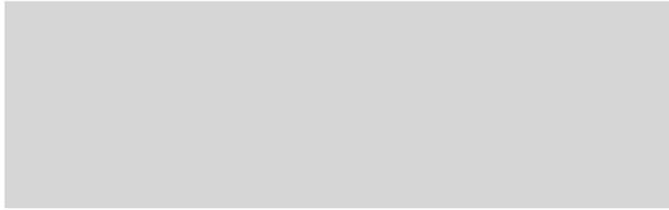




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JUL 30 2015

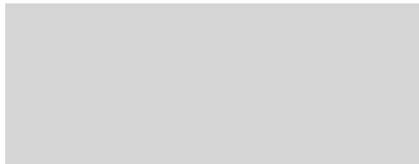
FILE # [REDACTED]
PETITION RECEIPT #: [REDACTED]

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) 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 petitioner subsequently filed an appeal to the Administrative Appeals Office (AAO), which we summarily dismissed, as well as a motion to reopen, followed by a motion to reconsider. After dismissing the petitioner's first motion, we remanded the petition to the director for the inclusion of missing record evidence. We requested that the director return the record to us for adjudication once the record was complete.

On May 15, 2014, the director issued a request for evidence, and on October 15, 2014, the director denied the petition due to the petitioner's lack of response without returning the record to us as instructed. The record is now before us on a motion to reopen. We do not have jurisdiction over motions filed on service center decisions; that jurisdiction rests with the office that denied the petition. *See* 8 C.F.R. § 103.5(a)(1)(ii) (stating that the official with jurisdiction over a motion "is the official who made the latest decision in the proceeding."). However, as a matter of administrative discretion, we will consider the merits of the motion on certification.¹ The director's decision will be affirmed and the petition will remain denied.

The petitioner filed the Immigrant Petition for Alien Worker (Form I-140) to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner, a [REDACTED] corporation established in [REDACTED], states that it engages in auto sales and marketing research with four current employees and a gross annual income of \$1,104,693.22. The petitioner seeks to employ the beneficiary as its President.

The director initially denied the petition concluding that the evidence of record did not establish that the beneficiary will be employed in the United States in a qualifying managerial or executive capacity. As noted above, we ultimately remanded the matter to the director in order to complete the record, and the director issued a new decision denying the petition for abandonment based on the petitioner's failure to respond to a request for evidence (RFE) issued on May 15, 2014. The petitioner filed a subsequent motion, which we have certified for review.

After completing an initial review of the record of proceeding, we issued a notice of derogatory information and request for additional evidence on April 28, 2015. The petitioner submitted a timely response to this notice which has been incorporated into the record of proceeding.

I. THE LAW

Section 203(b) of the Act states in pertinent part:

¹ Like any USCIS office, we may avail ourselves of the certification process. *See* 8 C.F.R. § 103.4(e). As a matter of administrative discretion, we may certify a decision to ourselves for review. We limit the practice to cases involving exceptional circumstances; it "is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations" *Matter of Jean*, 23 I&N Dec. 373, 380 n 9 (AG 2002). The present case, involving the director's failure to return the record of proceeding to us prior to issuing a final decision, warrants such review. We suspended the 30-day briefing period and will instead consider the petitioner's brief on motion. *See* 8 C.F.R. § 103.4(a)(3).

(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.

Finally, 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. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in an executive or managerial capacity in the United States.

1. Facts

The petitioner filed the Form I-140 on November 21, 2011. In support of the petition, the petitioner submitted a letter, dated November 18, 2011, stating that its business is to "provide marketing services to companies in the United States." It described the beneficiary's position in the United States as follows:

In the position of President, [the beneficiary] will be responsible for continuing the company on a sound financial footing, establishing goals and policies of the company, providing direction, hiring new personnel, establishing new business partnerships, negotiating contracts, conducting market research, promoting the marketing effort, and overseeing the transfer of vehicles.

The petitioner went on to state that, aside from the beneficiary, it has hired an office assistant, two commission-based sales agents, and a chief financial officer. The petitioner stated on the Form I-140 that it had four employees as of the date of filing.

