



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **AUG 27 2013**

OFFICE: NEBRASKA SERVICE CENTER FILE: [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:

INSTRUCTIONS:

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 Director, Nebraska Service Center, denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Texas which operates an import and export business and a restaurant. The petitioner states that it is an affiliate of [redacted] located in Mexico. The petitioner seeks to employ the beneficiary as its President and Chief Executive Officer. 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, finding that the petitioner failed to establish that it has a qualifying relationship with the foreign employer. Further, the director concluded that the petitioner had not established that the beneficiary will be employed in a managerial or executive capacity.

On appeal, counsel asserts that the director ignored evidence submitted by the petitioner and reached an erroneous conclusion with respect to both grounds for denial. Counsel submits a brief in support of the appeal.

**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.

**I. The Issues on Appeal**

**A. Qualifying relationship between the petitioner and the foreign employer**

The first issue to be discussed is whether the petitioner has established that a qualifying relationship exists between the petitioner and the foreign 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 pertinent regulation at 8 C.F.R. § 205.5(j)(2) defines "affiliate" and "subsidiary" as follows:

*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;

\* \* \*

*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. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm'r 1988);

*see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As a preliminary matter, while the AAO will affirm the director's finding that the petitioner failed to establish a qualifying relationship with the foreign entity, the petitioner correctly observes that the director's determination was based on a misunderstanding of the petitioner's claimed ownership. Specifically, the director appears to have reviewed only the ownership of the petitioner's partially-owned subsidiary, [REDACTED], and the ownership of the foreign entity, without acknowledging the evidence submitted to establish the common ownership and control between the petitioner and the foreign entity. Accordingly, the director's stated reasons for denial of the petition on this basis will be withdrawn. The AAO maintains plenary power to review each appeal on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Accordingly, we will address the petitioner's evidence below.

The petitioner asserted that the foreign employer is jointly owned by the beneficiary and his brother [REDACTED] with each owning 175,000 of the 350,000 outstanding shares in the company. However, in a letter submitted in support of the Form I-140 Petition for an Immigrant Worker that the petitioner was a wholly-owned subsidiary of the foreign employer. The petitioner submitted a stock certificate supporting the foreign employer's ownership of the petitioner's 1000 shares. However, the petitioner's IRS Form 1120 U.S. Corporation Income Tax Returns for 2009, 2010, and 2011, and related supporting IRS forms, all indicated that the beneficiary is the sole owner of the company.

Subsequently, in response to the director's request for evidence (RFE), counsel stated that he had mistakenly failed to include evidence of a stock transaction that took place in the latter part of 2011 whereby the foreign employer transferred 500 of its shares in the petitioner to the beneficiary and the other 500 shares in the petitioner to [REDACTED]. Counsel stated that the petitioner is therefore an affiliate of the foreign employer because the beneficiary and his brother each own the same proportion of shares in each entity. In support of this assertion, the petitioner submitted stock certificates, a resolution of the petitioner's board approving the transaction, and a stock transfer ledger.

However, the additional evidence submitted fails to address the material discrepancies on the record in the petitioner's IRS Form 1120s for 2009, 2010 and 2011, which all indicate that the petitioner is wholly owned by the beneficiary. Previous to the asserted stock transaction on November 18, 2011, the record included a material discrepancy with respect to ownership as the IRS Form 1120s for 2009 and 2010 were inconsistent with the assertion that the petitioner's assertion that it was wholly owned by the foreign employer. This discrepancy was not addressed or corrected in the IRS Form 1120 for 2011, and its accompanying IRS forms, despite these forms being completed and submitted after the date of the stated stock transfer to the beneficiary and [REDACTED] in November 2011. 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. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Due to this unexplained inconsistency, the evidence on the record fails to establish that the petitioner and the foreign employer have a qualifying relationship. For this reason, the appeal must be dismissed.

**B. Employment with the petitioner in a managerial or executive capacity**

The next issue to be addressed is whether the petitioner has established that it will employ the beneficiary in a qualifying managerial or executive capacity.

In denying the petition, the director noted the petitioner's failure to demonstrate that the beneficiary's subordinates are managers, supervisors, or professionals who will relieve the beneficiary from performing non-qualifying day-to-day operational duties. Also, the director reasoned that the petitioner described the beneficiary as a hybrid "executive/manager" and therefore failed to satisfy all elements of the statutory definition of either managerial capacity or executive capacity.

