



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **JUN 22 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:

[Redacted]

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 petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner develops critical power solutions and is engaged in development of engineered industrial products. It seeks to employ the beneficiary as continuous improvement director at its [REDACTED] Wisconsin location. The petitioner asserts that it currently has 2800 employees and had a gross annual income of \$1,184.2 million in net sales in 2012. 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 evidence of record did not establish that it will employ the beneficiary in a qualifying managerial or executive capacity in the United States.

The petitioner appeals the decision asserting that the director misapplied the law and facts, and misinterpreted or ignored evidence submitted. The director declined to treat the appeal as a motion and forwarded the appeal to us for review. On appeal, the petitioner submits documents and a brief disputing the director's adverse findings.

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.

Additionally, the regulations at 8 C.F.R. § 204.5(j)(3)(i) state that the petitioner must provide the following evidence in support of the petition in order to establish eligibility:

- (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
- (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
- (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
- (D) The prospective United States employer has been doing business for at least one year.

II. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The sole issue is whether the petitioner established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

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.

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. Section 101(a)(44)(C) of the Act.

A. Facts

The petitioner filed its Form I-140, Immigrant Petition for Alien Worker, on January 8, 2014. The petitioner claims to be doing business as [REDACTED]. It also claims to be a subsidiary of [REDACTED] and affiliated with the beneficiary's foreign employer, [REDACTED], which is also a subsidiary of [REDACTED].

The petitioner claims that the beneficiary is currently employed as its continuous improvement manager. The record shows that the beneficiary was initially approved to work in an L-1A non-immigrant status in the United States for [REDACTED] but he was physically placed at the [REDACTED] subsidiary location in Wisconsin. The petitioner filed this petition in order to have the beneficiary permanently employed with the petitioner (which is doing business as [REDACTED]). The petitioner stated that the beneficiary was previously employed abroad with an affiliate, [REDACTED] from 2002 until his transfer to the United States in May 2013.

The petition was filed on January 8, 2014 with a supporting letter stating that the beneficiary develops and supports continuous improvement strategies and initiatives throughout the business including operational, commercial, service, and sourcing excellence. The petitioner provided the following list of the beneficiary's nine general responsibilities:

- Managing and leading the Continuous Improvement department, whose initiatives involve lean improvements including manufacturing, business processes, service, and supply base;
- Managing, leading, and developing employees in the department including handling all aspects of human resource management for the department;

- Making hiring decisions, managing goals and objectives, evaluating performance, deciding on compensation and rewards, and other related activities by following the human resources policy of the company;
- Leading productivity improvement events to teach employees how to spot and eliminate waste in business processes;
- Leading and supporting efforts to achieve commercial excellence to grow the aftermarket parts and service business;
- Emphasizing and focusing on the continuous improvement work team to ensure it complies with sourcing excellence, operational excellence, commercial excellence, and service excellence;
- Working closely with supply chain, operations, and distribution on Customer Focused Initiatives (CFI) including supporting improved aftermarket parts delivery performance and shortened lead times;
- Working with supply chain and quality organizations on improving supplier development and performance; and
- Working with operations to make operational improvements including supporting manufacturing in implementation of the [REDACTED] Manufacturing Learning System ([REDACTED]); leading and participating in the development of [REDACTED] and lean systems techniques, trainings, scheduling, manufacturing, standardizing work processes, and error proofing.

In addition, the petitioner explained that the beneficiary managed one subordinate; continuous improvement leader, [REDACTED]. The petitioner submitted a document entitled "Job Description," dated July 2012, which indicated that in the position of continuous improvement leader, Ms. [REDACTED] performed such duties as: managing project teams for productivity improvement and cost reduction; managing training and facilitation of continuous improvement work teams (project teams that can range from work teams of 8 to 10); managing and accountability for budget performance and cost savings; maintaining records, reports and systems for the department; working closely with supply chain, operations, and distribution on customer focused initiatives; working with operations to make operational improvements; and supporting manufacturing in implementation of [REDACTED] and participating in the development of [REDACTED] Systems and techniques. The duty description required an employee with a bachelor's degree in business, operations, supply chain, engineering or similar fields. Ms. [REDACTED] resume indicated that she had a bachelor's degree in international business.

