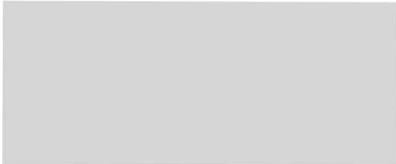




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **AUG 03 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 (AAO) on appeal. We will dismiss the appeal.

The petitioner, a manufacturer and seller of industrial cutting tools, seeks to employ the beneficiary in the United States as business development manager for its [REDACTED] product line. The petitioner filed this Form I-140, Immigrant Petition for Alien Worker, on January 13, 2014, 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 28, 2014, concluding that the petitioner had not established that the beneficiary's duties qualify as managerial, either in his previous position abroad or in his intended position in the United States.

On appeal, the petitioner submits a legal brief and copies of materials already in the record. The petitioner maintains that it provided enough information to show that the beneficiary's duties were, and remain, managerial in nature.

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.

A United States employer may file a Form I-140 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, U.S. Citizenship and Immigration Services (USCIS) must take

into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

II. Issues on Appeal

At issue in this proceeding is whether the petitioner has established that the beneficiary's former duties abroad, and his current and proposed duties in the United States, qualify as managerial and/or executive.

A. Duties Abroad

1. Facts

In support of the petition, the petitioner submitted a November 1, 2013 letter describing the beneficiary's duties as a deputy department manager at [REDACTED] in Switzerland prior to his arrival in the United States:

[The beneficiary] oversaw a team of Design Engineers in the entire process of designing a cutting tool. . . . In addition, [the beneficiary] managed the two-dimensional and three-dimensional design of new products, cross-checked production drawings, managed all production meetings, and coordinated the technical aspects of all sales orders from customers. [The beneficiary] also compiled guidelines for the design engineering team and was responsible for training his staff and ensuring the knowledge transfer of [REDACTED] design to [REDACTED] subsidiaries.

As Deputy Department Manager, [the beneficiary] had the authority to train, coach, discipline and terminate employees. He made decisions daily to uphold the quality standard of the product. . . . [The beneficiary] was responsible for the quality and the output of designs from his team. . . . He reported to [REDACTED] [also spelled [REDACTED]], CEO [chief executive officer] of [REDACTED]

The director issued a request for evidence (RFE) on June 24, 2014. The director stated that the description quoted above did not establish that the beneficiary's duties abroad were primarily managerial or executive. The director stated that the description "is general and does not include the day-to-day job duty description" that would show "what he actually did and the percentage of time he spent performing his detailed duties."

In a response dated September 15, 2014, the petitioner asserted that the beneficiary "principally managed the design process for the [REDACTED] product line at [REDACTED]," "supervised and controlled the work of professional employees," and "exercised a high level of discretion over the day-to-day operations of the design process of the [REDACTED] product line."

The petitioner submitted a letter dated September 9, 2014 from [REDACTED], identified here as the president of [REDACTED] (the new name of [REDACTED]), describing the beneficiary's work at that company. The description almost exactly matches the description submitted previously, and

therefore does not bear repeating here. The new description indicated that the beneficiary had hiring authority, a detail not provided earlier. Mr. [REDACTED] stated that the beneficiary “reported directly to Mr. [REDACTED], Vice President Engineering, who reported directly to me.”

Mr. [REDACTED] also stated:

I can certify that no documents exist regarding [the beneficiary’s] employment with [REDACTED] after it merged into [REDACTED]. This would include [the beneficiary’s] payroll documents, detailed information relating to [the beneficiary’s] subordinates, company organizational charts, and samples of his work product that would demonstrate that he was employed as a manager prior to this transfer to the United States.

