, monitors the purchasing and relations with suppliers as well as manages human resources. He assists the President in the daily operational management functions and continuously finds ways to increase the competitiveness of the business.

[The beneficiary] implements policies and procedures, manages budgets and monitors projects to ensure adherence to corporate standards. He also hires and trains new employees and reviews the company's performance to ensure profitability.

In denying the petition on November 14, 2013, the director found that the job description was “vague, nonspecific, and . . . does not clearly indicate what the beneficiary actually does each day.” The director noted that the use broadly descriptive terms such as “Coordinates Activities,” without further detail, “is not evidence of performing managerial duties.”

2. Analysis

The petitioner’s evidence and arguments on appeal concern only the beneficiary’s activities with the petitioning U.S. employer. The petitioner does not address the director’s finding that “the petitioner has not submitted sufficient documentation to demonstrate that the beneficiary has performed duties [that are] primarily managerial . . . abroad.”

When an appellant fails to offer an argument on an issue, that issue is abandoned. *Sepulveda v. U.S. Att’y Gen.*, 401 F.3d 1226, 1228 n.2 (11th Cir. 2005); *Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885, at *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff’s claims abandoned when not raised on appeal to the AAO).

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Specifics are clearly an important indication of whether a beneficiary’s duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *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). Reciting the beneficiary’s vague job responsibilities or broadcast business objectives is not sufficient; the regulations require a detailed description of the beneficiary’s daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary’s activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Id.*

The record supports the director’s conclusion that the petitioner has provided no significant details regarding the nature of the beneficiary’s work in Canada, although the director requested that information. The organizational chart placed the beneficiary in charge of five departments, but the record does not adequately describe the beneficiary’s duties or provide any information about the beneficiary’s claimed subordinates. Therefore, the petitioner has not established that the beneficiary primarily performed managerial or executive functions for the Canadian entity.

B. Executive or Managerial Duties in the United States

1. Facts

An organization chart for the petitioning entity showed the beneficiary at the top level, with the legend: “President / Relations with customer / Real Estate Broker / Real Estate Management.” The chart showed two subordinates, specifically the beneficiary’s spouse, identified as a “Real Estate Agent / Realtor / Marketing and Communications,” and another employee, identified as a “Real Estate Agent / Realtor.” Below those three names, the organizational chart listed twelve other businesses, including building contractors, an electrician, and a pool maintenance company. The petitioner did not establish any direct connection (such as through ownership) with any of these entities. It appears, instead, that the listed entities are contractors and other companies with which the petitioner has done business.

The petitioner submitted the résumé of the “Real Estate Agent / Realtor” identified on the organizational chart. The résumé did not mention the petitioning entity. Instead, it indicated that the individual has worked for “Premier Properties as a Realtor” since February 2010 and, at the same time, as a “Community Association Manager” for Seacrest Services since October 2010. The résumé indicated that the individual attended the [REDACTED] but did not identify the degree(s) awarded, if any.

In response to the March 2013 RFE, in which the director requested further information about the beneficiary’s duties at the petitioning company, the petitioner submitted an April 18, 2013 letter in which the beneficiary stated:

I have interviewed, negotiated terms with and engaged the services of Brokers, Attorneys, Title Agents, Bankers, Material Suppliers, Tradesmen, Architects, Engineers and Interior Designers . . . [and] the Petitioner’s Employees, and have, in all respects, overseen, monitored and supervised the work and or services that the various parties . . . have engaged in or provided to the Petitioner.

All of the substantial financial commitments and/or transactions that the Petitioner has been involved in have been negotiated by me on behalf of the Company. . . .

I have also been solely responsible for the Petitioner’s operational model, how its Employees are trained, supervised, motivated and remunerated, and how it has positioned itself for continued expansion, diversification and improvement on an institutional and financial level.

The petitioner’s resubmitted letter of October 19, 2011, stated that the beneficiary’s “daily duties will include the following”:

- Managing and directing the business development efforts;

- Driving overall revenue, business mix and sales strategy;
- Developing regional business plans to include growth strategy, annual sales plan and sales budget;
- Analyzing investment risks and formulating plans;
- Planning marketing strategies and identifying synergies between existing line of business and new business opportunities;
- Monitoring sales trends to ensure that operating goals are met on a consistent basis; and
- Examining expenditures to ensure compliance with budgetary constraints.

