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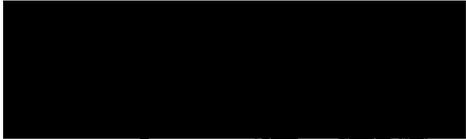
U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
SRC 03 053 51722

Office: TEXAS SERVICE CENTER Date: MAR 03 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 Director, Texas Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this immigrant petition seeking to employ the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation that is engaged in real estate development. It filed this immigrant petition requesting employment of the beneficiary as its vice-president.

The director denied the petition concluding that the petitioner had not established that the beneficiary had been employed abroad or would be employed by the United States entity in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal.¹ The director declined to treat the appeal as a motion and forwarded it to the AAO for review. On appeal, the petitioner states that the beneficiary is the general partner and chief executive officer of the petitioning organization's new construction project. The petitioner acknowledges that it does not employ any additional workers, but states "it is part of the record that the 'construction project' has and will continue to employ by the contract services many US workers and business contractors. . ." The petitioner claims that the beneficiary's employment clearly satisfies the requirements of managerial and executive capacity. The petitioner submits a letter in support of the appeal.

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 the 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

¹ The AAO notes that the petitioner filed Form EOIR-29, Notice of Appeal to the Board of Immigration, rather than the proper Form I-290B, Notice of Appeal to the Administrative Appeals Unit.

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 petitioner does not address on appeal the beneficiary's employment capacity in the foreign organization. As the petitioner has not submitted evidence on appeal in opposition of the director's finding, it is reasonable to conclude that the petitioner concedes that the beneficiary was not employed abroad in a primarily managerial or executive capacity. The director's decision pertaining to this issue will therefore be affirmed, and the appeal will be dismissed.

The issue in the present matter is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- (i) Manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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.

The petitioner filed the immigrant petition on December 10, 2002, noting that as vice-president of the United States organization the beneficiary would manage the daily operations of the company, acquire properties, supervise contractors and realtors, and manage the business' accounts. In an attached letter, dated September 3, 2002, the petitioner outlined the following job duties for the beneficiary as "Vice President/General Manager":

- Supervising and conducting office activities;
- Executive decisions involving the operations of the company in the United States;
- Locating and purchasing land suitable for upcoming projects;
- Selecting and establishing relationships with the various professionals required for the projects;
- Supervising the activities of the contractors in charge of construction at the projects;
- Supervising the activities of the Realtors in charge of the marketing of the properties after they are developed by the U.S. company;
- Maintaining constant communication between the U.S. company and the Mexican company;
- Designing and establishing new business strategies in response to different market situations;
- Managing the different . . . business accounts and maintaining relations with the financial institutions, and;
- Lastly, he will be responsible for the day-to-day operations of the business.

The petitioner noted that the beneficiary would receive a monthly compensation of \$3,700.00.

The petitioner submitted its business plan for three development projects – a fifteen space office complex, a 20-30 unit apartment complex, and a 10-15 home residential community – within the next eighteen to twenty-four months. The petitioner noted its belief that following the final stage of the office complex, it will be in the financial position to continue investing in land development and real estate. Included in the business plan was the following additional outline from the beneficiary of his job responsibilities in the petitioning organization:

I am in charge of the entire US operations of the company, which consists of:

- All the executive decisions involving operations of [the petitioning organization] in the US.
- Looking and buying land suitable for the project.
- Picking and establishing relations with the different professionals required for the master-project.
- Supervising the activities of contractors in charge of the construction of the different projects above described.
- Supervising activities of the realtors in charge of marketing the properties being developed by [the petitioning organization].

- Maintaining constant communication between the San Antonio office and the Headquarters in Mexico City.
- Designing and establishing new business strategies according to the different market situation.
- Managing the different business accounts and maintaining relations with the financial institutions.

The director issued a request for evidence on August 30, 2003. While the director requested additional evidence related to the beneficiary's employment abroad and the business operations of both the foreign and United States organizations, she did not request any specific evidence pertaining to the beneficiary's employment in the petitioning entity.

In her decision dated December 3, 2003, the director determined that the petitioner had not established that the beneficiary would be employed by the United States organization in a primarily managerial or executive capacity. The director noted that in cases where a company employs a limited number of workers, it is questionable whether the beneficiary is acting in a primarily qualifying capacity. The director stated that "[Citizenship and Immigration Services (CIS)] may reasonably conclude in such a case that a wide range of daily functions associated with running a business will be performed [by the beneficiary] and that these duties are unrelated to the definitions of manager or executive." The director stated that in the instant matter, a "major part of the beneficiary's assignment" is functioning as a first-line supervisor of non-managerial and non-professional personnel, and concluded that the beneficiary would not spend a majority of his time managing functions of the organization. Consequently, the director denied the petition.