A chart provided further claimed details about the beneficiary’s work. The information in the chart is condensed below:

Function/Task within that function	% of time
Supervise 14 College Graduate Design Engineers	
Interview, select, hire and train new engineering personnel	1.0
Establish performance measurements. Measure employees against performance indicators and take appropriate action, e.g., promotions, demotions, and discipline.	1.9
Motivate and engage employees to meet and exceed their goals.	1.6
Supervise design, development, engineering and troubleshooting	
Develop the process of creating engineering drawings. Manage the design team to follow the process.	37.5
Provide technical support to design engineers.	20.0
Manage prototype development by meeting with design team.	3.5
Manage production meetings	
Manage production meetings and provide technical support	3.8
Coordinate all technical aspects of sales orders	
Provide technical assistance to sales team to determine if a tool can be made or not	12.5
Quality	
Define cross check procedure for design engineers, take remedial action	9.4
Define parameters for final testing during production	0.1
Day to day operations	
Make discretionary decisions regarding day to day operations	8.8

The petitioner asserted that the beneficiary’s former “position is clearly managerial” when compared to the description of an engineering manager position in the Department of Labor’s *Occupational Outlook Handbook*, which the petitioner quoted:

1. Make detailed plans for the development of new products and designs
2. Lead research and development teams that produce new products, processes, or designs
3. Check the technical accuracy of their team's work
4. Ensure the soundness of methods their staff uses
5. Coordinate work with other teams and managers
6. Propose budgets for projects and programs
7. Determine staff, training, and equipment needs
8. Hire, assign, and supervise staff

The petitioner stated that the beneficiary's duties abroad compared to the above list as follows:

- Manage the process of design, development, engineering and troubleshooting of [REDACTED] (Bullet 1 and 3)
- Supervise 14 College Graduate Design Engineers (Bullet 2, 4, 7 and 8)
- Manages production meetings (Bullet 5)
- Coordinate all technical aspects of sales orders (Bullet 5)
- Ensure Quality Control of Design Process (Bullet 3)

In the denial notice, the director found that Mr. [REDACTED] letter lacked detail about the beneficiary's duties, and did not explain "why a Deputy Department Manager would report to a VP instead of what might seem more likely, to a Department Manager." The director found that the petitioner's chart was "too broadly written to demonstrate what [the beneficiary] specifically did."

On appeal, the petitioner asserts that it has submitted highly detailed information to show that the beneficiary's "foreign position of Deputy Department Manager clearly meets the definition of managerial capacity." The petitioner describes some of the details provided in the chart submitted in response to the RFE, and states "[t]here is absolutely no indication . . . [that the beneficiary] is actually performing the duties necessary to produce a product or service" rather than managing the work of others in that respect. The petitioner also asserts that the director "arbitrarily" disregarded or failed to believe assertions in Mr. [REDACTED] letter, even though "it would be clear to a reasonable person that Mr. [REDACTED] has full authority to make assertions regarding the employment of a former [REDACTED] . . . employee." The petitioner contends that the director relied on "legal requirements that are not part of the statutory definitions."

2. Analysis

Upon review, we concur with the director's finding that the evidence of record does not establish that the beneficiary was employed abroad in a primarily managerial or executive capacity.

The director, in the RFE, requested specific evidence to shed further light on the beneficiary's role with the foreign company. The director was entitled to request this evidence under 8 C.F.R. § 204.5(j)(3)(ii). The petitioner asserts that Mr. [REDACTED] is in a position to know about the beneficiary's work in

Switzerland, and that the director's failure to give deference to that letter means that "USCIS believes that Mr. [REDACTED] letter must be either falsified or illegitimate."

The central issue involves corroboration. The burden of proof is on the petitioner to establish eligibility for the immigration benefit sought. See section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner cannot meet or relieve this burden by claiming, without elaboration, that no evidence exists relating to the beneficiary's claimed managerial duties abroad.

Here, Mr. [REDACTED] did not explain in his letter why the specific evidence discussed above does not exist. The petitioner stated: "As outlined in Mr. [REDACTED] aforementioned letter, copies of organizational charts, payroll summaries etc. were destroyed after the company was merged into [REDACTED]." Mr. [REDACTED] did not state that the documents were destroyed after the merger; he stated only that "no documents exist." Furthermore, the claimed destruction of pre-merger documents would not explain why there is no evidence of the beneficiary's "employment with [REDACTED] after it merged into [REDACTED]" (emphasis added). 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'l Comm'r 1972)).