The 2011 letter further stated:

[The beneficiary] will set up the sales and investment activities which will include developing training programs, promotional collateral and guidelines to ensure consistency throughout the company's activities. He will also research opportunities to expand activities in new markets and will apply tactical initiatives to increase competitiveness. He will evaluate investment opportunities and have authority in the decision making process to ensure the return-on-investment of each project.

In addition, [the beneficiary] will select, hire and train personnel for the company. He will monitor the personnel's performance and take the necessary corrective actions to ensure achievement of individual and corporate goals. He will establish the salary and compensation structure as well as implement long and short-term goals.

To establish that that the beneficiary is a hiring official at the petitioning company, the petitioner submitted copies of three signed employee agreements, dated, respectively, January 1, 2012; August 25, 2012; and March 1, 2013. Each agreement indicated that the newly hired individual "will be employed as maintenance supervisor." The petitioner submitted no agreement for the realtor previously identified on the organizational chart. One of the employee agreements correlates the employee's name with [REDACTED], which is one of the 12 companies named at the bottom of the organizational chart.

The petitioner submitted an Employee Earnings Record for January 1, 2012 through March 29, 2013. The document does not show any paychecks issued to the individuals named on the organizational chart or on the employment agreements described above. The record shows data for three other employees, whose titles are unspecified. During the 15-month period covered by the record, the three employees earned \$23,500, \$18,620 and \$10,752, respectively. Two employees worked 32 hours a week and earned \$8.00 per hour, while the third worked 40 hours a week for \$12.50 per hour.

In the denial notice, the director cited the lack of details about the beneficiary's work. The director also found that, given the small number of employees, "one may reasonably expect [the beneficiary] . . . to devote the major or primary part of his assignment to the firm's daily productive tasks."

On appeal, the petitioner asserts that the RFE response had included “a very clear and comprehensive description of how the Beneficiary conceived of the Petitioner’s business model and took all of the necessary steps required to turn what was a mere idea into a vibrant and growing business within a few months.” The petitioner, here, refers to the beneficiary’s April 18, 2013 letter.

The petitioner submits evidence intended “to demonstrate that [the petitioner] is a vibrant and growing enterprise thanks to the strategies devised and implemented by [the beneficiary].” The documentation includes six further employment agreements; bank statements; and copies of leases and contracts. Most of the documentation dates from 2013, after the petition’s filing date.

2. Analysis

In the denial notice, the director stated: “In the petitioner’s response [to the RFE] he clearly states that the beneficiary’s role is that of a manager and not an executive.” On appeal, the petitioner asserts that “nothing in [the RFE response] suggests that the Beneficiary is a mere Manager.” The director’s comment was evidently in reference to a letter, written by the beneficiary, stating that his “role in the United States is a managerial position.”

The record leaves no doubt that, as president, the beneficiary controls the petitioning organization. At issue is whether the beneficiary primarily performs qualifying managerial or executive duties rather than day-to-day functions of the petitioning entity.

The beneficiary’s April 2013 letter did not, as claimed on appeal, provide details about his usual work. The beneficiary’s assertion that he has “been solely responsible for the Petitioner’s operational model” is a general claim that provides no specific information. The beneficiary states that he has “interviewed, negotiated terms with and engaged the services of Brokers, Attorneys, Title Agents, Bankers, Material Suppliers, Tradesmen, Architects, Engineers and Interior Designers . . . [and] the Petitioner’s Employees,” but the petitioner has not shown that these functions constitute a significant part of his ongoing duties.

The beneficiary also stated that he has “overseen, monitored and supervised the work and or services that the various parties . . . have engaged in or provided to the Petitioner.” A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. 8 C.F.R. § 204.5(j)(4)(i). The petitioner has not established that any intermediate layers of management existed on the date of filing, nor has he established that any of the workers supervised meet the statutory definition of a professional at section 101(a)(32) of the Act.

The petitioner has submitted nine employment agreements, executed between January 1, 2012 and October 1, 2013. On appeal, the petitioner asserts that these agreements show that the petitioner “is currently employing 9 individuals.” The agreements contain the following information:

| Name | Title | Date of agreement |
|------------|------------------------|-------------------|
| [REDACTED] | maintenance supervisor | January 1, 2012 |
| [REDACTED] | maintenance employee | April 6, 2012 |
| [REDACTED] | maintenance employee | April 6, 2012 |
| [REDACTED] | maintenance supervisor | August 25, 2012 |
| [REDACTED] | maintenance supervisor | March 1, 2013 |
| [REDACTED] | maintenance employee | March 25, 2013 |
| [REDACTED] | maintenance employee | April 25, 2013 |
| [REDACTED] | maintenance employee | May 27, 2013 |
| [REDACTED] | electrical supervisor | October 1, 2013 |