The petitioner did not submit any additional information regarding the beneficiary's position in the United States, its current staff, or its organizational structure.

The director issued an RFE on March 22, 2012; however, the record does not contain a copy of the actual RFE or the petitioner's response, which, according to the director's decision, was received on June 15, 2012.

The director originally denied the petition on August 10, 2012, concluding that the petitioner did not establish that the beneficiary will be employed in a primarily managerial or executive capacity. In denying the petition, the director found that the petitioner did not present sufficient evidence to establish that the beneficiary had subordinates to carry out non-managerial duties associated with the company's day-to-day operations. The director found that the beneficiary's actual time devoted to non-qualifying functions would exceed that which is spent on managerial or executive duties for the U.S. company. *See* section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44).

The petitioner subsequently filed an appeal, which we summarily dismissed on May 23, 2013 based on the petitioner's failure to identify an erroneous conclusion of law or statement of fact as a basis for the appeal. *See* 8 C.F.R. § 103.2(a)(1)(v).

In support of its motion to reopen filed on June 25, 2013, the petitioner submitted its IRS Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2012, indicating that it had one employee and paid \$10,500 in wages, tips, and other compensation. The petitioner also submitted its IRS Form 1120, U.S. Corporation Income Tax Return, for 2011, indicating that it paid \$42,000 in compensation of officers, \$0 in salaries and wages, and \$0 in costs of labor during the year in which the petition was filed. On its subsequent motion, the petitioner submitted its IRS Form W-2, Wage and Tax Statement, for the beneficiary indicating that he received \$21,000 in wages, tips, and other compensation in 2010, and \$42,000 in wages, tips, and other compensation in 2011.

The petitioner also submitted its IRS Form 1120 for 2012, indicating that it paid \$42,000 in compensation of officers, \$0 in salaries and wages, \$3,894 in costs of labor, and \$5,000 in "office help." The petitioner also submitted its 2012 IRS Form W-2 for the beneficiary indicating that he received \$42,000 in wages, tips, and other compensation in 2012. The petitioner also submitted two IRS Forms 1099-MISC for 2012 indicating that [REDACTED] received \$3,894 and [REDACTED] received \$5,000 in nonemployee compensation in 2012. The petitioner did not submit any IRS Forms 1099-MISC for 2011.

On February 4, 2014, we remanded the petition to the service center director and requested that the record be completed to include the original RFE and response, or supplemented with a new RFE and response from the petitioner. On October 15, 2014, the director denied the petition due to the petitioner's failure to respond to the new RFE. The petitioner subsequently filed a motion, which is now before us on certification. The petitioner has submitted additional relevant evidence in response to the request for evidence issued on May 15, 2014.

The petitioner submitted a letter dated June 13, 2012, describing the beneficiary's duties in the United States as follows:

As President of the company, the beneficiary performs a functional managerial role and manages a professional member of his staff.

* * *

The beneficiary's primary functional management duties are to:

Oversee the procurement and sales process – On a daily basis, his Sales Staff presents him with multiple opportunities to purchase and sell automobiles. His Sales Staff locates cars and accumulates the vital information about each car. . . . The beneficiary is responsible for reviewing this data and determining the value, condition and marketability of every car. From this he determines which car to purchase or sell as well as which outlet it would be most profitable to sell through. He makes the final decision on bidding for a car and he is the one who is solely authorized by the State of New Jersey to sign all documents of title and sale. His Office Assistant and Sales Agents will then see to it that the car is delivered to them, is prepped for delivery to a customer, or arrangements are made for shipping overseas. (60% of his role)

Oversee new business and marketing opportunities – His Sales Staff and Chief Financial Officer are constantly on the lookout for new marketing opportunities. These opportunities may include local car dealerships hoping to market to the Asian community or car dealers hoping to export their used cars to foreign countries. Once an opportunity is discovered, his staff accumulates financial data and his staff presents the beneficiary with market research for his review. He will then decide on the best way for the business to grow and which opportunities would fit within the company's marketing plan; he will review the financial aspects of the opportunity and review the limitations of his budget; set the tone and parameters for a negotiation; confer with the Chief Financial Officer and company lawyer; monitor the negotiation of the terms of an agreement; and sign off on the final approval. (25% of his role)

In these roles, the beneficiary has the sole authority over financial and budgeting issues; contracts; and strategic decision-making all of which have a direct and significant impact on the company's profits and operations.

