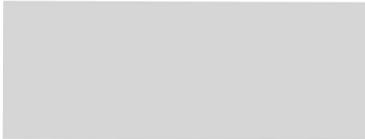




U.S. Citizenship
and Immigration
Services

(b)(6)



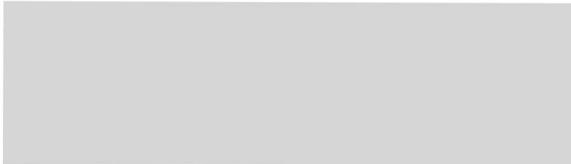
DATE: **MAY 12 2015**

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Florida corporation. Part 5, subsection 2.a states that the petitioner is engaged in "int trade bananas [and] communic part." The petitioner claimed eight employees at the time of filing and currently seeks to employ the beneficiary in the United States as its "president-general manager." 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 eligibility based on the following three grounds: (1) the petitioner failed to establish that it has a qualifying relationship with the beneficiary's employer abroad; (2) the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity; and (3) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

On appeal, counsel disputes the director's conclusions and offers additional evidence in support of the appeal. Based on the record as presently constituted, we find that the petitioner has overcome the adverse findings with regard to the petitioner's qualifying relationship with the beneficiary's foreign employer and with regard to the beneficiary's qualifying employment abroad. Notwithstanding our withdrawal of these two adverse findings, the petitioner has failed to establish eligibility based on the ground pertaining to the beneficiary's proposed employment with the petitioning entity.

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 26, 2013. The petition was accompanied by supporting documents, including a statement from counsel, dated June 10, 2013, which included job descriptions for the beneficiary and the other U.S. employees. Supporting evidence also included a statement from the petitioner, dated May 22, 2013, which included a description of the beneficiary's proposed position with the U.S. entity. The petitioner submitted other supporting evidence including an organizational chart as well as financial, corporate, and tax documents. The organizational chart depicted the beneficiary at the top of the petitioner's hierarchy, subordinate only to a board of directors. The organization also depicted the following positions comprising the organizational hierarchy: a legal consultant, a financial consultant, an investment service provider, an administrative assistant, an administration manager and an operation manager overseeing a logistic and operation assistant, and a sales manager overseeing two sales people.

On April 15, 2014, the director issued a request for evidence (RFE), informing the petitioner of various deficiencies in the supporting evidence. The director addressed, in part, the issue of the beneficiary's proposed position with petitioning entity instructing the petitioner to provide a definitive statement listing the beneficiary's specific daily job duties and the percentage of time the beneficiary would spend carrying out each duty. The petitioner also requested the petitioner's quarterly wage reports for 2013 as well as IRS Form W-2 wage and tax statements the petitioner issued to its employees showing wages paid in 2013. In addition, the petitioner was asked to provide an organizational chart accompanied by the names, job titles, brief job descriptions, and educational credentials of the beneficiary's subordinates. The director stated that if the petitioner claims use of contract labor, additional evidence should be submitted to corroborate the claim and establish which services were provided.

The petitioner responded with a statement, dated June 2, 2014, which included a list of 19 job duties without time allocations. The same statement included a separate list of five broadly stated functions to which the petitioner assigned the following time allocations: 45% of the beneficiary's time would be spent managing "corporate activity" and meeting with the managerial staff and the financial consultant; 30% would be spent evaluating new investments and markets, controlling financial resources, and reviewing monthly financial statements; 15% would be spent overseeing personnel; 5% would be spent drafting budgets for new activities and marketing plans; and the remaining 5% would be spent preparing management reports for review by the board and visiting potential clients. Although the petitioner also provided an updated organizational chart, which showed the same personnel structure as the one depicted in the original chart, the updated chart reflected employee turnovers in the sales department. Lastly, the petitioner provided the requested Form W-2s and quarterly tax returns as well as each employee's corresponding payroll record specifying the months the petitioner paid wages to each of its employees in 2013.

After reviewing the petitioner's submissions, the director determined that the petitioner failed to establish eligibility and therefore issued a decision dated August 21, 2014, denying the petition. The director noted that the petitioner failed to adequately explain what the beneficiary would be doing on a day-to-day basis and further determined that the beneficiary would likely perform the petitioner's daily operating tasks, despite having discretionary authority to make decisions regarding the company's operation.

