



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE:

JUN 26 2015

FILE #:



PETITION RECEIPT #:



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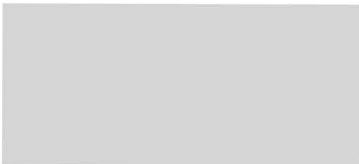
Petitioner:



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

The petitioner is a New York corporation that is engaged in the distribution of silver jewelry. It seeks to employ the beneficiary in the United States as its president. 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 failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

On appeal, the petitioner submits a brief and additional evidence and asserts that the director's decision was erroneous based on the evidence in the record and the law and policy in effect at the time the decision was rendered.

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. Factual Background and Procedural History

The record shows that the petition was filed on September 26, 2013. The petition was accompanied by a supporting statement, dated September 20, 2013, in which the petitioner discussed the beneficiary's current responsibilities in his position as chief executive officer as well as the responsibilities that

correspond to the beneficiary's proposed position as president of the petitioning entity. The petitioner stated that the beneficiary is currently responsible for directing the company's management, expansion, promoting the business, studying market trends, and monitoring the company's employees. The petitioner stated that the beneficiary's proposed position would involve hiring and supervising sales and marketing employees, setting sales goals, developing marketing strategies, maintaining contact with buyers, participating in gem and jewelry expositions, negotiating contracts, studying market trends, and communicating with the Indian parent company. In addition, the petitioner provided a copy of its lease, utility bills and bank statements, its 2012 tax return, two quarterly tax returns with corresponding wage reports, an organizational chart, and a separate job description which included percentage breakdowns for the beneficiary's proposed position as well as those of the rest of the company employees.

On July 14, 2014, the director issued a request for evidence (RFE), informing the petitioner that the record lacked sufficient evidence to establish eligibility. Among the issues addressed was that of the beneficiary's proposed employment with the petitioning entity. Namely, the director instructed the petitioner to provide a definitive statement listing the beneficiary's specific daily job duties and the corresponding percentage of time the beneficiary would allocate to each of his assigned tasks. The petitioner was also asked to provide its organizational chart naming its employees and listing their job titles, job duties, and educational credentials.

In response, the petitioner provided the requested organizational chart as well as the petitioner's 2013 tax return and its employees' wage documents. Although the petitioner's response included a job description for the beneficiary's position, the format and content of the job description was identical to the one that was originally submitted in support of the Form I-140.

After reviewing the petitioner's submissions, the director determined that the petitioner had not established eligibility and therefore issued a decision, dated October 28, 2014, denying the petition. The director concluded that the petitioner had not established that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. In making his determination, the director reviewed the beneficiary's job description, the petitioner's organizational chart, and the information contained in the petitioner's employees' wage statements. The director considered employee salaries in the wage documents and questioned whether the beneficiary would oversee professional employees and whether the petitioner has the ability to relieve the beneficiary from having to allocate his time primarily to non-qualifying tasks. The director also noted that the petitioner did not provide evidence in the form of educational credentials for the beneficiary's subordinates.

On appeal, the petitioner submits a brief disputing the director's findings, and specifically contends that the evidence of record is sufficient to establish that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. In support of this contention, the petitioner provides additional evidence in the form of résumés pertaining to the petitioner's employees and the petitioner's state quarterly wage reports for all four quarters of 2013.

Upon review, we conclude that the petitioner did not provide sufficient evidence to overcome the director's conclusion. Therefore, for the reasons stated below, we will affirm the denial of 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 that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

In general, when examining the executive or managerial capacity of a given position, we review the totality of the record, starting first with the description of the beneficiary's job duties with the entity in question. 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 the employing entity's organizational structure, the duties of the petitioner's support staff, and any other relevant factors that may contribute to a comprehensive understanding of the beneficiary's proposed daily tasks and his prospective role within the petitioning entity.