The balance of his time (15%) is spent on the executive functions of operating the business including supervising the Chief Financial Officer on issues of finance; overseeing licensing, communications, banking, and advertising issues conducted by his Office Assistant; and overseeing sales issues that arise with the Sales Staff.

In his executive capacity, the job of the President is to provide leadership to position the company in the most favorable way possible; develop and implement a strategic plan to advance the company's mission and objectives; promote revenue, profitability and growth;

and oversee company operations to insure production efficiency, quality, service, and cost-effective management of resources. . . .

With regard to the supervision of a professional, the President supervises the work of the Chief Financial Officer by reviewing activity reports and financial statements to determine progress and status By nature of the duties of the Chief Financial Officer's job and his university degree, we believe that he qualifies as a professional. This supervision of a professional should therefore qualify the beneficiary as a Manager or Executive.

In the same letter, the petitioner stated that the Office Assistant has a bachelor of science degree in commerce and indicated that she is responsible for managing and maintaining the beneficiary's schedule; communicating with clients, sales staff, and government officials; conducting research and preparing materials for the beneficiary to review; creating presentations and spreadsheets; arranging for delivery of the cars; preparing expense reports and bills; and entering and updating information into company computers. The petitioner stated that the Chief Financial Officer also has a bachelor of science degree in commerce and indicated that he is responsible for preparing financial statements; account analysis and reconciliation; general ledger closings; interfacing with tax accountants; and preparing project reports and financial analysis for new business opportunities. Finally, the petitioner stated that the two sales staff members seek out buying and selling opportunities, accumulate sales and marketing data for presentation to the beneficiary, deliver automobiles to customers, and arrange for cars to be shipped overseas.

The petitioner submitted its organizational chart depicting the beneficiary at the top tier of the hierarchy as President, supervising an Office Assistant, [REDACTED] a Chief Financial Officer, [REDACTED] a "Vehicle Procurement and Sales" position; and a "Business Development" position. According to the organizational chart, both the "Vehicle Procurement and Sales" and "Business Development" positions supervise "various Scouts and Sales Staff/Agents." The organizational chart briefly lists job duties for each of the positions. For example, it indicates that the President oversees the procurement and selling processes, acts as the Business Development Manager, and performs administrative functions such as licensing, banking, and advertising; the "Vehicle Procurement and Sales" position reviews the information provided by the sales staff and determines the value, condition, and marketability of each vehicle, makes final decisions on biddings performed at various car auctions, and signs off on all documents relating to sales and titles; and the "Business Development" position reviews financial data and the results of market research while accounting for the budget prior to approving any opportunities for growth presented by the sales staff. The brief job duties for the office assistant, chief financial officer, and sales staff are similar to those described in the petitioner's letter above.

The petitioner submitted its IRS Form 941 for each quarter in 2011, 2012, 2013, 2014, and for the first quarter of 2015. Each of the IRS Forms 941 state that the petitioner had one employee and paid \$10,500 in wages, tips, and other compensation. The petitioner re-submitted its IRS Form 1099s for 2012, along with evidence that it issued three Form 1099s in 2013 and five Form 1099s in 2014.

2. Analysis

Upon review, and for the reasons discussed herein, the petitioner has not established that it will employ the beneficiary 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). As discussed above, a detailed job description is crucial, as the duties themselves will reveal the true nature of the beneficiary's foreign and proposed employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2nd Cir. 1990).at 1108. We consider this information in light of other relevant factors, including (but not limited to) job descriptions of the beneficiary's subordinate employees, the nature of the business conducted by the entities in question, the size of the subordinate staff of the entity in question, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role within the petitioning entity.

