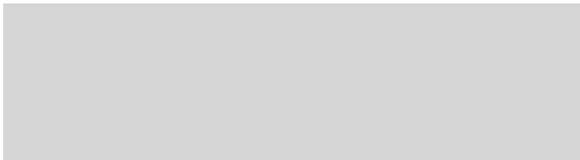




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JUN 08 2015**

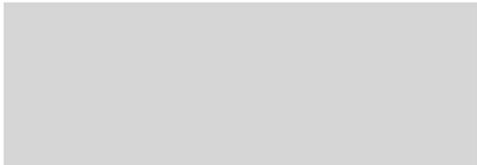
FILE #: [REDACTED]

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 immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner filed an 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 petitioner is a U.S. branch office of a Chinese company that operates as an international passenger airline. It seeks to employ the beneficiary in its U.S. office, located in ██████████ Washington, in the position of deputy general manager.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity or that she would be employed in the United States in a qualifying managerial or executive capacity.

I. The Law

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

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

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and 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. Procedural History

The record shows that the petition was filed on October 16, 2013 and was accompanied, in part, by the petitioner's supporting statement, dated October 10, 2013, from the U.S. branch executive director, who provided job descriptions for the beneficiary's positions abroad and her prospective position in the United States. The petitioner also provided supporting evidence in the form of business and financial documents as well as organizational charts pertaining to the two foreign branches where the beneficiary was employed prior to coming to the United States and to the [REDACTED] Washington branch where the beneficiary is currently employed.

On April 24, 2014, the director issued a request for evidence (RFE), informing the petitioner that the record lacked sufficient evidence to establish that the beneficiary was employed abroad or would be employed in the United States in a managerial or executive capacity as claimed in the petitioner's supporting documents. The director acknowledged the petitioner's submission of supporting evidence, but determined that the petitioner failed to establish that the beneficiary's subordinates, in either of her former positions abroad or in her proposed position with the [REDACTED] branch office, can be deemed supervisory, professional, or managerial employees. Accordingly, the director instructed the petitioner to provide a list of the beneficiary's specific daily job duties, including those performed abroad during the relevant three-year time period and those assigned to the beneficiary as part of her proposed employment in the United States, accompanied by the percentage of time the beneficiary previously allocated and would allocate to each of the enumerated tasks.

The director also instructed the petitioner to list the employees (including contractors) within the beneficiary's immediate division or team and to provide their respective job descriptions, educational levels, and their full- or part-time status. In addition, the petitioner was asked to provide organizational charts or diagrams that depict the overall structure and staffing level of each branch office where the beneficiary was previously employed and where the beneficiary's proposed employment will take place. The director specified that the information in the charts or diagrams must correspond to the beneficiary's periods of employment with each branch office. Lastly, the director asked the petitioner to provide documentary evidence establishing that the positions of the beneficiary's subordinates at her former and proposed positions require a baccalaureate degree as the minimum for their respective positions.

In response, the petitioner provided job descriptions pertaining to the beneficiary's former positions abroad as well as her proposed position with the U.S. branch office. The petitioner also provided evidence pertaining to some of the beneficiary's subordinates at her respective positions as well as each branch office's organizational chart depicting the beneficiary and her subordinates during her two former positions at the [REDACTED] Belgium and [REDACTED] China branches. In addition, the petitioner provided organizational charts for its U.S. branch offices depicting the staffing structure that existed at the time the petition was filed as well as an updated organizational chart.

In a decision dated August 6, 2014, the director denied the petition, concluding that the petitioner failed to establish that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity.

The petitioner now files an appeal, disputing the director's conclusions. The petitioner asserts that the beneficiary's foreign and proposed positions involved and would continue to involve the supervision of professional employees. The petitioner offers expert opinions from two sources in support of its claims. Lastly, the petitioner contends that the director's denial is inconsistent with U.S. Citizenship and Immigration Services' (USCIS's) prior approval of the petitioner's previously filed L-1 nonimmigrant petition.

III. Issues on Appeal

As indicated above, the two primary issues to be addressed in this proceeding are whether the petitioner provided sufficient evidence to establish that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity.

A. Qualifying Employment in the United States

First, we will address the beneficiary's proposed position with the petitioning entity. In general, when examining the executive or managerial capacity of a given position, we review the totality of the record, starting first with the description of the beneficiary's proposed job duties with the petitioning entity. See 8 C.F.R. § 204.5(j)(5). Published case law has determined that the duties themselves will reveal the true nature of the beneficiary's employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). We then consider the beneficiary's job description in the context of the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, and any other factors that may contribute to a comprehensive understanding of the beneficiary's actual job duties and role within the petitioning entity.

Here, the petitioner has not provided consistent descriptions of the beneficiary's duties or a consistent illustration of the personnel structure of the company's [REDACTED] branch office.

