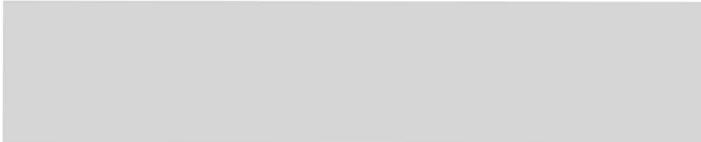




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE:

JUL 01 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:



INSTRUCTIONS:

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. The appeal will be dismissed.

The petitioner is an international airline based in [REDACTED] providing international passenger and cargo services with 29,000 employees worldwide and a gross annual income of \$12 billion. The petitioner seeks to employ the beneficiary as commander/pilot-in-command for its Boeing 777 aircraft. 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 did not establish: (1) that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity; and (2) that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

On appeal, the petitioner submits a brief disputing the director's conclusions.

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.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The petition was filed on December 23, 2013 and it was accompanied by supporting documents, including a letter from the petitioner describing the beneficiary's role as commander/pilot-in-command of its Boeing 777 aircraft. The petitioner stated that the beneficiary held the position of commander/pilot-in-command while employed by the petitioning airline abroad and would continue in that position in the United States.

The petitioner stated that the beneficiary directly manages a cockpit crew of two first officers and one second officer who are responsible for assisting the beneficiary and carrying out duties in accordance with normal operating procedures. The petitioner stated that the beneficiary would be in command of the aircraft at all times but could instruct the first officer to take command for "short periods" during the flight. According to the petitioner, the cockpit crew's duties include confirming the safe navigation of the aircraft, maintaining a continuous and independent check of the aircraft's geographical position, reporting problems to the beneficiary and volunteering advice, information or assistance to ensure the safety of the flight. The in-flight service manager manages 14 to 16 flight attendants. The petitioner stated that the beneficiary is "uniquely well-qualified to perform the stated managerial duties" and that "throughout his 19 years of employment, and 12 years in a specifically managerial role" the beneficiary has proven his ability to perform the duties required by the petitioner. The petitioner stated that the beneficiary is responsible for the mentoring, on-going training, and development of less experienced crew members. Specifically, the petitioner stated "management of further training is a critical and mandatory requirement of taking on the responsibility of commander/pilot-in-command."

Regarding the beneficiary's employment abroad, the petitioner stated the beneficiary has been employed as commander/pilot-in-command of its Boeing 777 aircraft based out of [REDACTED] flying long haul international routes since 1996. The petitioner stated that the beneficiary's duties abroad and in the United States are the same and are "managerial in nature."

On June 30, 2014, the director issued a request for evidence (RFE) informing the petitioner of various deficiencies and requesting additional supporting evidence. The director addressed, in part, the beneficiary's proposed and prior position and instructed the petitioner to provide evidence such as a statement listing the beneficiary's specific daily job duties and the percentage of time the beneficiary would spend carrying out each duty. The director requested a list of the employees on

the beneficiary's team, their specific duties, educational level, and salary information. The director also requested detailed organizational charts.

The petitioner responded with a letter dated September 8, 2014, reiterating much of the same information previously provided. The petitioner stated that the beneficiary was employed abroad from 1996 until 2011 and that he was employed as a captain/pilot-in-command abroad and will continue in that role in the United States. The petitioner stated that the commander/pilot-in-command is designated to fly a specific flight and that in this role the beneficiary had been and would be wholly responsible for the navigation of the aircraft and the safety of the passengers aboard. The petitioner explained that the beneficiary "spends his entire time on the aircraft commanding and flying the plane" and that he has full discretion and full authority over all crew members. The petitioner stated that the beneficiary executes his duties primarily according to procedures developed by the airline but he has the authority to vary procedures when necessary to ensure passenger safety. The petitioner acknowledged the director's RFE but explained that it could not provide a list of employees or their salaries because the job is "nontraditional" in that the beneficiary's crew changes, having different crews for different international flights. In addition to the letter, the petitioner provided pay documentation for the beneficiary and a generic organizational chart for a typical Boeing 777/747 cabin crew that corroborates the basic positions as identified in the petitioner's letter.

On September 30, 2014, the director denied the petition after finding that the petitioner did not establish that the beneficiary had been or would be employed in a qualifying capacity. The director found that the petitioner did not sufficiently respond to the RFE or otherwise establish that the beneficiary would primarily perform managerial or executive duties. The director also found that the petitioner provided insufficient evidence to establish that the beneficiary supervises and controls the work of other supervisory, professional or managerial employees.

On appeal, the petitioner asserts that the director erred and that the beneficiary's duties as commander/pilot-in-command are consistent with the statutory definition of "executive capacity."

III. ISSUES ON APPEAL

Upon review, and for the reasons stated below, we find that the petitioner did not establish that the beneficiary was employed abroad or would be employed in the United States in a qualifying managerial or executive capacity.

