



U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **AUG 20 2015**

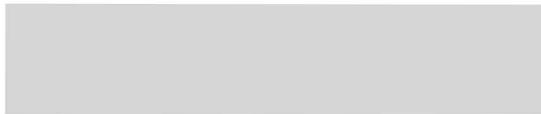
FILE#:

PETITION RECEIPT #:

IN RE: Petitioner:   
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page ([www.uscis.gov/i-290b](http://www.uscis.gov/i-290b)) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal was rejected as untimely filed and the petitioner subsequently filed a motion to reopen and reconsider. In light of new evidence submitted, we hereby grant the petitioner's motion in order to give this matter full consideration on the merits presented in the record. The appeal will be dismissed.

The petitioner is a Florida corporation that seeks to employ the beneficiary as its chief executive. 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 determined that the petitioner did not establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity and denied the petition on that basis.

On appeal, counsel disputes the director's decision dismissing the motion, contending that the decision to deny the petition is contradictory to U.S. Citizenship and Immigration Services' (USCIS') prior decisions to grant the petitioner's original and two extension L-1 petitions. Counsel focuses on the additional documents the petitioner submitted in support of the motion.

#### 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. Facts and Procedural History

The record shows that the petition was filed on February 17, 2012 and was accompanied by the petitioner's supporting statement, dated January 15, 2012, in which the petitioner described the nature of its business, the basis of its relationship with the beneficiary's former employer abroad, and the beneficiary's duties and responsibilities in his proposed position with the U.S. entity. The petitioner also provided corporate, financial, and business documents pertaining to the U.S. and foreign entities.

On May 18, 2012, the director issued a request for evidence (RFE), informing the petitioner that the record lacked sufficient evidence to meet certain eligibility requirements. Among the eligibility factors addressed in the RFE were the beneficiary's proposed employment with the petitioning entity. The director found that the petitioner had not submitted evidence to support the claim pertaining to the number of employees it had at the time of filing or to establish that the job duties the beneficiary would perform would be primarily within a qualifying managerial or executive capacity. Accordingly, the petitioner was instructed to provide payroll information pertaining to its employees, that included the employees' job descriptions and job titles, and to state whether the employees work on a part- or full-time basis.

In response, the petitioner provided payroll documents and tax documents establishing precisely whom it employed at the time of filing and the wages those employees received. The petitioner also provided a copy of its organizational chart naming the employees who were already working and indicating which positions remained to be filled. In addition, the petitioner provided several business contracts naming the beneficiary as the main contact person in each of the petitioner's purchase transactions as well as a supplemental job description listing the beneficiary's key job responsibilities.

After reviewing the record the director determined that the petitioner did not provide sufficient evidence to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. Therefore, the director issued a decision dated August 31, 2012, denying the petition.

## III. Issue on Appeal

As indicated above, the primary issue to be addressed in this proceeding is whether the petitioner provided sufficient evidence to establish the beneficiary's proposed employment with the U.S. entity would be primarily comprised of tasks within 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. 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 evidence to determine which employees comprise the petitioner's organizational hierarchy, what duties they carry out, and who within the organization was available to relieve the beneficiary from having to carry out the daily operational tasks at the time the petition was filed. As such, the petitioner's organizational chart and evidence of employee salaries are both highly relevant in helping to establish the petitioner's ability

to support the beneficiary in a position where the primary portion of his time would be allocated to tasks of a managerial or executive nature.

Turning first to the beneficiary's job description, we note that the beneficiary would allocate between ten and twenty hours of his time to various non-qualifying tasks, such as developing new business opportunities, conducting market and product research, and researching customers and their needs. We find that the underlying sales, marketing, and customer service nature of these tasks is operational rather than executive or managerial. In addition, while the petitioner claimed that the beneficiary would "[s]upervise office procedures and personnel including sales and clerical staff," the record shows that at the time of filing the beneficiary's only two subordinates included an accounts officer and a financial manager. Based on the job descriptions the petitioner provided for these two employees in its RFE response, neither can be deemed as either a sales or clerical employee. In fact, while the accounts officer's job description indicates that he would serve as a point of contact for customers and support an outside sales team, there is no indication that an accounts officer is a sales position and the petitioner provided no evidence to establish the existence of an outside sales team, which is referenced in the accounts officer's position. Despite the petitioner's claim that it is currently seeking to fill an executive secretary position, the record indicates that the position was vacant when the petition was filed.

