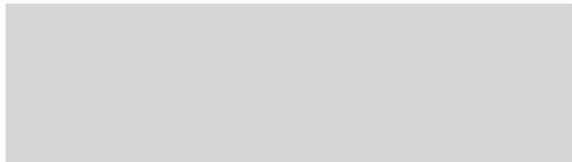




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE:

JUN 30 2015

FILE #:

PETITION RECEIPT #:

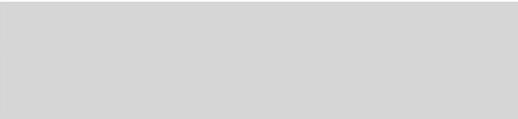
IN RE:

Petitioner:

Beneficiary:

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

ON BEHALF OF PETITIONER:



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

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) 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.¹ The appeal will be dismissed.

The petitioner is a California corporation that operates as an export, import, and distribution company. It seeks to employ the beneficiary in the United States as its CEO. 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 that the beneficiary was employed abroad, or would be employed in the United States, in a qualifying managerial or executive capacity.

On appeal, the petitioner asserts that the applicable law was inappropriately applied and that the director's reasoning was inconsistent with the information and evidence it presented to establish the beneficiary's eligibility for the benefit sought. The petitioner submits a brief and additional evidence in support of the appeal.

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.

¹ Upon our initial review of this matter, we found information at the website of the California Secretary of State which showed the petitioner's corporate status as "FTB Suspended." We subsequently issued a notice of derogatory information and intent to dismiss, dated April 27, 2015. The petitioner responded to our inquiry with evidence showing that the U.S. entity is active and in good standing with the State of California. Accordingly, we will make our determination regarding this petition based on the merits of the evidence before us.

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 December 9, 2013. The petition was accompanied by a supporting statement, dated December 3, 2013, in which the petitioner indicated that it had a staff of five employees, including the beneficiary, at the time of filing. The statement contains a list of the job duties and responsibilities pertaining to the beneficiary's former employment abroad as well as a percentage breakdown applied to the beneficiary's assigned job duties and responsibilities in her proposed position as CEO of the petitioning entity. The petitioner also provided organizational charts depicting the beneficiary's respective positions with both entities as well as evidence in the form of tax, bank, and business documents.

On June 10, 2014, the director issued a request for evidence (RFE), informing the petitioner that the record lacked sufficient evidence to establish that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity. Accordingly, the director instructed the petitioner to provide the foreign entity's organizational chart that corresponds with the beneficiary's period of employment abroad along with a definitive statement pertaining to the beneficiary's former position accompanied by the beneficiary's payroll summary as well as the names, job titles, brief job descriptions, educational credentials, and payroll summaries of the beneficiary's subordinates at her former position with the foreign entity.

With regard to the beneficiary's proposed position with the U.S. entity, the director asked the petitioner to provide position descriptions, work schedules, and IRS Form W-2 statements and/or MISC Form 1099s for the beneficiary's superior and any subordinate staff. In response, the petitioner provided the requested evidence pertaining to both of the beneficiary's positions.

After reviewing the petitioner's submissions, the director determined that the petitioner failed to establish eligibility and therefore denied the petition on September 15, 2014. The director determined that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying capacity, focusing the discussion of the beneficiary's foreign employment almost entirely on the beneficiary's job description. Namely, the director concluded that the job description the petitioner submitted was overly vague and that the petitioner failed to disclose the type of business the foreign entity operated or the beneficiary's function within that business.

The director similarly concluded that the petitioner failed to establish that the beneficiary's proposed employment in the United States would be within a qualifying managerial or executive capacity, finding that the petitioner's support staff at the time of filing was insufficient to relieve the beneficiary from having to allocate her time primarily to performing non-qualifying operational tasks.

On appeal, the petitioner submits a brief, disputing the director's findings with regard to the beneficiary's former and proposed employment. With regard to the beneficiary's employment abroad, the petitioner asserts that the beneficiary was employed in an executive capacity. The petitioner emphasizes the foreign entity's complex organizational hierarchy, which includes department managers, and states that this staff relieved the beneficiary from having to allocate her time primarily to non-executive tasks. The petitioner contends that the beneficiary's proposed employment in the United States is also within an executive capacity. The petitioner focuses on the beneficiary's discretionary authority in choosing business projects, approving bids, and overseeing project implementation.