In a letter dated October 10, 2013, the petitioner stated that the beneficiary, as Deputy General Manager, is responsible for marketing and sales for the [REDACTED] branch office, and is required to "extensively analyze data from the company's [REDACTED] which it uses to maintain its day-to-day operations." Briefly, the petitioner stated that the beneficiary allocates her time as follows: 20% supervising three managerial and professional employees in ensuring the marketing and sales data for all flights departing from [REDACTED]; 10% overseeing pricing issues to be incorporated into [REDACTED]; 15% working with the managing director and executive director to develop long, medium and short-term sales growth plans, implement sales strategies, and assist in creating business relations; 5% maintaining the branch office's relevant information according to company technical standards; 5% configuring [REDACTED] data and synchronizing with other offices; 15% serving as a key liaison with the parent company; 5% ensuring the scheduling, pricing, and ticketing information is properly maintained; 5% monitoring and analyzing sales data; 5% making recommendations to senior executives regarding potential flight and pricing changes; 5%

coordinating with the parent company's Revenue Management Department; and 5% ensuring that all flight information is promptly updated for flights bound to China.

The petitioner provided an organizational chart at the time of filing which indicates that the beneficiary supervises two account managers with bachelor's degrees in Banking and Insurance and International Studies, respectively, and a sales support employee. The chart also indicates that the Revenue Manager for North America reports to the beneficiary, although the chart suggests that this employee is available as a resource for all North American branches. We note the revenue manager did not appear on the petitioner's state quarterly wage report for the second quarter of 2013.

In response to the RFE, the petitioner stated that its [REDACTED] branch office had expanded since the filing of the petition, and noted that, at the time the petition was filed, the branch office's general manager had been temporarily assigned to the company's new [REDACTED] office. The petitioner explained that the beneficiary had temporarily served as the general manager of the [REDACTED] office until the petitioner was able to transfer an employee from China. Turning to the U.S. job description the petitioner provided in response to the RFE, we note that the petitioner claimed that 12% of the beneficiary's time would be allocated to supervising "up to five" direct subordinates, who are managerial and professional employees, as well as more than 50 indirect subordinates, including contractors and others performing the petitioner's daily operational tasks. The petitioner claimed that another 12% of the beneficiary's time would be allocated to overseeing subordinates charged with logistics tasks pertaining to cargo and passenger flights departing from [REDACTED] Washington. We note, however, that neither of the petitioner's claims regarding these time allocations is corroborated in the organizational chart that depicts the North American branch operations at the time the petition was filed. Namely, the beneficiary was shown as overseeing the work of four subordinate employees – a revenue manager, two account managers, and one sales support employee. The chart depicted no indirect subordinates within the beneficiary's specific department. While further review of the chart shows that the [REDACTED] branch employs both a cargo manager and a manager of airport operations, neither individual was depicted as being within the supervisory purview of the beneficiary's position at the time of filing. Therefore, the claim that the beneficiary would oversee the cargo and flight logistics through employees charged with executing the underlying tasks is not supported in the chart that was intended to illustrate the petitioner's [REDACTED] branch operation at the time the petition was filed. The petitioner stated at the time of filing that the beneficiary's responsibilities are focused on sales, marketing and the [REDACTED], rather than the overall operation of the branch office.

While the petitioner's June 2014 organizational chart depicts a more developed staffing structure, showing a [REDACTED] manager as the beneficiary's direct subordinate overseeing two account managers and a sales support employee, this staffing composition did not exist at the time the petition was filed and thus lacks probative value to establish eligibility as of the priority date. Similarly, while the updated organizational chart depicts the beneficiary as overseeing other managerial positions, including an airport station manager, a cargo manager, and a public relations specialist, such organizational growth took place sometime after October 2013 and thus does not establish eligibility at the time of filing. A petitioner must establish eligibility at the time of filing; a petition cannot be

approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

In whole, the supplemental job description the petitioner submitted in its RFE response is based on an organizational hierarchy that did not yet exist when the petition was filed. As such, the information contained in the updated job description, even if it were to support the petitioner's claims, lacks probative value in that it does not include a list of the beneficiary's projected list of tasks based on the petitioner's organizational structure at the time the petition was filed. Therefore, our analysis of the beneficiary's position must be based on the petitioner's initial job description and organizational chart.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act.¹ If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Section 101(a)(44)(A)(iii) of the Act. While the petitioner indicated at the time of filing that the beneficiary would be directly supervising three subordinate employees, the initial description indicated that such supervisory tasks would require only 20 percent of her time. Moreover the petitioner did not state

¹ In evaluating whether the beneficiary manages professional employees, we 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'r 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 focus on the level of education required by the position, rather than the degree held by a 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. The petitioner indicates that the beneficiary's subordinate account managers both have bachelor's degrees; however, the petitioner indicated that the beneficiary's subordinate account managers during her tenure in China had only associate degrees. As such, the record does not establish that a bachelor's degree in a specialized field of study is required for this position. Further, the petitioner did not establish that the account managers or sales support employee supervised subordinate staff at the time of filing, such that they would qualify as supervisors or managers.

that the beneficiary's responsibilities included hiring or firing employees or making recommendations regarding personnel decisions. For these reasons, we cannot conclude that the beneficiary would be primarily performing the duties of a personnel manager.

