

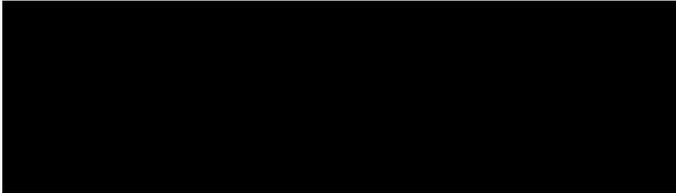
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U.S. Citizenship
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FILE: [Redacted]
WAC 04 008 53012

Office: CALIFORNIA SERVICE CENTER

Date: **DEC 01 2005**

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a California corporation operating as a gas station, convenience store, and auto repair shop. It seeks to employ the beneficiary as its chief executive officer. 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 the two following separate grounds: 1) the beneficiary would not be employed in a managerial or executive capacity; and 2) the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel disputes the director's conclusions and submits a brief in support of his arguments.

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 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.

The first issue in this proceeding is whether the U.S. petitioner would employ the beneficiary in a capacity that is managerial or executive.

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.

In support of the petition, the petitioner submitted a letter dated September 29, 2003, which provided the following description of the duties to be performed by the beneficiary under an approved petition:

As CEO of [the petitioner, the beneficiary] has directed all operations, created corporate strategies and policies, evaluated deals for acquisitions, created long[-]term goals—including the current acquisition and expansion strategy, and served as a liaison between [the petitioner] and the [b]oard of [d]irectors as well as liaison to the [b]oard of [d]irectors of its Indian affiliate corporation. [REDACTED]

[The beneficiary] is also responsible for evaluating, hiring, and managing new U[.]S[.] managerial employees, and developing [the petitioner]'s service stations and financial planning to expand in the United States. He is also responsible for setting corporate policy

and hiring consultants and analysts to define and analyze U[.]S[.] market opportunities, as well as organizing strategic partnerships with complementary service providers

[The beneficiary]'s executive responsibilities have been extended to defining [the petitioner]'s corporate goals for its U[.]S[.] operations and making important decisions including negotiating large contracts, securing legal counsel, opening additional offices and managing the growth of the company. [The beneficiary] works without supervision and takes direction only from the [b]oard of [d]irectors.

The petitioner also provided an organizational chart showing that its hierarchy consists of the beneficiary as president, a manager, two cashiers, and a contracted accountant.

On September 23, 2004, the director issued a request for additional evidence (RFE) instructing the petitioner to submit a more detailed description of the beneficiary's job duties indicating the percentage of time the beneficiary would spend on each listed duty. The petitioner was also asked to provide its organizational chart describing the company's managerial hierarchy and staffing levels as of the date the petition was filed. Additional documentation was also requested in the form of wage reports and the petitioner's federal income tax returns from 2002 through the date of the RFE. As the RFE was issued in September 2004, the petitioner was therefore expected to provide its tax returns for the 2002 and 2003 calendar years.

The petitioner's response included an organizational chart similar to the one submitted earlier in support of the petition. The petitioner supplemented the organizational chart with brief job descriptions for the entire staff. The petitioner stated that only one of its cashiers was employed on a full-time basis, but it did not indicate how many hours the part-time employee contributed to the petitioner's overall hours of operation. The petitioner also provided the following list of the beneficiary's proposed responsibilities:

- Evaluate data and analysis about business opportunities and markets for new service stations and other related businesses in the United States and also consider financing options to facilitate those acquisitions[.]
- Make decisions about what businesses to ultimately acquire and how to finance those acquisitions[.]
- Evaluate strategy and change it depending on the results of market and competitor research and analysis provided by internal and external analysts and information[.]
- Review reports from the [m]anager of [REDACTED] and also from the [p]resident, Jasbir Hora on operations and business performance[.]
- Present regular reports to the [b]oard of [d]irectors of [the petitioner] confirming financial performance, and long[-]term goals[.]
- Make decisions about overall staffing levels in consideration of financial and business needs and direct managers to hire or discharge employees based on those desired levels[.]

- Define the functions, duties and performance of management including the [p]resident and the [m]anager of [REDACTED] hire and discharge senior management based on performance and assessment of the need for certain activities and performance[.]
- Work with managers to develop departmental systems[.]
- Confer with investors and potential business partners[.]
- Secure legal counsel[.]
- Make important business decisions on large contracts with suppliers and customers and also with regard to financing based on information provided by legal counsel, accountants and other advisors[.]

The petitioner further stated that the beneficiary maintains his position as president of the overseas entity and indicated that the beneficiary spends approximately 30% of his time carrying the duties associated with that position.