Turning to the beneficiary's job description, we find that the petitioner did not provide sufficient information to establish that the primary portion of the beneficiary's time would be allocated to tasks within a qualifying managerial or executive capacity. First, we note that the petitioner did not comply with the express instructions of the RFE, which asked the petitioner to list the beneficiary's specific job duties and to assign a time constraint to each individual activity in order to establish what portion of the beneficiary's time would be allocated to tasks within a qualifying managerial or executive capacity. The petitioner offered a job description comprised of eleven paragraphs, each listing a general job responsibility as the heading with a percentage of time allocated to that overall responsibility. However, given that five of the eleven subject headings – totaling 55% of the overall time allocations – include multiple job duties, we are unable to determine the specific amount of time the beneficiary would spend on individual tasks. This is particularly problematic when a number of the job descriptions within a given heading contain vague statements that fail to list actual tasks or list tasks that are of a non-qualifying nature. For instance, the petitioner indicated that the beneficiary would allocate 15% of his time to planning, developing, and establishing the company's goals and policies. The petitioner indicated that this overall set of responsibilities would require the beneficiary to set long- and short-term goals, devise strategies for meeting those goals, review and revise strategies when necessary, monitor the effectiveness of the strategies, and verify each customer's financial background prior to finalizing a sales transaction. However, the petitioner did not describe any actual short- or long-term goals that the beneficiary has or would set in his position with the petitioning entity; nor did the petitioner clarify what types of daily activities are indicative of the beneficiary's goal-setting role. The petitioner also failed to explain how the beneficiary will gauge whether the goals he sets are being effectively implemented or what specific role the beneficiary would assume with respect to checking each customer's financial background. In other words, it is not clear that someone other than the beneficiary actually conducts the customer financial background checks, a job duty that cannot be deemed as one within a qualifying capacity.

The petitioner was similarly vague in discussing the beneficiary's role with regard to setting sales targets and the actual duties underlying the beneficiary's responsibility to direct the petitioner's marketing initiatives. Although the petitioner claims that the beneficiary would be responsible for determining

yearly sales targets, it provided no discussion of the actual daily tasks associated with this general responsibility; nor did the petitioner clarify what underlying process is involved in setting the sales goals and what specific tasks would be assigned to the beneficiary. Although the petitioner stated that it has experienced "good growth" as a result of the beneficiary's "strategic planning," it provided no explanation to clarify what specific tasks the beneficiary performed that led to such progress. It is unclear that the single act of periodically reviewing reports prepared by sales representatives is responsible for the petitioner's business progress. In addition, while the petitioner claimed that the beneficiary and the marketing/sales manager would collaboratively determine which "new measures" will be implemented to increase sales, the petitioner did not specify any "new measures" or distinguish the beneficiary's role from that of the marketing/sales manager in determining what those measures would be.

Next, in discussing the beneficiary's key role with regard to the company's budget, the petitioner indicated that the beneficiary would make sure that "various departments function within the allocated budget." However, the record does not show that the petitioner consists of "various departments." A review of the petitioner's organizational charts shows that it is focused on marketing and selling the petitioner's products and that the petitioner's employees, including the bookkeeper, perform sales, marketing, or a combination of marketing and sales tasks. It is therefore unclear what "various departments" the petitioner referenced, as the organization appears to be comprised of a bookkeeper, who also performs sales-related tasks, and three sales and marketing employees. While the organizational chart makes a general reference to "office staff," no positions were named to indicate what positions would comprise the "office staff." Moreover, the parenthetical reference beneath the words "office staff" indicates that such staff would be hired sometime in the future and that the petitioner did not employ any office staff at the time of filing. As the petitioner's eligibility must be based on the facts and circumstances that existed at the time of filing, the future hires are not relevant in the matter at hand. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

While the petitioner also claimed that the beneficiary would analyze the market in search for "core items" in an effort to update the petitioner's product line, it is unclear how much of his time would be allocated to seeking out new products and how much of his time would be spent meeting directly with the customer to assist the sales representative in selling the petitioner's merchandise. As the petitioner did not assign time allocations to individual job duties it is unclear how the beneficiary's time would be distributed. The beneficiary's job description includes other job duties that cannot be readily identified as those performed within a qualifying capacity. For instance, the petitioner indicated that the beneficiary would be directly involved in training and overseeing non-professional staff, evaluating staff performance, and attending jewelry trade shows "where he would meet important customers personally." While the value of these tasks is undisputed, they cannot be deemed as tasks performed within a qualifying capacity.

