U.S. Department of Homeland Security
U. S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: APR 0 1 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630.The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a California limited liability company that seeks to employ the beneficiary as managing director. 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 petitioner states that it is engaged in sale and trade of automobiles and the food industry, and indicates that it has three employees. In support of the Form I-140 the petitioner submitted a letter from counsel dated April 28, 2011 which provided some of the beneficiary's expected duties with the U.S. company. The petitioner also provided evidence in the form of corporate and financial documents pertaining to the beneficiary's foreign employer.

The director reviewed the initial submission and determined that the petition did not warrant approval. Therefore, the director issued a request for evidence (RFE) on September 19, 2011 informing the petitioner of various deficiencies. The director requested evidence establishing the beneficiary's employment for at least one year abroad with the foreign company. The director also requested: more detailed descriptions for the beneficiary's duties abroad and in the United States; organizational charts, names and duty descriptions for the beneficiary's subordinates abroad and in the United States; and evidence of wages and work schedules for all the petitioner's employees.

In response to the RFE, the petitioner provided a variety of documents but failed to provide the requested information regarding the beneficiary's duties or organizational charts reflecting the structure of either the foreign company or the U.S. petitioner.

The director considered the petitioner's response but determined that the petitioner failed to establish that the beneficiary had been employed abroad or would be employed in the United States in a qualifying managerial or executive capacity. In a decision dated December 16, 2011 the director stated that the petitioner failed to provide adequate duty descriptions or organizational charts. Further, the director concluded that the evidence the petitioner did provide indicated the beneficiary would be responsible for the mundane and routine duties required to operate a small business without adequate staff to assist him.

On appeal, counsel for petitioner disagrees with the director's decision and asserts that all necessary supporting documents were already provided. Nevertheless, counsel encloses additional evidence including letters and other documents which were originally submitted in support of the petitioner's previous L-1A nonimmigrant petition filed on behalf of the beneficiary, as well as organizational charts for the foreign company and the petitioner.

During adjudication of the appeal, evidence came to light that the petitioner in this matter had a suspended corporate status in the State of California. Therefore, on January 8, 2013, the AAO notified the petitioner that a review of the petitioner's status at the business search website maintained by the California Secretary of State indicated that the petitioner was suspended

within the State of California. *See* Website of California Secretary of State (last accessed March 22, 2013).

In response to the AAO's Notice of Derogatory Information, counsel submits a letter dated February 4, 2013 stating that the petitioner, formed in 2005, was acquired or merged with another U.S. company named in September 2008. The petitioner submits a statement of information, Employer Identification Number notice, tax documents and other documents relating to The petitioner did not submit a single document in support of counsel's claim that merged with or was acquired by

Notably, this petition was filed on May 2, 2011 by the petitioner, more than two years after the petitioner's claimed merger or acquisition with According to the California Secretary of State website, filed with the state as a food establishment & restaurant on October 28, 2005 and is currently suspended. was incorporated in California on June 17, 2008 and is currently listed as active. These businesses are legally separate and independent entities. The petitioner claims a merger/acquisition but provides no explanation regarding its current filing and absolutely no documentary evidence of a merger or acquisition. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Nevertheless, the petitioner asserts "the continuity of the Petitioner's operation has been uninterrupted. The mere change in name and subject matter does not alter the validity of the underlying Petition." The petitioner is mistaken, however. The beneficiary appears to be affiliated with both companies and the petitioner is attempting to treat the two companies as interchangeable for the purpose of the instant appeal. However, the two companies are not interchangeable and is not the petitioner in this matter.

Further, the evidence does not support counsel's assertion. According to the California Secretary of State website, the separate existence of a business entity will cease upon the filing of a merger document reflecting the merger of one entity with another. Furthermore, a business entity may not be merged with another while in a suspended or forfeited status. The petitioner is still identified as a separate entity which is suspended in the State of California. The petitioner submitted no documents such as a certificate of ownership, agreement of merger, or officer certification of the surviving or merging business entities in order to establish a merger or acquisition of the petitioner by .

Further, in a recent letter dated April 28, 2011, counsel asserts that the petitioner had been doing business as for its first few years of operation, but then expanded into the automotive industry and was now also doing business as . Counsel referenced the petitioner's profitable year in 2010 and reiterated that the petitioner was a California limited liability company. On appeal counsel continues to refer to the petitioner as a limited liability company while simultaneously claiming that the petitioner is now a corporation, Counsel urges consideration of an abundance of documentation including tax returns,

financial records, and other corporate documents. A review of these documents shows that counsel is referring to . Counsel refers to the petitioner and interchangeably. These assertions are confusing because counsel failed to provide any documentation showing the merger or acquisition of the petitioner by . Rather, the petitioner merely submits documents reflecting . in lieu of the petitioner and baldly asserts that the companies are one and the same. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner and are separate and independent business entities having distinct Federal Employer Identification Numbers (EIN) as reflected in the record. The petitioner suggests that the two entities are affiliates, but does not provide evidence in support of this claim. Regardless, the beneficiary has been identified as a potential employee for the petitioner and not The petitioner's assertion that it has merged with as of 2008 is not credible given that the petitioner filed this petition on behalf of the beneficiary in 2011 and failed to provide any documentation establishing this merger and/or acquisition.