On appeal, counsel states that the director's finding is "untenable," reasoning that the definitions of executive and manager are bound to overlap, thereby suggesting that a beneficiary may be described as a hybrid "executive/manager." Further, counsel contends the director mistakenly analyzed whether the beneficiary was a manager, and not an executive. Counsel also contends that a beneficiary need not have professional subordinates to qualify under the statutory definition of "executive capacity", and that the petitioner has submitted sufficient evidence to establish the beneficiary as an executive consistent with the Act.

The AAO does not find counsel's assertions persuasive. Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that it will employ the beneficiary in an executive capacity.

First, the AAO does not concur with counsel's assertion that a beneficiary may be offered as a hybrid "executive/manager" or that it is untenable to require a petitioner to establish a beneficiary either as an executive or a manager, or both separately. In fact, this is the exact intent of the Act and regulations. The petitioner must clarify whether it is claiming that the beneficiary will be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner cannot claim that a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. At a minimum, the petitioner must establish that the beneficiary meets all eligibility criteria under either section 101(a)(44)(A) or section 101(a)(44)(B) of the Act. Regardless, on appeal, the petitioner clearly claims that the beneficiary will be employed in an

executive capacity and, therefore, the AAO will analyze whether the beneficiary qualifies as an executive as defined at section 101(a)(44)(B) of the Act.

In order to determine whether the beneficiary would be employed in a qualifying executive capacity, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the RFE, the director requested that the petitioner submit a detailed description of the beneficiary's duties in the United States, including an estimate as to the percentage of time the beneficiary will dedicate to each duty. In response, the petitioner stated that the beneficiary "provides a leadership position to the company working towards developing a strong market position in the United States." Additionally, the petitioner submitted the following additional duties for the beneficiary in his capacity as president and chief executive officer:

- Establishes goals (weekly, monthly and yearly) and policies of the organization. The President is in charge of setting goals for each employee. As to sale the product or gain clients. 5%
- Exercises wide latitude in discretionary decision-making. The President decides the future of the company. There are certain risks he can take to try to achieve their goal of growing the business. 10%
- Know all of the information about the company, as to how it works, financial position, employees, and goals to meet with future clients to discuss what the company has to give. The President should be 100% prepared and knowledgeable about the company as a whole and how it works. He needs to be ready to answer questions and describe the product or services the organization provides. 5%
- Create, communicate and implement the organization's vision, mission and overall direction. The president has to create and inform the staff of the different short term goals and the mission of the corporation. He implements the ideas so the staff and the company can achieve success. 10%
- Create and manage a budget for the corporation and use the resources efficiently as possible within the guidelines. The President ensures a yearly budget for all the enterprise's present and future projects. He has an overview of the progress of the company monthly and yearly to achieve the budget goal. 10%
- Approve any company operational procedures, policies, and standards. The President has to create the operational procedures for each of the employees and what the policies and standards of the company are. 5%
- Review all of the accounting documentation to determine the progress and know the status of the business. The President has a total communication with the Public Accountant to make sure the company is advancing. He should know the position of the company and from the financial results he can change different techniques of the company to achieve its financial goals. 5%

- Promote the company to the general public, locally, regional [*sic*], nationally, and internationally constituencies. The President is in charge of approving any publicity of the company so it can be known locally through nationally. 5%
- Directs the management of the organization or major component or function of the organization. The President will meet with the managers of the company to discuss the improvement of the company such as the progress of the staff. 10%
- Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization. The President will meet with any shareholder or director of the corporation to discuss the position of the company and to make new ideas for the success of the organization. 10%

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).

Although the petitioner has provided a lengthy duty description for the beneficiary, the duty description is insufficient as it fails to provide details and specifics regarding his day-to-day tasks. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The duties offered by the petitioner are vague and provide little probative value as to the beneficiary's actual daily activities. For instance, the petitioner provides no specifics, details or supporting documentation regarding: goals established by the beneficiary; visions, missions or direction implemented, scale of budgets managed; or operational procedures, policies, or standards implemented. In fact, the beneficiary's listing of duties is less a duty description than a discussion of general attributes of any executive, such as "a President should be prepared and knowledgeable about the company," "the President decides the future of the company," or "the President has to create and inform the staff of the different short term goals and the mission of the corporation." Indeed, the duties provided for the beneficiary in the United States could apply to any executive with any company, in any industry.

Given that the beneficiary currently serves as the petitioner's president pursuant to an approved nonimmigrant petition, it is reasonable to expect a detailed description of the beneficiary's actual day-to-day duties within the context of the petitioning organization based on its current staffing structure and stage of development. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

Overall, while the duty description suggests that the beneficiary possesses the appropriate level of authority as president of the company, the lack of detail regarding his specific day-to-day duties raises questions as to whether the broadly described responsibilities require 100% of his time. Further, while the petitioner indicates that it operates an import-export business and has a subsidiary that operates a restaurant, the duty description provided has no direct correlation to either of these businesses and does not distinguish how the beneficiary divides his time among his claimed managerial responsibilities for these two distinct operations.