Upon review, and for the reasons stated below, we find that the petitioner has submitted sufficient evidence to overcome the director's denial with regard to the issue of the beneficiary's employment abroad. Notwithstanding this finding, we conclude that the petitioner has not established that the beneficiary's proposed position in the United States can be in a qualifying managerial or executive capacity. Both findings are fully addressed in the discussion below.

III. Issues on Appeal

As indicated above, the two primary issues to be addressed in this proceeding are whether the petitioner provided sufficient evidence to establish that the beneficiary was employed abroad and would be employed by the petitioning entity in a qualifying managerial or executive capacity.

A. Qualifying Employment Abroad

Based on our review of the totality of the record, we find that the petitioner provided sufficient evidence to establish that the beneficiary was employed abroad in a qualifying executive capacity.

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.*

The record includes an organizational chart and supporting payroll records, which show a sufficiently complex organization comprised of four department managers, who reported to the beneficiary, and their subordinates. The petitioner provided evidence that the beneficiary's position was placed at the top-most tier of the organization, and that she was responsible for overseeing and directing the management of all four departments. Therefore, while the director was correct in his consideration of the beneficiary's foreign job

description, this element must be assessed in light of a comprehensive analysis of the other relevant factors and supporting evidence. In the present matter, the director failed to fully consider the foreign entity's staffing and organizational structure, which shows the beneficiary's position with respect to others and indicates that the beneficiary operated at the foreign entity's highest management level. In light of these compelling factors and the ample supporting evidence that the petitioner provided, we find that the petitioner established that the beneficiary was more likely than not employed abroad in a qualifying executive capacity. On the basis of this finding, we hereby withdraw the director's conclusion pertaining to the beneficiary's employment abroad.

B. Qualifying Employment in the United States

Notwithstanding our determination pertaining to the beneficiary's employment abroad, we find that the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity.

Among the key factors to be considered is the beneficiary's description of job duties in her proposed position with the petitioning entity. See 8 C.F.R. § 204.5(j)(5). Published case law has determined that the duties themselves will reveal the true nature of the beneficiary's employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). We then consider the beneficiary's job description in the context of the petitioner's organizational structure and staffing levels as well as subordinates' job duties and any other relevant factors that may contribute to a comprehensive understanding of the beneficiary's actual job duties and role within the petitioning entity.

Turning first to the beneficiary's job description, we find that the information provided is overly vague and, when considered in light of the petitioner's limited organizational structure, fails to establish that the petitioner, at the time of filing, had the subordinate staff to relieve the beneficiary from having to allocate her time primarily to the performance of non-managerial and non-executive tasks. Based on the job description provided in the petitioner's December 3, 2013 supporting statement, the beneficiary would allocate 25% of her time to setting up, and reviewing the petitioner's corporate policy, operation procedures, and business goals, directing the petitioner's departments, recruiting personnel, and managing business development. The petitioner provided no insight as to the specific daily tasks that reflect the beneficiary's corporate policy and goal-setting role. The petitioner also failed to specify what actual tasks the beneficiary would perform in her role as manager of the petitioner's business development activities, as such, it is unclear whether the tasks involved would be of a qualifying nature. Similarly, the petitioner failed to establish that recruiting "qualified personnel," a task that is generally attributed to human resources personnel, is a qualifying managerial or executive task. The beneficiary's job description includes other job duties that have not been established as being qualifying managerial or executive tasks. Namely, the petitioner indicated that the beneficiary's position would include promoting the U.S. business and new products into the U.S. market, building relationships with distributors and suppliers, visiting distributors and customers, negotiating contracts, and providing customer support.

Although the beneficiary's job description includes a percentage breakdown, the petitioner assigned time allocations to groups of duties and responsibilities, rather than to individual tasks and thus fails to effectively

establish what percentage of time the beneficiary would allocate to each of the above listed non-qualifying tasks. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as those listed above, do not fall directly under traditional managerial duties as defined in the statute. For this reason, we cannot determine 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).