In addition, we note that the evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. Here, despite the petitioner's organizational chart's depiction of the beneficiary as directly overseeing a single employee with a managerial position title – marketing/sales manager – the job description the petitioner provided for the

beneficiary's direct subordinate is not consistent with that of a manager, as the job duties assigned to this position do not include overseeing the work of other employees. According to the employee résumés the petitioner provided on appeal, the job duties of the marketing/sales manager include creating catalogues and mailing lists for potential customers, processing new orders and preparing shipments, listing items for internet sales, processing returns and exchanges, and ensuring accuracy in the stock room. There is no indication that the employee who is depicted as the beneficiary's only direct subordinate (and whose position stands between the beneficiary and the remainder of the petitioner's lower-level staff) is a bona fide managerial employee, notwithstanding her assigned position title. Therefore, despite the staffing hierarchy illustrated in the petitioner's organizational chart, which indicates that the beneficiary would oversee one managerial employee who would oversee the company's non-professional staff, it appears that the petitioner's staff is comprised of non-managerial and non-professional employees, whom the beneficiary would directly oversee.

On appeal, the petitioner submits a brief asserting that according to the *Occupational Outlook Handbook*, a Department of Labor publication, there are no degree qualification requirements for marketing/sales agents or for the marketing/sales manager. This information further indicates that the petitioner's support staff is comprised of non-professional employees and that any time the beneficiary would spend overseeing such employees would not be deemed as time spent performing tasks within a qualifying capacity. As stated above, the lack of personnel management tasks assigned to the marketing/sales manager indicates that the beneficiary's direct subordinate is a manager in position title only and that she does not oversee or supervise other personnel, despite the staffing hierarchy illustrated in the petitioner's organizational chart. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Given the beneficiary's position at the top-most level within the petitioner's hierarchy and the petitioner's apparent lack of other managerial positions, there appear to be no employees, other than the beneficiary himself, available to oversee the petitioner's non-managerial and non-professional staff.

In addition, while the petitioner points out that USCIS must consider the petitioner's reasonable needs in light of its purpose and stage of development when considering the number of employees the beneficiary supervises, we note that 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. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. *See Systronics*, 153 F. Supp. 2d at 15. Further, based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary in a qualifying capacity where the primary portion of his time would be allocated to tasks of a managerial or executive nature. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections

101(a)(44)(A) and (B) or the Act. In light of the deficiencies discussed above, the petitioner has not established this essential element of eligibility.

Contrary to the petitioner's claim on appeal that the beneficiary would be employed in a primarily managerial and/or executive capacity, the record does not support this assertion. 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 the matter at hand, while the beneficiary holds a position that is at the top-most level of the petitioner's organization and has discretionary authority over the employees of the organization as well as matters concerning the petitioner's business and finances, the record lacks evidence to establish that the petitioner has reached a stage in its development such that it can support the beneficiary in a primarily executive position wherein his time would be primarily spent directing the management and establishing the goals and policies of the petitioning entity. Rather, the record indicates that the petitioner has a managerial level of employees for the beneficiary to direct and that instead of directing the management of the entity, the beneficiary would assume the role of training, evaluating, and overseeing the company's staff, which is comprised of non-professional employees. Nor does the petitioner submit sufficient evidence to establish that the beneficiary would be employed in a qualifying managerial capacity where his primary focus would be either managing an essential function or managing a staff comprised of supervisory, professional, or managerial employees. *See* section 101(a)(44)(A)(ii) of the Act. Given the beneficiary's deficient job description, which consists of both qualifying and non-qualifying tasks and which fails to provide an adequate list of specific tasks and their respective time allocations, we are unable to conclude that the beneficiary would be employed in a primarily managerial capacity.

Finally, we note that the petitioner refers to a number of unpublished decisions in which we determined that the beneficiary met the requirements of serving in a primarily managerial and executive capacity for L-1 classification despite the small size of the petitioning entities. The petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Therefore, in light of the reasons provided in the above analysis, the petitioner has failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity and the petition cannot be approved on this basis.



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, in light of the findings issued in the director's decision and the additional findings issued by this office, that burden has not been met.

ORDER: The appeal is dismissed.