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). In this matter, the petitioner provided a general description of the beneficiary's role as commander of a large commercial passenger aircraft which included piloting the plane, and managing, mentoring and training crew members. The petitioner's vague description provided little insight into how the beneficiary would spend his time during the flight, nor does it identify any specific tasks he would perform other than piloting the plane. Moreover it is unclear whether the beneficiary has any responsibilities other than

those directly related to flight and pre-flight activities, such as training activities conducted on the ground. 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).

Nevertheless, the petitioner's assertion that the beneficiary spends his time commanding and flying the plane while allowing the first officer to take command for "short periods" leads us to conclude that the beneficiary would spend the majority of his time, or even substantially all of his time, flying the aircraft, a non-managerial duty. The director specifically requested a description of the beneficiary's specific duties and a percentage of time he would spend on those duties but the petitioner did not comply with this request. Therefore, although the petitioner claimed that the beneficiary has other duties, we cannot determine that he has been or would be primarily employed in a qualifying managerial capacity, as claimed. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 204.5(j)(4)(i). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 204.5(j)(2). According to the record, the beneficiary directly supervised his cockpit crew and the in-flight service manager while commander during a flight, but there is insufficient evidence to establish the beneficiary has the authority to hire and fire employees, recommend those actions or take any other personnel actions.

In addition, we find that the petitioner failed to provide information regarding its employees or a detailed organizational chart, as requested by the director. In response to the director's request, the petitioner stated that the composition of the beneficiary's flight crews fluctuates; however, the petitioner provided no additional information regarding employees or organizational charts in support of its petition. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

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). Here, we acknowledge the critical nature of the beneficiary's duties as commander of a commercial passenger

plane, and his decision-making authority within the context of each flight. However, as discussed above, the petitioner's statements reflect that the beneficiary spends nearly all of his time commanding and flying the plane, allowing the first officer to relieve him for only short periods. We agree with the director's determination that if the beneficiary is primarily piloting the aircraft he cannot also be primarily performing qualifying managerial or executive duties. 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'r 1988).

These same deficiencies apply to the petitioner's description of the beneficiary's former role and duties as a commander and pilot-in-command with the company's overseas operations. As noted by the director, the petitioner failed to provide a detailed organizational chart for the foreign entity or provide position descriptions for the foreign entity's employees. Because the petitioner relied upon the same evidence to establish that the beneficiary has been employed in a managerial or executive capacity in his role abroad as a commander/pilot-in-command prior to transferring to the U.S. in the same role, we find that the petitioner failed to submit evidence sufficient to establish that the beneficiary had been employed in a qualifying capacity for all of the reasons discussed above.

On appeal, the petitioner disagrees with the director's decision and asserts that the beneficiary's duties fall within the regulatory definition for "executive capacity." Specifically, the petitioner asserts that the beneficiary "directs the management" of the flight from pre-takeoff to arrival, has absolute discretion over activities during flight, exercises authority which includes "establishing operating procedures and process to be followed and ensuring procedures and processes are followed." The petitioner asserts that the beneficiary is the ultimate authority onboard having no direction or supervision in the course of carrying out his duties.

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.*

In this matter, the petitioner asserts on appeal that the beneficiary is "vested with executive authority at all times" when performing his duties. While this assertion may be true it does not establish the

beneficiary in an executive capacity where the record indicates that his primary duty is piloting the plane. Further, the petitioner's assertion that the beneficiary's duties meet the elements of the statutory definition is not persuasive, as the record establishes that the beneficiary has authority to ensure the crew follows established policies and procedures but it does not support the petitioner's assertion that the beneficiary establishes goals, policies and procedures, aside from emergency decision making. Furthermore, we note and agree with the director's finding that the petitioner failed to provide an organizational chart depicting the beneficiary's supervisor or the beneficiary's position within the organization's hierarchy. Again, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

We acknowledge that the regulations do not require one to "constantly perform executive acts" since no beneficiary is required to allocate 100 percent of his time to managerial- or executive-level tasks; however the petitioner must establish that any non-qualifying tasks the beneficiary performs are only incidental to the position. Again, 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, we conclude that the petitioner did not establish that it would employ the beneficiary in a qualifying managerial or executive capacity or that the beneficiary was employed in a qualifying managerial or executive capacity abroad. Therefore, this petition cannot be approved.

IV. NONIMMIGRANT APPROVALS

We acknowledge that the beneficiary has been granted classification as a nonimmigrant L-1A intracompany transferee in a managerial or executive capacity. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant I-129 L-1 petitions. See, e.g., *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. Cf. §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427.

If the previous nonimmigrant petitions were approved based on the same evidence that is contained in the current record, such approvals would constitute material and gross error on the part of the director. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). In both the request for



evidence and the final denial, the director clearly articulated the objective statutory and regulatory requirements and applied them to the case at hand. As discussed, the beneficiary's primary performance of non-managerial and non-executive duties precludes a finding that he has been or would be employed in a qualifying managerial or executive capacity.

V. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative 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.