The petitioner also provided an organizational chart dated March 2013; the document was also dated December 19, 2013 in the lower right corner. The chart depicted the beneficiary as continuous improvement director supervising his single subordinate, [REDACTED], as continuous improvement leader. No other positions or employees were listed as subordinate to the beneficiary.

On June 17, 2014 the director issued a request for evidence (RFE) instructing the petitioner to provide, *inter alia*, evidence to establish that the beneficiary will primarily perform in a managerial or executive capacity such as: the beneficiary's specific daily tasks and the percentage of time the beneficiary would spent on those tasks, degree and pay documentation for [REDACTED] and a list of

the beneficiary's subordinates and [REDACTED] subordinates. The director requested a list of all employees or contractors employed in the beneficiary's department.

In response to the RFE, the petitioner provided a letter, dated August 25, 2014, stating that the beneficiary was employed with [REDACTED] in the United States as continuous improvement director since May 2013 and was occupying the same position with the petitioner since January 2014. The petitioner provided the following second duty description which included a percentage of time the beneficiary allocated to each of his four categories of responsibilities as follows:

- Managing and leading the Continuous Improvement department (52%), whose initiatives involve:
 - Continuous improvement strategy, reorganizing and restructuring the Continuous Improvement department at [REDACTED] ensuring it complies with sourcing excellence, operational excellence, commercial excellence, service excellence and business excellence;
 - Leading productivity improvement events to teach employees how to spot and eliminate waste in business processes;
 - Working with operations to make operational improvements including supporting manufacturing in implementation of the [REDACTED] Manufacturing Learning System ([REDACTED]); leading and participating in the development of [REDACTED] and lean systems techniques, trainings, scheduling, manufacturing, standardizing work processes, and error proofing;
 - Leading and supporting efforts to achieve commercial excellence to grow engine sales and aftermarket parts;
 - Leading and supporting efforts to achieve service excellence to grow the service business;
 - Working closely with supply chain, operations, and distribution on Customer Focused Initiatives (CFI) including supporting improved aftermarket parts delivery performance and shortened lead times;
 - Creating, leading and supporting cross departmental teams, working in business problem solving; and
 - Developing strategy and necessary activities for the cultural renew of the company.
- Managing personnel and developing talent (22%), including:
 - Managing, leading, and developing employees in the Continuous Improvement department;
 - Making hiring decisions, evaluating performance, deciding on compensation and rewards, managing goals and objectives, and other related activities;
 - Developing personnel talent from different departments through rigorous coaching program; and
 - Mentoring personnel from different departments.

- Developing and deploying [REDACTED] initiatives (20%):
 - Actively participating in development of corporate strategic initiatives and deployment of corporate initiatives at [the petitioner]; and
 - Representing [petitioner] at other manufacturing and continuous improvement corporate groups.
- Facilitating and developing [REDACTED] Continuous Improvement support and guidance by serving as liaison and support for Continuous Improvement between [REDACTED] divisions (12%).

The petitioner provided a second organizational chart, dated August 7, 2014, depicting the beneficiary as continuous improvement director, subordinate [REDACTED] and a newly added second continuous improvement leader position which was vacant.

After reviewing the petitioner's submissions, the director determined that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The director acknowledged the petitioner's submission in response to the RFE, which included the list of the beneficiary's four categories of responsibilities, the percentages of time spent on them, and the bulleted initiatives grouped under each category of responsibilities. The director found that the petitioner identified responsibilities but did not describe actual tasks associated with those responsibilities to demonstrate how the beneficiary spent his day. The director did not find adequate support in the record to establish that the beneficiary would be primarily performing in a qualifying managerial or executive capacity, and denied the petition on November 5, 2014.

B. Analysis

When examining the executive or managerial capacity of a given position, we review the totality of the record, starting first with the petitioner's description of the beneficiary's 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). Also critical to this analysis are factors such as staffing size, job descriptions of the beneficiary's subordinates and other employees who will carry out the petitioner's daily operational tasks, the nature of the business conducted, and any other facts that may contribute to a comprehensive understanding of the beneficiary's actual role within the petitioning organization.