On February 16, 2005, the director denied the petition noting that the petitioner's wage reports for the third quarter of 2003 and the second quarter of 2004 show that the petitioner had a total of three employees including the beneficiary during the two random quarters. The director also stated that the descriptions of the beneficiary's position were broad and noted the petitioner's failure to provide a detailed list of duties accompanied by a percentage breakdown, which was requested in the RFE.

On appeal, counsel restates portions of the beneficiary's job description, emphasizing the degree of discretionary authority bestowed upon the beneficiary as a result of occupying the top position in the petitioner's organizational hierarchy. However, 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. *See* 8 C.F.R. § 204.5(j)(5). The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? 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). Although counsel includes an additional list of responsibilities accompanied by a percentage breakdown, the AAO notes that the petitioner failed to provide this requested information in its response to the RFE. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's RFE. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the breakdown of job responsibilities submitted on appeal.

Furthermore, even if the AAO were to overlook the inadequate description of the beneficiary's proposed position, the petitioner's staffing levels and organizational complexity at the time the petition was filed do not support the claim that the beneficiary would primarily perform qualifying managerial or executive tasks. For instance, the petitioner claims that the beneficiary's responsibilities include evaluating data, evaluating strategy, and reviewing reports. However, there is no indication that the petitioner employed individuals that

would actually provide the data, strategy, and reports for the beneficiary to review and analyze. In light of the petitioner's business operation, which consisted of a single gas station/convenience store, it is entirely unclear as to the petitioner's need for an employee, who would spend any length of time analyzing data or strategy and what specific data and strategy would be the subject of such analysis. The same is true of the claim that the beneficiary would hire and fire senior management and "[w]ork with managers to develop departmental systems." The fact that the petitioner employed only one manager at the time the petition was filed discredits this claim and suggests that the job description provided by the petitioner is not an accurate projection of the duties the beneficiary would have carried out at the time the petition was filed. While the petitioner may eventually have the support staff to allow the beneficiary to primarily carry out managerial or executive tasks, the petition was filed before the petitioner had reached that stage in its development. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Based on the evidence furnished, the AAO cannot conclude that the beneficiary would be employed primarily in a qualifying managerial or executive capacity.

The other issue in this proceeding is whether the petitioner has a qualifying relationship with a foreign entity.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

* * *

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In the instant matter, the director determined that the petitioner is a franchise and is therefore unable to establish a qualifying relationship based on the belief that "there can never be any actual control of the petitioning organization." While it is possible for a franchising agreement to be so overreaching as to deprive a petitioner of the essential elements of control, including the distribution of its shares and the overall management of the organization, the AAO acknowledges that not all franchising agreements are the same. It is possible for a petitioner to buy into a franchise and still maintain enough control to be considered a qualifying organization. See *Matter of Church Scientology International*, 19 I&N Dec. 593, 595 (BIA 1988). That being said, there is no indication that the director's conclusion was based on the petitioner's degree of

control over [REDACTED] Service Center. As such, the director's analysis and conclusion with regard to this issue are withdrawn.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In the instant matter, the record suggests that the U.S. petitioner and the beneficiary's foreign employer and majority owned and controlled by the same individual. Therefore, based on regulations and precedent case law, the petitioner has submitted sufficient evidence to establish the existence of a qualifying relationship.

Notwithstanding the existence of a qualifying relationship, the record does not warrant approval of the petition, as the petitioner has failed to establish that the beneficiary would be employed in a qualifying capacity.

Additionally, the AAO would like to address a separate issue, which was not previously discussed in the director's decision. Namely, 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner is required to submit evidence that the prospective United States employer has been doing business for at least one year. The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

In the instant matter, as the Form I-140 was filed in October of 2003, the petitioner should have submitted evidence to establish that it had been doing business as of October of 2002. Although the petitioner submitted a number of invoices showing its payment for various utility services, these documents are not indicators of whether or not a company has been doing business on a "regular, systematic, and continuous" basis. *Id.* The petitioner in the instant matter is operating as a retailer providing products and services. Thus, any invoices showing that its services and products were provided on a "regular, systematic, and continuous" basis would have been appropriate submissions. Furthermore, even if the AAO were willing to accept the submitted documentation as an indication that the petitioner was doing business, the petitioner did not cover the relevant time period. As previously stated, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Thus, documents dated after the filing of the petition do not establish that the petitioner had been doing business for one year prior to filing the petition.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional ground discussed in the above paragraph, this petition cannot be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

The petition will be denied 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.