Furthermore, after considering the petitioner's staffing and organizational hierarchy, it is unclear how the beneficiary would be able to meet a number of her assigned job responsibilities having to directly perform the underlying operational tasks. For instance, in claiming that the beneficiary would be in charge of managing business development, the underlying implication is that the petitioner is staffed with someone who would actually carry out the business development function. However, based on the organizational chart that reflects the petitioner's hierarchy at the time of filing and the employee job descriptions that were provided in response to the RFE, it is unclear who, other than the beneficiary would be charged with that underlying business development function. Similarly, the petitioner's claim that the beneficiary's proposed position would involve planning and directing marketing activities is not supported by the evidence of record. Although the employee job descriptions indicate that the petitioner's sales manager assumes a role with respect to marketing the petitioner's products and services, this position's role is also described as supervisory, thus failing to establish who actually performs the underlying marketing-related job duties if both the beneficiary and the sales manager, who is subordinate to the beneficiary, would assume managerial or supervisory roles with respect to the marketing function. While the petitioner's original organizational chart included a marketing position, the petitioner's more recently submitted organizational chart entirely omits this position and depicts the marketing employee from the earlier chart in the position of assistant sales manager. In other words, even if the marketing employee's job duties were assumed to be consistent with his position title, it is unclear who would carry out the marketing duties within the petitioner's current staffing scheme, given that there is no longer a marketing position within the hierarchy.

In addition, a comparison of the organizational chart the petitioner submitted originally in support of the petition with the chart that the petitioner submitted in response to the RFE indicates a need for further clarification regarding the organizational structure the petitioner depicted in the original chart. Namely, a review of the first chart shows [REDACTED] in charge of the finance department with an accounting service/CPA firm within his/her managerial purview. However, a review of the chart the petitioner submitted with its RFE response depicts [REDACTED] in the assistant sales position, which is subordinate to the assistant sales manager position. In other words, it is unclear why an employee, whose original position within the petitioner's organization was that of a finance department manager, would assume a position at the bottom tier of the same organization. The petitioner must submit evidence that substantiates the beneficiary's duties and the duties of her subordinates such that the job duties correspond to the employees' respective placements 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 manager position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

Further, given the lack of sufficient evidence to support the facts presented in the originally submitted organizational chart, it is unclear whether the petitioner in fact had a qualified employee to manage the finance department at the time of filing. If not, then the record raises questions as to the nature and scope of the beneficiary's duties related to the finance department when the petition was filed. That said, we find that the record lacks evidence to establish that the petitioner had independent sales agents to assist in the sale of the petitioner's products and services at the time of filing. Despite the director's request that the petitioner provide IRS Form W-2s and IRS Form MISC 1099 for any employees and contract workers, respectively, the petitioner provided only the W-2s, which were issued only to direct company employees. The petitioner failed to provide evidence to support the claim that it had hired independent sales agents to assist the sales manager as of the date of filing. Similarly, the petitioner failed to provide any evidence to show that it retained the services of an accounting/CPA firm to meet its bookkeeping and accounting needs, and, although it indicates that it is an import-export company, it has not specifically identified who coordinates shipping, import and export activities. 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).

Furthermore, given the petitioner's failure to provide relevant evidence pertaining to its organizational hierarchy and in light of the petitioner's limited staffing, it is reasonable to conclude that the beneficiary, at the time of filing, was called upon to carry out various operational tasks that are required for the petitioner to continue its daily functions. While 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).

On appeal, the petitioner asserts that the director focused entirely on the size of the petitioning entity without considering the petitioner's stage of development and the reasonable needs of the organization. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, 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). Additionally, while the petitioner is correct in pointing out that USCIS must take into account the petitioner's reasonable needs when considering staffing size, those needs do not serve to override the petitioner's legal burden of having to establish that the beneficiary would primarily perform duties of a qualifying managerial or executive nature. The director's discussion of the petitioner's staffing is appropriate

and suggests that the director had valid concerns regarding the petitioner's ability to relieve the beneficiary from having to primarily perform non-qualifying tasks.

On appeal, and in response to the RFE, the petitioner has emphasized the beneficiary's responsibility for international bidding projects, noting that the company achieved over \$3 million in sales revenue in 2013 and signed a sales contract valued at over \$5.1 million in 2013. While these figures are impressive, the petitioner did not specifically mention bidding activities in its description of the beneficiary's U.S. duties or identify a "project bidding team" on its initial organizational chart. The beneficiary's authority to negotiate and sign off on major contracts is indicative of her senior position within the organization; however, the petitioner has not submitted sufficient evidence of how the non-managerial, day-to-day tasks of the petitioner's import-export company are allocated among the four-person subordinate staff that was in place at the time of filing, nor has it adequately documented its use of contractors as of the date the petition was filed.

Therefore, given the beneficiary's deficient job description and the insufficient evidence showing that the petitioning entity was adequately staffed at the time of filing, we are unable to conclude that the petitioner had a reasonable need for the beneficiary to perform tasks that are primarily in a managerial or executive capacity. On the basis of these findings, we conclude that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. Accordingly, the appeal will be dismissed.

IV. Conclusion

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.