The petitioner also indicated that the beneficiary would allocate ten hours weekly to creating and monitoring financial policies, budgets, and costs. However, the petitioner did not provide any information as to the specific policies that the beneficiary has created thus far or discussed the underlying tasks of creating budgets. The vague nature of the petitioner's statements does not convey a meaningful understanding of the actual tasks to be performed or what managerial or executive characteristics are inherent to the unknown tasks.

Next, we turn to the petitioner's staffing at the time of filing. While the petitioner objects to the director's focus on the size of the petitioner's personnel and the employees' respective wages, we find both factors to be relevant in determining the petitioner's eligibility in this instance, as they allow us to gauge the petitioner's ability to relieve the beneficiary from having to primarily engage in the daily operational tasks that would be deemed as non-qualifying. If the petitioner does not establish the existence of an adequate support staff, we can only conclude that the beneficiary would be required to assist with daily operational tasks and thus would not be able to spend his time primarily performing qualifying managerial or executive tasks. In the present matter, the record shows that the petitioner had a total of three employees, including the beneficiary, at the time of filing.

A review of the employee payroll documents indicates that two of the employees were employed on a part-time basis. While the petitioner asserts that the issue of whether the support personnel work on a full- or part-time basis is irrelevant, this assertion is incorrect. Information pertaining to the petitioner's support staff, including the hours they work and the duties they perform, is highly relevant in determining the means by which the petitioner plans to support the beneficiary in an executive or managerial or executive capacity. If the petitioner has few employees who provide their services on a limited part-time basis, it is reasonable for us to question the petitioner's ability to relieve the beneficiary from having to allocate his time primarily to the performance of non-qualifying operational and administrative tasks. Here, the evidence does not establish that the petitioner can support the beneficiary in a qualifying managerial or executive capacity with the

limited support staff it employed at the time the petition was filed. 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)). While the petitioner provided an organizational chart outlining its hiring plans, 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). As such, the petitioner's plan to hire additional employees is irrelevant to the issue of establishing the petitioner's ability to employ the beneficiary in a qualifying managerial or executive capacity at the time of filing.

On appeal, the petitioner cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1574 (N.D. Ga. 1988), to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. First, we note that the petitioner has not furnished evidence to establish that the facts of the instant petition are analogous to those in *National Hand Tool Corp.*, where the Fifth Circuit Court of Appeals decided in favor of the legacy Immigration and Naturalization Service (INS), or *Mars Jewelers, Inc.*, where the district court found in favor of the plaintiff. With respect to *Mars Jewelers*, we are not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before us, the analysis does not have to be followed as a matter of law. *Id.* at 719.

In both *National Hand Tool Corp.* and *Mars Jewelers, Inc.*, the courts emphasized that the former INS should not place undue emphasis on the size of a petitioner's business operations in its review of an alien's claimed managerial or executive capacity. We have long interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. However, consistent with both the statute and the holding of *National Hand Tool Corp.*, we have required the petitioner to establish that the beneficiary's position consists of primarily managerial or executive duties and that the petitioner will have sufficient personnel to relieve the beneficiary from performing operational and/or administrative tasks. Like the court in *National Hand Tool Corp.*, we emphasize that our holding is based on the conclusion that the beneficiary is not primarily performing managerial duties; our decision does not rest on the size of the petitioning entity. 889 F.2d at 1472, n.5.

Finally, we note that the petitioner's organizational chart illustrates a seven-person hierarchy, which includes two managerial positions and an executive secretary directly subordinate to the beneficiary, as well as an accounts officer and two deliver people subordinate to the business development manager. However, the record shows that four of those positions – the business development manager, executive secretary, and two deliver people – were vacant at the time the petition was filed. It is therefore possible, and even likely, that the beneficiary, in the absence of a number of support employees, would assume the various non-qualifying tasks that would otherwise be assigned to the positions that were vacant at the time of filing. Regardless, the petitioner did not establish that the staffing composition that was in place at the time of filing was sufficient to warrant employing the beneficiary in a capacity where the primary portion of his time would be spent performing tasks of a managerial or executive nature. 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. As previously indicated, 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).

Accordingly, in light of the deficient job description that does not reflect the petitioner's limited staffing at the time of filing, we cannot conclude that the petitioner was capable of employing the beneficiary in a qualifying managerial or executive capacity at the time of filing and on the basis of this 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, that burden has not been met.

**ORDER:** The appeal is dismissed.