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FILE: [Redacted]
WAC 04 017 52045

Office: CALIFORNIA SERVICE CENTER

Date: **OCT 04 2006**

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:



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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center. The petitioner appealed the matter to the Administrative Appeals Office (AAO). The AAO determined that the appeal was untimely filed and rejected it. The matter is now before the AAO on motion to reopen and reconsider. The motion will be dismissed.

The petitioner is a California corporation seeking to employ the beneficiary as its general manager. 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.

In a decision dated April 7, 2005, the director denied the petition concluding that the petitioner failed to establish that the beneficiary had been and would be employed in a managerial or executive capacity. The record further shows that the petitioner appealed the denial by submitting Form I-290B, which was received on May 12, 2005, or 35 days after the decision was issued. Accordingly, the AAO rejected the petitioner's appeal as untimely filed.

On motion, counsel provides a photocopied envelope with a postage date of April 20, 2005, indicating that correspondence regarding the beneficiary was sent to counsel nearly two weeks after the date stamped on the decision. However, the photocopied envelope is not sufficient evidence to establish that the envelope contained the decision that was issued on April 7, 2005. Furthermore, the only documentation the petitioner is required to provide within the regulatory 30-day period is a Form I-290B briefly stating the reason for appeal. The petitioner is given the option of submitting an appellate brief and any additional supporting evidence at a later date. Therefore, contrary to counsel's implication, the requirements for the initial filing of an appeal are minimal and can certainly be met in less than the allowed 30 days as suggested in the case of an appeal following the revocation of an approved petition in which the petitioner is allowed only 15 days to file an appeal. *See* 8 C.F.R. § 205.2(d).

Counsel further asserts that the appeal was timely filed and provides documentation showing that the appeal was sent on May 4, 2005 via certified mail. Counsel suggests that the date stamped on the domestic return receipt, which shows the date the petitioner's material was received at a CIS office, should be disregarded.

Counsel's argument, however, is contrary to 8 C.F.R. § 103.2(a)(7)(i), which indicates that actual receipt of an application (in the instant matter, an appeal) by a Citizenship and Immigration Services (CIS) office shall be determined based on the time and date stamped on the petitioner's submission at the time of delivery to the designated office. There is no regulation that support's counsel's contradictory assertion.

The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The regulations at 8 C.F.R. § 103.5(a)(3) state, in pertinent part:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or CIS policy. A motion to reconsider a decision on an application or

petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

In the instant matter, the assertions made by counsel do not warrant either reopening or reconsideration of the AAO's prior decision rejecting the petitioner's appeal. Specifically, the evidence presented is not new, in that it could have been previously submitted, and the motion to reconsider fails to demonstrate that the AAO made any error based on the evidence of record before it. Therefore, the motion will be dismissed in accordance with 8 C.F.R. § 103.5(a)(4), which states, in pertinent part, that a motion that does not meet applicable requirements shall be dismissed.

Moreover, even if the AAO were permitted to have rendered a decision based on the merits of the record as presently constituted, the appeal would have been dismissed due to the petitioner's failure to establish eligibility for the benefit sought.

First, while the petitioner adequately illustrated the beneficiary's high level of discretionary authority, the description of the beneficiary's proposed daily activity is lacking in detail. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). As such, the petitioner is expected to provide a detailed description of the duties the beneficiary would perform on a day-to-day basis. *See* 8 C.F.R. § 204.5(j)(5).

In the instant matter, the petitioner provided two job descriptions, one in support of the initial Form I-140 and another in response to the director's request for additional evidence (RFE). While the first job description included a percentage breakdown and was considerably lengthier than the latter, neither provided an adequate description of duties. Both descriptions established the significance of the beneficiary's prospective role within the petitioning organization's hierarchy and illustrated a broad range of job responsibilities, including setting long- and short-term goals, directing and coordinating activities, reviewing and approving project proposals, and determining the funding and staffing needs of each project. However, the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. That being said, even in the case of a petitioner with a large support staff, the beneficiary's specific duties are crucial. The AAO cannot assume that a beneficiary would primarily perform qualifying duties simply because a petitioner is able to establish that it has a complex organizational hierarchy. Thus, a detailed description of duties is particularly important where a petitioner's support staff is limited. The petitioner must articulate the job duties to be carried by the beneficiary and adequately convey an understanding of who would relieve the beneficiary from having to carry out the organization's daily operational tasks that are considered non-qualifying. In the instant matter, regardless of the petitioner's staffing levels, the petitioner failed to provide the requisite job description that would enable the AAO to determine whether the beneficiary's duties are primarily within a qualifying capacity.

Second, 8 C.F.R. § 204.5(j)(3)(i)(C) states that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer. 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 petitioner claims that it has an affiliate relationship with the beneficiary's foreign employer by virtue of being owned by the same individual, [REDACTED]. 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;

Although the petitioner provided documentation with regard to its own ownership, the record fails to establish who owns the foreign entity. 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)). As such, the petitioner's mere claim regarding the foreign entity's ownership is not sufficient to establish that it has the requisite qualifying relationship with the beneficiary's foreign employer.

Thus, while the AAO deems its prior rejection of the petitioner's untimely appeal as proper, a full decision based on a comprehensive review of the record would not have resulted in approval of the Form I-140 filed by the petitioner in the instant matter.

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, the petitioner has not sustained that burden.

ORDER: The motion is dismissed.