In an appeal filed on January 5, 2004, the petitioner explains that as the general partner and chief executive officer of the petitioning organization, the beneficiary is managing the company's first construction project, which includes the development of a 16,000 square foot medical office building. The petitioner acknowledges that although it "does not have employees, it is part of the record that the 'construction project' has and will continue to employ by the contract services many US workers and business contractors for this construction project." The petitioner claims that in this capacity, the beneficiary "clearly meets the requirements of an 'Executive/Manager'."

Upon review, the petitioner has not demonstrated that the beneficiary would be employed by the petitioning organization in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). While the petitioner provided an adequate list of the job duties to be performed by the beneficiary in the United States company, the petitioner did not clearly identify the position in which the beneficiary would be employed. The petitioner noted on the immigrant petition that the beneficiary would be the vice-president of the organization, yet stated in an appended letter that the beneficiary would be employed in the capacity of vice-president/general manager. Alternatively, on appeal, the petitioner states that the beneficiary "is applying [for an immigrant visa] as an International Executive Manager," and is the petitioner's chief executive officer and manager. In order to determine the beneficiary's true employment capacity, the petitioner must be consistent in the beneficiary's title, clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. A petitioner may not claim to employ the beneficiary as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. Here, the petitioner has

failed to clarify whether the beneficiary would be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act.

Additionally, although the petitioner submitted documentary evidence of the petitioner's business relationship with independent contractors, there is no evidence supporting the petitioner's claim that the beneficiary is "supervising the activities of the contractors." Of the three agreements for contractor services submitted by the petitioner, none stipulate that the beneficiary possesses supervisory control over the contractors' work or performance. Two agreements specifically outline the scope of the contractor's work, thereby appearing to limit the services to be performed under the contract. With regard to the third contractor's agreement, the petitioner only submitted page one of seven, which failed to outline the scope of services to be performed. The AAO is therefore prevented from determining the true relationship between the beneficiary and the third contractor. The record is also devoid of evidence substantiating the petitioner's claim that the beneficiary also "supervises the activities of the Realtors in charge of marketing [the petitioner's properties]." Again, there is no condition in the petitioner's contractual agreement with the real estate company allowing the beneficiary to supervise or control the work performed by the realtors. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Moreover, at least a portion of the beneficiary's job duties requires the performance of non-qualifying operations of the business by the beneficiary. Specifically, the beneficiary would be responsible for managing the company's business accounts and maintaining relationships with financial institutions. As these tasks are specifically related to the operational tasks associated with the petitioner's financial functions, they are not typically deemed to be managerial or executive in nature. Furthermore, as the petitioner did not account for any employees who would be responsible for the administrative and secretarial tasks of the organization, it is reasonable to assume that the beneficiary would likely be responsible for the performance of these additional non-qualifying job duties. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Based on the above discussion, the petitioner has failed to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the petitioner established the existence of a qualifying relationship between the foreign entity and the United States organization as required in the Act at section 203(b)(1)(C). 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 at 593; *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 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 at 595.

Here, the petitioner claimed that it is the subsidiary of the foreign entity. However, in a November 14, 2002 letter from an attorney, whose affiliation to the petitioner is not explained, it is noted that the beneficiary's

father is the sole owner of the petitioning organization. The petitioner submitted a stock certificate also identifying the beneficiary's father as the owner of the petitioner's 10,000 authorized shares of stock. In documentation submitted by the petitioner in response to the director's request for evidence, the petitioner noted that the petitioning organization is owned solely by the beneficiary's father, but that the company is under the managerial control of the beneficiary. The petitioner noted in the same document that 50% of the foreign entity is owned by the beneficiary's father, while the beneficiary owns 25% of the stock and has managerial control over the foreign entity. The petitioner did not account for the ownership of the remaining 25% of the foreign entity's stock, nor did the petitioner submit the foreign entity's stock certificates confirming the stock ownership.

The record clearly contains inconsistencies regarding the existence of a subsidiary or affiliate relationship between the two entities. The record does not conclusively establish that the petitioning organization is a subsidiary of the foreign entity, as the stock certificate identifies the beneficiary's father as the sole owner of the petitioner's authorized stock. The record also fails to demonstrate that an affiliate relationship exists between the two entities. In addition to the petitioner's failure to document the claimed stock ownership in the foreign entity, the petitioner has not established that the beneficiary's father owns a majority stock interest in the foreign entity necessary for an affiliate relationship. As a result of the discrepancies in the record, the AAO cannot conclude that a qualifying relationship exists between the two organizations. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). For this additional reason, the appeal will be dismissed.

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).

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.