Consequently, the AAO considers the suspended to be the petitioner. Since the petitioning business is no longer an active business, no bona fide job offer exists and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Moreover, any such concealment of the true status of the organization by the petitioner seriously compromises the credibility of the remaining evidence in the record. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). In any further filings, the petitioner would need to establish that it is in good standing or submit other proof that the business is not suspended and is currently in active status.

The AAO further finds that counsel's assertions that the director's findings were in error are not persuasive and thus fail to overcome the director's adverse decision.

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

> (1) Priority Workers. -- Visas shall first be made available ... to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or

other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives or managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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.

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.

The director found that the record did not establish that the petitioner's claimed parent company employed the beneficiary in a managerial or executive capacity for at least one year of the three years prior to his admission to the United States as a nonimmigrant.

The petitioner submitted a vague and non-specific job description for the beneficiary's foreign position which failed to sufficiently describe what the beneficiary did on a day-to-day basis. Based on the evidence provided, it appears the beneficiary obtained permits in 2004 for the German restaurant and handled "[p]roduct management, marketing, daily operations and overseeing staff and services." A detailed duty description was not provided. 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner failed to provide additional information regarding the beneficiary's duties or the staffing of the foreign entity despite the director's specific request for evidence. 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). Only on appeal did the petitioner provide an undated organizational chart identifying the beneficiary's roles as one of two shareholders, one of three members on the board of directors, the Chief Executive Officer, and the president of the foreign company. The chart provided a list of eleven named employees, including the beneficiary, but no job titles or duty descriptions are included. The petitioner provided no additional detail regarding the beneficiary's duties. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Therefore, the petitioner has failed to overcome the director's adverse findings, and the appeal will be dismissed based on the petitioner's failure to establish that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity.

The director also determined that the evidence did not establish that the beneficiary's employment with the petitioner would be in a qualifying managerial or executive capacity.

According to information provided on the Form I-140 petition, the beneficiary would direct and manage "the operation of the underlying business including hiring and firing the staff, ordering supplies and materials and entering into contracts and executing checks and other valuable or financial documents." In a letter, counsel asserted that the beneficiary is "in charge of daily

operation of the entity." Further, counsel indicated that beneficiary "supervised and implemented the hiring and training of the staff, promulgating rules and procedures to employ qualified workers. He has also poised (*sic*) his best to acquire all equipment and tools required for smooth operation of the entity." The petitioner offered no additional detail regarding the beneficiary's proposed duties.

The petitioner further states that it has three employees including the beneficiary. Since the petitioner also asserted that it operates two separate businesses under two fictitious names, [redacted] it is unclear how it is able to operate with only three employees.

Furthermore, while petitioner claims to have three employees, it has failed to establish that the regular and current employment of anyone other than the beneficiary. The petitioner asserts on appeal that the two individuals who received 2010 IRS Form 1099-MISCs are not independent contractors as determined by the director, but rather are regular employees. A review of the 2010 IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for [redacted] shows a salary credited to the beneficiary as an officer of the company. The return also reflects an additional $36,000 paid in commission to two individuals in the amount of $18,000 each on 2010 Forms 1099-MISC. The AAO emphasizes that these individuals were paid by [redacted] and not by the petitioner. Even if this company were the actual petitioner, the petitioner has not provided job titles or duty descriptions for these claimed employees. The petitioner was given another opportunity to provide this information in response to the director's RFE but it failed to do so. Again, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Therefore, based on the minimal evidence provided, the director found that the beneficiary would more likely than not be primarily performing the mundane and routine duties required in the operation of a small business. The director found that the petitioner did not meet its burden and the AAO concurs with this determination. The petitioner failed to establish that it presently employs sufficient subordinate employees to ensure the beneficiary could devote his time to primarily executive or managerial functions.

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* § 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). 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. Here, absent credible evidence of the number of employees the petitioner employs and the duties they perform, the petitioner has not established that the company has sufficient staff to relieve the beneficiary from performing primarily non-qualifying duties, or that it has a reasonable need for the beneficiary to allocate the majority of his time to managerial or executive tasks.

Therefore, the petitioner failed to establish that the petitioner employed the beneficiary in a qualifying managerial or executive capacity and for this additional reason, the appeal will be dismissed.

The petitioner noted that USCIS approved nonimmigrant petitions that had been filed on behalf of the beneficiary. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427. Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

Further, nonimmigrant petition filings and immigrant petition filings are separate proceedings with separate records and a separate burden of proof. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). For the reasons discussed above, the evidence in the current record of proceeding fails to establish that the beneficiary and petitioner are eligible for the benefit sought.

Accordingly, the petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.