The first four of these agreements predate the petition’s September 4, 2012 filing date, and three others predate the May 14, 2013 RFE response. The employee earnings record submitted with the RFE response covers the period from January 1, 2012 through March 29, 2013, a period in which six of the above employment agreements were in effect, but the employee earnings record shows payment to only three workers: [REDACTED] hired January 1, 2012; [REDACTED] hired January 1, 2012; and [REDACTED], hired June 3, 2012. Only one of these three names is an exact match for one of the employment agreements, and the hire dates do not correspond. The employee earnings record does not show that anyone whom the petitioner has identified as a supervisor was on the petitioner’s payroll on or before the date of filing.

Two of the employment agreements refer to outside companies, specifically [REDACTED] and [REDACTED]. The agreements for [REDACTED] and [REDACTED], therefore, do not appear to demonstrate that the petitioner employs those individuals. Rather, the petitioner contracted their services for specific projects. The 2013 bank statements submitted on appeal support this conclusion, showing copies of several checks payable to [REDACTED] and [REDACTED]. The bank statements do not include copies of the paychecks described in the employee earnings record, likely because a third-party payroll service issued those checks and prepared the report. The materials submitted on appeal do not establish that the individuals named in the employment agreements receive regular salary payments from the petitioner.

The beneficiary signed several construction contracts submitted on appeal, showing that various clients contracted the petitioning entity to perform construction and renovations. The contracts refer to services such as carpentry, tile installation, and plumbing. The petitioner had not originally identified itself as a building contractor. Its articles of organization stated that the petitioner’s “general purpose . . . is to engage in the business of real estate investments and services.”

All but one of the submitted employment agreements classify the respective workers under “maintenance.” If these classifications are correct, the petitioner has not documented its employment of carpenters, plumbers, and others who would perform the services described in the contracts. If, on the other hand, the classifications are not correct, and the named workers do not work in maintenance, then the documents are inaccurate, which diminishes their evidentiary weight. See *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The submitted construction contracts do not show how much of the contracted services are performed by the petitioning entity, as opposed to subcontractors. These contracts do not establish the nature of the beneficiary's ongoing, daily duties with the petitioning entity.

Section 101(a)(44)(C) of the Act requires us to "take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function." We have long interpreted the statute to prohibit discrimination against small or medium-size businesses. However, we have also consistently required the petitioner to establish that the beneficiary's position consists of "primarily" managerial and executive duties, and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks.

Reading section 101(a)(44) of the Act in its entirety, the "reasonable needs" of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs do not permit a beneficiary to spend the majority of his or her time on non-qualifying duties. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See *Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir., 2008).

The information about the number and duties of the petitioner's employees is inconsistent, as is the information about the nature of the petitioner's business itself. The petitioner has provided only general information about the nature of the beneficiary's duties. The petitioner has not met its burden of proof by establishing that the beneficiary is primarily engaged in qualifying managerial or executive tasks.

III. Additional Issue

Beyond the director's decision, the record shows that the petitioner has not established its ability to pay the beneficiary's proffered salary of \$66,000 per year. The regulation at 8 C.F.R. § 204.5(g)(2) provides:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.² If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In the RFE, the director stated that the petitioner had not submitted sufficient evidence of ability to pay the beneficiary's salary. In response, the petitioner asserted that the beneficiary "has an incentive to reinvest Company revenues/profits" in order to grow the company, and that "the Beneficiary's taxable income for 2012 exceeded \$140,000." The beneficiary's taxable income came from other sources, such as rent paid on his personal real estate holdings, and as such it is irrelevant to the issue of the petitioner's ability to pay. The petitioner must establish its ability to pay the proffered salary from the filing date until the beneficiary adjusts status, regardless of whether or not the beneficiary has other sources of income.

In the instant case, the petitioner did not demonstrate that it paid the beneficiary the full proffered wage in 2012, and its net income and net current assets were not equal or greater to the proffered wage. Further, the petitioner failed to establish that factors similar to *Sonogawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary, net income and net current assets.

Accordingly, after considering the totality of the circumstances, the documentation in the record does not establish that the petitioner has sufficient income or assets to cover the beneficiary's full salary of \$66,000 per year. For this additional reason, we cannot approve the petition.

We may deny a petition that fails to comply with the technical requirements of the law, even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

IV. 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

² See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

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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.