The petitioner provided the beneficiary's job description with a percentage breakdown of his overall responsibilities and initiatives, and a generalized list of duties that fail to include specific tasks that demonstrate how the beneficiary will actually spend his day. 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 not provided any detail or explanation of the beneficiary's activities in the course of her/his daily routine. The actual duties themselves will reveal the true nature of the employment. *Id.* at 1108.

The petitioner has not sufficiently established that the beneficiary will primarily perform in a qualifying capacity. According to the petitioner, the beneficiary will spend 52% of his day managing and leading the department but as a part of those duties, the beneficiary would participate in the development of systems, a nonqualifying duty. The description indicated that the beneficiary would dedicate at least 32% of his time to non-qualifying duties such as developing and deploying or facilitating its parent company's initiatives. Finally, the beneficiary would devote 22% of his time to personnel management issues which would include all aspects of the human resources tasks and necessarily including non-qualifying duties. Aside from the obvious discrepancy that the beneficiary's time allocation amounts to more than 100%, the petitioner has not provided sufficient evidence to establish that the beneficiary will be primarily engaged in a qualifying capacity. 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).

We acknowledge the petitioner's claim on appeal that the beneficiary "spends approximately 20% of his time participating in senior level company strategic meetings to develop corporate initiatives as well as representing (the petitioner) at external meetings and conferences." The petitioner concludes that the beneficiary actually spends 72% of his time managing a key department and essential function. However, the petitioner failed to discuss this new assertion or explain why it is inconsistent with the beneficiary's duty descriptions contained in the record. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On appeal, the petitioner also asserts that the director erred by failing to consider the nature of the beneficiary's position as a functional and personnel manager.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See sections 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).

In this matter, the petitioner asserts that the beneficiary serves as director of the petitioner's continuous improvement department and has a single subordinate employee holding the position of

continuous improvement leader. The petitioner's organizational chart at the time of filing corroborates that this is the sole subordinate position. The director questioned the petitioner's claim that 22% of the beneficiary's time would be spent on personnel issues since the beneficiary had only one subordinate employee. On appeal, the petitioner asserts that the beneficiary spent 22% of his time managing personnel because at the time of filing there was an "open position within the Continuous Improvement Department" for which the beneficiary was recruiting but the director did not consider. We note that the record demonstrates a second continuous improvement leader position was not included on the petitioner's organizational chart until August 2014, well after this petition was filed. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). As to this point, we note that even if the petitioner had established that 22% of the beneficiary's time was in a qualifying capacity managing personnel, it would still be insufficient to establish that the beneficiary was primarily engaged in qualifying duties overall.

Furthermore, after assessing the beneficiary's job duties in light of the petitioner's organizational chart and other evidence of the petitioner's staffing at the time of filing, it cannot be concluded that the petitioner was adequately staffed to relieve the beneficiary from having to allocate his time primarily to the performance of non-qualifying tasks. As a part of the initial filing and on appeal, the petitioner refers to other employees in different departments, cross-departmental teams, project teams, and "continuous improvement work teams" allegedly under the management or supervision, on loan or by project, of the beneficiary. However, the petitioner provided insufficient evidence to demonstrate the identity or availability of any additional employees or contractors to support the beneficiary in his department. Moreover, in regards to the beneficiary's only subordinate, the petitioner failed to provide evidence expressly requested by the director, such as the subordinate's degree documentation or evidence of her salary. 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). Given that the petitioner's continuous improvement department is comprised of the beneficiary and a single employee, even if a professional employee, it is reasonable to assume that the beneficiary would assist in carrying out the operational duties of the continuous improvement department for the organization.

In reviewing the relevance of the number of employees a petitioner has, the 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)). Furthermore, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a

"shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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 Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. at 604. As discussed, the petitioner provided an insufficient duty description and insufficient evidence to establish that the beneficiary primarily manages the function as opposed to performing the duties of the function. Therefore, the petitioner has not established that the beneficiary manages an essential function.

Accordingly, based on our review of the totality of evidence, we find that the evidence of record has not established that the petitioner would employ the beneficiary in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

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 appeal is dismissed.