When examining the managerial or executive capacity of a beneficiary, USCIS reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive position.

The petitioner asserts that it owns 50% of another company called [REDACTED] that operates a sushi restaurant in California. The petitioner further states that the other 50% of [REDACTED] is owned by [REDACTED], an unrelated company. The petitioner is based in San Antonio, TX and described as being engaged in the import and export of goods, mainly from China. The petitioner indicated that it employs the beneficiary, a manager, a logistics representative and an assistant, although in response to the RFE, the petitioner stated that it had only two employees. The petitioner also stated in a support letter submitted with the petition that the company earned \$808,130 in revenue from January through July 2012, \$258,408 of which was generated from its import and export activities. As such, the majority of the petitioner's revenue is generated from the operation of [REDACTED]. Indeed, the petitioner stated in response to the director's RFE that "the San Antonio office continues to operate, but the company's primary focus is expansion into food services." The petitioner indicated that [REDACTED] has eleven employees, including a manager with a subordinate sushi chef, chef, and head of waitresses. Additionally, an assistant sushi chef reports to the sushi chef, a cook and dishwasher to the chef, and four waitresses to the head of waitresses.

On appeal, counsel contends that the director mistakenly analyzed whether the beneficiary qualified as a manager, and more specifically, whether the beneficiary was required to have professional subordinates. Counsel asserts that the petitioner will employ the beneficiary in an executive capacity, and therefore, is not required to establish that the beneficiary's subordinates are professionals. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an

executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

The petitioner has not submitted sufficient evidence to establish that the beneficiary will be employed in an executive capacity. The petitioner has presented [REDACTED] as part of the petitioner's organizational hierarchy and indicates that [REDACTED] is under the beneficiary's sole direction in his role as the petitioner's president and chief executive officer. However, the record shows that [REDACTED] is owned 50-50 by the petitioner and [REDACTED]. The petitioner has described [REDACTED] as a joint venture, but has not provided evidence of a joint venture agreement, shareholder agreement or any other documents to establish that the petitioner and/or beneficiary were given full direction and control over the subsidiary and its restaurant business. The petitioner submitted [REDACTED] bank records which demonstrate that [REDACTED] contributed \$53,000 to [REDACTED] operations from December 2011 to April 2012. However, the petitioner provides no explanation or evidence regarding the involvement of this company or its management, despite it owning 50% of [REDACTED], an operation that is critical to the petitioner's claim that the beneficiary is employed in an executive capacity. 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)).

Further, even if the petitioner had submitted sufficient evidence to support its claim that the beneficiary has sole management authority over the restaurant business, the petitioner's description of the beneficiary's duties is vague and contains no details specific to the operation of either an import-export business or a restaurant. In addition, the petitioner submitted evidence that the restaurant is open daily for a total of 72 hours per week. While the restaurant appears to have one subordinate manager, the record does not establish how a single employee would relieve the beneficiary from all non-managerial tasks associated with the operation of the restaurant, including first-line supervisory and administrative tasks. Given that the beneficiary works on-site at the restaurant, it is unclear why the petitioner's description of his job duties makes no specific mention of the restaurant operations. The evidence is insufficient to establish that the restaurant supports an executive position or that the petitioner has sole authority for management of this 50% owned business.

Similarly, the petitioner has failed to establish that its Texas-based import-export business is able to support an executive position. At the time the petitioner responded to the RFE, it stated that the San Antonio office had only two employees. In fact, IRS Form W-2 Wage and Tax Statements for 2011 reflect that the three subordinates to the beneficiary working directly for the petitioner made less than the federal minimum wage of \$15,080 for a fulltime employee. Also, the same IRS Form W-2's for 2011 indicated that the stated manager working directly for the petitioner made less than her subordinate logistics representative and the same as her subordinate assistant. Again, artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive

position. The petitioner's claims fail, in large part, because it is left unclear from the record what specific duties the beneficiary will be performing as the petitioner has provided a vague and non-specific duty description for the beneficiary that explains no specific executive decisions, goals, policies, or other qualifying level duties performed that relate to either the petitioner's or [REDACTED] operations. In sum, the totality of the evidence presented on the record does not support a conclusion that the beneficiary will be employed in a qualifying executive capacity or that he primarily performs executive duties.

For the reasons discussed above, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity. For this additional reason, the appeal must be dismissed.

#### IV. Conclusion

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

**ORDER:** The appeal is dismissed.