On appeal, counsel points to the beneficiary's experience and knowledge of the business as well as the years of work experience of the beneficiary's subordinates in an attempt to establish that such experienced individuals are essential to achieve the company's set sales goals. Counsel further asserts that the

beneficiary's subordinates are professional employees and claims that "a great number of workers," who would not appear on the petitioner's payroll, contribute to the petitioner's successful operation and "are considered within the cost of sales." Lastly, counsel contends that the individual who was originally employed as the petitioner's sales manager has since been replaced by an individual who was officially hired in May 2014, thus explaining why the recently hired employee was not issued a Form W-2 in 2013.

Upon review, and for the reasons stated below, we find that the petitioner failed to submit sufficient evidence to establish that the beneficiary's proposed employment with the U.S. entity would be in a primarily managerial or an executive capacity.

III. Issues on Appeal

As indicated above, the primary issue to be addressed in this proceeding is whether the petitioner provided sufficient evidence to establish that the beneficiary would be employed by the petitioning entity 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 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 other relevant factors, such as 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, the nature of the petitioner's business, and any other factors that may contribute to a comprehensive understanding of a beneficiary's actual duties and role within the petitioning entity.

Turning to the beneficiary's job description, we note that the petitioner failed to comply with the director's express instructions, which asked the petitioner to list the beneficiary's specific daily tasks and to assign a percentage of time to each item. While the record shows that the petitioner did provide a percentage breakdown in response to the RFE, the time allocations were assigned to the job description that did not list individual daily tasks, but rather was comprised primarily of broadly stated job responsibilities, which do not disclose specific daily tasks and thus cannot serve as a basis for concluding that the beneficiary would spend his time primarily performing tasks within a qualifying capacity. For instance, while the petitioner indicated that approximately 75% of the beneficiary's time would be spent controlling corporate activity and financial resources, holding meetings with managerial employees and a financial consultant, reviewing monthly financial statements, and evaluating new investments, this list of responsibilities does not reflect the beneficiary's specific daily tasks or explain what types of corporate activities the beneficiary would focus on or how the beneficiary will control those activities. The petitioner also failed to explain what types of "new investments" the beneficiary would evaluate or how he would determine which investments to consider. In other words, it is unclear whether the beneficiary himself seeks out the investments and if so, which specific tasks are involved in the search process. The petitioner also failed to clarify the difference between "periodical" and "permanent" meetings, which would provide information as how frequently the beneficiary would meet with his staff and the types of topics addressed at each type of meeting. Given that the responsibilities discussed herein would consume a majority of the beneficiary's time, the petitioner's failure to provide more detailed information precludes us from being able to narrow down the beneficiary's specific tasks and whether the tasks can be deemed as being within a managerial or executive capacity.

Looking to the more comprehensive list of job duties that the petitioner provided in the same RFE response statement, we once again note the petitioner's failure to comply with the director's RFE instructions, which expressly asked the petitioner to assign time constraints to the beneficiary's itemized daily tasks. We also find that a number of the items listed lacked specificity as to the actual tasks being carried out. Such ambiguities contribute to our inability to determine what portion of the beneficiary's time on the job would be allocated to specifically qualifying tasks. While 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 are only incidental to the 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. 593, 604 (Comm. 1988). Establishing that the beneficiary performs tasks at a professional level is also not sufficient unless those tasks rise to the level of managerial or executive capacity. Thus, it is essential that the petitioner specify precisely how much of the beneficiary's time would be allocated to training employees and engaging in contract negotiation, which are more akin to operational tasks, rather than tasks performed within a qualifying capacity. It is also crucial that the petitioner specify the actual tasks involved in planning, developing, and implementing company strategy. These ambiguous terms fail to identify any company strategies or specify what actual daily tasks are associated with planning and implementing various strategies. Similarly, merely stating that the beneficiary would develop and implement sales policies and procedures does not provide sufficient information as to the specific underlying tasks the beneficiary actually carries or the difference between planning and implementing company strategy and developing and implementing the company's sales policies and procedures. The petitioner was equally vague in stating that the beneficiary would plan future expansion of the company and coordinate and develop public relations policies. Without identifying the specific daily tasks involved in either set of job responsibilities, these broad claims are virtually meaningless in terms of establishing whether the underlying tasks would be performed within a qualifying managerial or executive capacity.