The petitioner's description of the beneficiary's duties does not establish that the beneficiary will be employed in a qualifying managerial or executive position. The petitioner has not provided sufficient information detailing the beneficiary's duties at the U.S. company to demonstrate that these duties qualify him as a manager or an executive. At the time of filing, the petitioner characterized the beneficiary's role as president and briefly described his duties in very broad terms, noting that he will be responsible for continuing the company on a sound financial footing and that he will establish goals and policies of the company, provide direction, hire new personnel, establish new business partnerships, negotiate contracts, conduct market research, promote marketing, and oversee the transfer of vehicles. Such duties are not indicative of a position that is executive or managerial in nature.

On appeal, the petitioner submits a new list of job duties for the beneficiary's position in the United States and allocates percentages of time to a grouping of duties. The petitioner provides a broad and vague list of job duties that again do not indicate what actual specific day-to-day tasks will be involved with the completion of each general area of responsibility. The petitioner states that the beneficiary will be a function manager and describes his duties as follows: oversee the procurement and sales process - 60% of his time; oversee new business and marketing opportunities - 25% of his time; and executive functions, such as supervising the chief financial officer on issues of finance; overseeing licensing, communications, banking, and advertising issues conducted by his office assistant; and overseeing sales issues that arise with the sales staff – 15% of his time.

The petitioner did not break down the beneficiary's daily duties or elaborate sufficiently on any of the groups of duties listed, as shown above. The information provided by the petitioner on motion and in response to the RFE does not clarify or provide more specificity to the original duties of the position, but rather provides a new set of job duties loosely related to those previously submitted. 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 petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. 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. *Id.*

The petitioner states that the beneficiary will be a function manager and claims that the list of job duties with percentages indicates that the beneficiary spends 60% of his time devoted to managing the procurement and sales process for vehicles. However, absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, we cannot determine what proportion of his duties would be managerial or executive, nor can we deduce whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

While we acknowledge that no beneficiary is required to allocate 100% of his or her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Therefore, the size of a petitioning company may be used for the purpose of determining who within the organization would be available to perform the necessary, non-qualifying tasks, such that the beneficiary is relieved from having to allocate the primary portion of his time to tasks that are not within a qualifying managerial or executive capacity. Neither the petitioner's reasonable needs nor its stage of development can be used to support a favorable finding when the petitioner is unable to establish that the beneficiary would spend his time primarily performing tasks within a qualifying capacity.

In the instant matter, the petitioner claims to have four staff members and contends that the sales staff seeks out the vehicles for purchase and sale and provides all of the necessary information to the beneficiary for his final decision on each transaction. In support of this claim, the petitioner asserts the beneficiary exclusively makes the final decisions and does not perform the specific tasks necessary to carry out the buying and selling of vehicles. However, at the time of filing the petition, on November 21, 2011, the petitioner failed to establish that it had any employees to carry out the non-qualifying operational and administrative tasks of its U.S. company.

The petitioner's IRS Forms 1120 for 2011 and 2012, along with IRS Forms 941 for the same periods, indicate that it only had one employee in 2011, the beneficiary, and made no additional payments to outside contractors or commissioned employees. Although the individuals identified as the petitioner's chief financial officer and office assistant received a total of \$8,894 in payments in 2012, the petitioner has not established that either of these individuals provided services to the company in 2011 when the petition was filed.

Accordingly, these individuals could not relieve the beneficiary from performing non-qualifying operational and administrative duties in 2011. 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).

Therefore, although the petitioner claimed on the Form I-140 that it had four current employees at the time of filing, it has documented the employment of only one employee and no contractors or commissioned staff. The record does not support a finding that the beneficiary, as the sole employee of the petitioner's car dealership, would be performing primarily managerial or executive duties as of the date of filing. Rather, it is reasonable to believe that he was performing the non-qualifying operational and administrative tasks assigned to the claimed subordinates, including purchasing, sales, customer service, business development and day-to-day financial and administrative tasks that do not fall within the definitions of managerial or executive capacity. 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 Int'l.*, 19 I&N Dec. at 604.

Due to the deficiencies discussed above, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity in the United States. Accordingly, the director's decision to deny the petition will be affirmed.

III. 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 director's decision is affirmed. The petition is denied.