Rather, the initial position description stated that the beneficiary would be allocating much of her time "to extensively analyze data from the company's [REDACTED]," and those duties require the beneficiary to perform recordkeeping, monitoring, analysis and coordination functions that were not shown to be managerial in nature. While the petitioner indicated that it subsequently hired a [REDACTED] Manager to perform these duties, as noted above, the petitioner must establish eligibility as of the date the petition was filed. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. at 49.

On appeal, the petitioner provided two expert opinions – one statement from an airline executive and another from a professor of finance and business management – to help establish that the beneficiary was employed abroad in a qualifying managerial capacity. The airline executive asserts that a management position in the area of revenue and sales in the airline industry "is a key managerial position." He also makes assertions as to the "typical" requirements that apply to the sales manager position within the international airline industry. However, these assertions have little probative value in this matter, as establishing that the beneficiary's former and proposed positions are those of a professional employee would not establish that the beneficiary would be employed in a qualifying managerial or executive capacity as those terms are defined at section 101(a)(44) of the Act.

Although the expert opinion of the college professor is more relevant to the matter at hand in the sense that it addresses the beneficiary's proposed position within the context of the relevant statutory definitions of managerial and executive capacity, the professor's assertions also lack probative value, as they are premised on the assumption that the petitioner's claims, regardless of whether they were corroborated by sufficient supporting evidence, were accurate. The expert has no first-hand knowledge of the petitioner's unsupported statements and provides no evidence to establish that he has an in-depth understanding of the definition of managerial capacity, despite restating that definition in his opinion. Further, this expert, in reviewing the beneficiary's supervision of subordinates, indicates that he considered the beneficiary's supervision of a [REDACTED] Manager in reaching his conclusion. This position was not on the petitioner's organizational chart at the time of filing. As noted above, several of the beneficiary's duties as initially described involved working with the [REDACTED] and were not shown to be managerial in nature.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. See *Matter of Caron Int'l.*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding a beneficiary's eligibility for the benefit sought. Accordingly, supporting letters from experts, such as those submitted in this matter, do not constitute presumptive evidence of eligibility. *Id.*; see also *Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact").

USCIS may even give less weight to an opinion that is not corroborated or is in any way questionable. *Matter of Caron Int'l.*, 19 I&N Dec. at 795.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his or her duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner did not establish that the managerial duties claimed at the time of filing constituted the beneficiary's primary duties, or that the petitioner had sufficient subordinate staff in place to relieve the beneficiary from performing non-qualifying duties. Therefore, it did not establish that the position of Deputy General Manager was in a qualifying managerial capacity. For this reason, the appeal will be dismissed.²

B. Qualifying Employment Abroad

Turning to the beneficiary's prior employment, the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B) provides that if the beneficiary is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, the petitioner must demonstrate that in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity.

Upon review of the record in its entirety, we find that the petitioner has established by a preponderance of the evidence that the beneficiary was employed abroad in a qualifying managerial capacity based on her position with the petitioning airline company's [REDACTED] China branch office from November 2005 until September 2007. Therefore, the record establishes that the beneficiary had more than one year of qualifying employment in the three-year period preceding her admission to the United States as a nonimmigrant. Accordingly, the director's decision with respect to this single issue will be withdrawn.

IV. Prior L-1 Approvals

Lastly, despite the petitioner's previously approved L-1 petitions, which were filed on behalf of the same beneficiary, such approvals do not constitute *prima facie* evidence of the petitioner's eligibility in this matter. We acknowledge that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. See §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). However, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. USCIS is not required to assume the burden of searching through previously provided evidence submitted in support of other petitions to determine the approvability of the petition at hand

² While we find that the petitioner did not establish the beneficiary's eligibility as of the date of filing, the petitioner is not barred or limited in any way from filing a new petition with supporting documentation if it wishes USCIS to make a determination of the beneficiary's eligibility based on its current staffing levels and organizational structure.

in the present matter. The approval of a nonimmigrant petition in no way guarantees that USCIS will approve an immigrant petition filed on behalf of the same beneficiary. USCIS denies many I-140 immigrant petitions after approving 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 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103. 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. 1988).

As discussed above, the petitioner in this matter has not provided sufficient evidence to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity as of the date of filing. The petitioner's prior L-1 approvals are not sufficient to address and overcome the evidentiary deficiencies discussed above.

V. Conclusion

The petition will be denied based on our determination that the petitioner did not establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. 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.