On appeal, the petitioner offers a third job description, wherein it purports to account for the beneficiary's time by listing his daily activities in a chart depicting a five-day work week and the number of minutes and percentage of time the beneficiary will allocate to each activity during an eight-hour work day five days per week. However, similar to the issues pertaining to the previously provided job descriptions, the most recent job description continues to list a number of activities in vague terms, which fail to identify the beneficiary's tasks. Namely, the petitioner stated that for 120 minutes, or 25% of each day, the beneficiary would "perform the management required to achieve the development of the company, according to plans and programs . . . taking into account the profiles that are within the Organization, the characteristics of the environment and the internal conditions of the company." This statement is confusing, as it fails to explain what is meant by "the characteristics of the environment" or "internal conditions of the company." This statement also fails to clarify what specific steps the beneficiary would take to achieve the end goal of developing the company, a phrase that is also vague and open-ended. In a similarly ambiguous statement, the petitioner indicated that for 90 minutes, or 19% of each day, the beneficiary would supervise and control the "financial, administrative, and operational [o]ffice areas, programs and projects of the business." The petitioner did not identify any programs or projects or clarify what specific actions the beneficiary would carry out to explain how he would actually execute his supervisory responsibility regarding the petitioner's finances, administration, and its overall operation.

We also find that some of the information in the job description does not convey a realistic portrayal of the beneficiary's daily tasks. For instance, one of the items in the job description chart included submitting a draft budget of income and expenditures to the board of directors – a task that the petitioner claims the beneficiary would carry out every day for fifteen minutes. However, it is unclear why the beneficiary would be required to dedicate his time daily to drafting a company budget. In other words, while it is reasonable to claim that the beneficiary is responsible for drafting the company's budget, it is not reasonable to claim that the beneficiary consistently allocates a portion of his time every day an activity that is generally done on a more intermittent basis for the purpose of achieving a quarterly or yearly budget. We also question the validity of the claim that the beneficiary performs a daily budget analysis and then apprises the board daily of the "evolution of the company." It is unclear why the beneficiary would be required to define sales policies and new procedures on a daily basis. As the job description lacks a discussion of the specific sales policies and procedures the beneficiary would devise, we fail to understand the petitioner's need to devise new policies and procedures on a daily basis. While it is possible that the beneficiary would be responsible for drafting the company's budget, reporting on deviations from the budget, and defining and amending the company's sales policies and procedures, it is unreasonable to claim that the beneficiary performs these tasks every day of the work week without adequately explaining the needs of the petitioning entity that would prompt the beneficiary to carry out seemingly intermittent tasks as frequently as is claimed in the job description.

Next, we consider the proposed position in light of the level of complexity of the petitioner's organizational hierarchy and available staff to carry out the petitioner's daily operational tasks. Federal courts have generally agreed that in reviewing the relevance of the number of employees a petitioner has, USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d at 42; *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In the present matter, a review of the IRS Form W-2s the petitioner issued in 2013 and each recipient's payroll history indicates that the petitioner's sales manager as well as one of its sales employees were no longer employed with the petitioning entity in August 2013 when the Form I-140 was filed. The record further shows that neither position was filled immediately following the departure of either employee, thus leaving the petitioner with a single employee – one sales person – in the petitioner's sales department. In fact, based on counsel's explanation on appeal and the additional supporting evidence, it appears that the position of sales manager remained vacant until May 2014, thus leaving unanswered the question of who, other than the beneficiary himself, was available to oversee the sales department and carry out the tasks that would normally be assigned to the sales manager during the numerous months that the position remained vacant. While the petitioner is under no legal obligation to actually employ the beneficiary in a qualifying capacity unless and until the petition is approved, the fact remains that the petitioner must have the capability of employing the beneficiary in a qualifying capacity as of the date the Form I-140 is filed. Given that the petitioner lacked a sales manager from the date of filing and continuing until May 2014 when the position was filled, we cannot rule out the likelihood that as head of the company, the beneficiary may have been called upon to carry out the duties of the vacant position during the interim time period of the vacancy and that in the absence of a



sales manager the petitioner lacked the ability to relieve the beneficiary from having to perform certain key operational tasks that would normally be inherent to a sales manager's position.

In addition, with regard to the petitioner's employees and service providers, counsel claims on appeal that the petitioner relies on "a great number of workers (for example, third party laborers, quality controllers and stowers[])" who contribute to the petitioner's efforts but who are not included in the petitioner's payroll. We note, however, that the record lacks any evidence to corroborate counsel's 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Accordingly, in view of the various deficiencies described above concerning the beneficiary's job description and the lack of sufficient evidence establishing the existence of an adequate support staff at the time of filing, we find that the petitioner has failed to establish that it had attained an organizational complexity that was capable of supporting the beneficiary in a qualifying managerial or executive capacity at the time the Form I-140 was filed. We conclude that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity and on the basis of this initial adverse conclusion the instant petition cannot be approved.

IV. Conclusion

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, in light of the findings issued in the director's decision, that burden has not been met.

ORDER: The appeal is dismissed.