The director requested specific evidence in keeping with the regulations at 8 C.F.R. §§ 103.2(b)(8)(iv) and 204.5(j)(3)(ii), and explained why that evidence is material to the proceeding. The petitioner's failure to submit the requested evidence is, itself, a ground for denial of the petition. See 8 C.F.R. § 103.2(b)(14). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). If a required document does not exist or cannot be obtained, the petitioner must demonstrate this and submit secondary evidence pertinent to the facts at issue. *Id.* It cannot suffice to assert, without explanation or corroboration, that the requested documents do not exist.

The director, in the denial notice, found that "the beneficiary's job title abroad is generic and does not seem likely to have been a job title which would have been given to a high managerial position." The petitioner takes issue with this finding, stating that the law does not require "a high managerial position" and that, therefore, the director has imposed impermissible new requirements. Viewed in context, the director did not require that the beneficiary have filled "a high managerial position." Rather, the director indicated that an official in "a high managerial position" would report directly to a vice president of the company, whereas a "Deputy Department Manager would . . . more likely [report] to a Department Manager."

The appellate brief, submitted by the petitioner's counsel, contains this response to the issue:

The U.S. equivalent to [the beneficiary's] foreign position is Engineering Manager. It is entirely plausible that a company could exercise its discretion in calling an Engineering Manager a Deputy Department Manager and that that Manager would report to a Vice President responsible for the function of Engineering.

The unsupported assertions of counsel do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The responsibility lies with the petitioner to corroborate such claims, not with USCIS to refute them.

Furthermore, the petitioner had previously claimed that the beneficiary reported to Mr. [REDACTED] an assertion that Mr. [REDACTED] himself contradicted when he stated that the beneficiary reported to a lower official. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-2 (BIA 1988). The petitioner has not provided this objective evidence, contending instead that it does not exist.

When examining the executive or managerial capacity of the beneficiary, we will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). 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). The actual duties themselves will reveal the true nature of the employment. *Id.*

The petitioner asserts that the petitioner "submitted a detailed chart outlining the position's daily duties, including . . . the percentage of time as well as the minutes spent on each duty." The chart provided specific percentage and time figures, despite the asserted lack of any documentary evidence from which the petitioner could have derived those figures. The tasks to which the petitioner claimed the beneficiary devoted most of his time received only vague, general descriptions. Phrases such as "[d]evelop the process of creating engineering drawings," "[m]anage the design team to follow the process," and "[p]rovide technical support to design engineers" refer to broad categories rather than identifiable activities, and their wording raises additional questions. For instance, "provide technical support" could refer to support from above or below, and therefore is not inherently managerial. As another example, the beneficiary is said to have spent 37.5% of his time – 60 hours per month – "[d]evelop[ing] the process of creating engineering drawings." The petitioner has not explained how "the process of creating engineering drawings" requires continuous development in this way.

Inconsistencies and questions regarding the petitioner's evidence serve to highlight the need for corroborating evidence. The contention that such evidence does not exist does not relieve the petitioner of its burden of proof. It is, rather, a concession that the petitioner cannot meet that burden. For this reason, we agree with the director's decision to deny the petition.

B. Duties in the United States

We now turn to the issue of whether the beneficiary will be employed in the United States 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. 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. 1108. We then consider the beneficiary's job description in the context of the employer'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.

Having conducted a review of these relevant factors in the matter at hand, we find that the petitioning entity's organizational structure, the beneficiary's job description, and examples of the beneficiary's work product indicate that the entity is reasonably capable of relieving the beneficiary from having to allocate his time primarily to non-qualifying operational tasks. Based on the evidence provided regarding the petitioning entity's organizational composition, the beneficiary's placement therein, and the job duties performed by the beneficiary, we find that the petitioner successfully established that it more likely than not has the ability to relieve the beneficiary from having to allocate his time primarily to the performance of non-qualifying tasks and that the beneficiary is more likely than not employed in a qualifying managerial or executive capacity.

The director found that there is "doubt about how much time the beneficiary actually spends performing operational tasks rather than delegating them." Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The level of doubt that the record engenders is not sufficient to prevent the petitioner from satisfying this standard of proof. We therefore withdraw the director's finding regarding the beneficiary's employment in the United States.

III. Conclusion

Although we are withdrawing the director's finding with respect to the beneficiary's duties in the United States, the director's finding still stands regarding the beneficiary's earlier employment abroad. We will dismiss the appeal for that reason.

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. at 128. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.