

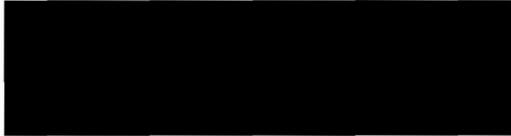
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**U.S. Citizenship  
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FILE: [REDACTED]  
EAC 04 219 50351

Office: VERMONT SERVICE CENTER

Date: AUG 03 2007

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 initially denied by the Director, Vermont Service Center. The petitioner appealed the matter to the Administrative Appeals Office (AAO), where the matter was remanded back to the service center for further consideration. The director has since issued a new denial, which was subsequently appealed. The director determined that the appeal was untimely filed and opted to treat the matter as a motion, ultimately affirming the prior decision denying the petition. The matter presently before the AAO is an appeal from the director's decision on motion. The appeal will be dismissed.

The petitioner is a New Jersey corporation engaged in the business of managing the development of a storage electricity generation plant. It seeks to hire 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 his latest decision, the director denied the petition based on three independent grounds of ineligibility: 1) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity; 2) the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer; and 3) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

On appeal, counsel disputes the director's decision, asserting that the director failed to address documentation submitted in support of the motion.

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.

Two of the issues in this proceeding call for an analysis of the beneficiary's job duties in his prospective position with the U.S. petitioner as well as his job duties during his employment abroad.

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 Form I-140, the petitioner submitted a letter dated July 1, 2004, which contained the following list of the beneficiary's proposed duties and responsibilities:

1. Direct and control, through various independent contractors, all activities of the company in the United States;

2. Formulating and administering organization policies and developing long[-]range goals and objectives;
3. Directs and coordinates activities of all independent contractors for which responsibility is delegated to further attainment of goals and objectives;
4. Authorizes settlements and strategizing goals and objectives in legal negotiations with the government and private entities;
5. Reviews analyses of activities, cost, operations and forecast data to determine business progress toward stated goals and objectives;
6. Confers with APIL headquarter to review achievements and discuss required changes in goals or objectives resulting from current status and conditions;
7. Plans and develops industrial, labor and public relations policies in accordance with the local applicable law;
8. Evaluates performance of independent contractors; contribution in attaining objectives, decides on company's hiring and firing policies towards these contractors;
9. The position offered also requires [the beneficiary] to use his personal influence and contacts with clients both at home and overseas to increase efficiency and profit.

The petitioner also stated that the beneficiary supervises the work of independent contractors and has an administrative assistant to relieve him from the daily office administration and clerical tasks. With regard to the beneficiary's employment abroad, the petitioner stated that the beneficiary "has been in charge of project management as well as preparation of technical studies and the monitoring of finances."

In compliance with the AAO's instructions, the director issued a request for evidence (RFE) dated September 23, 2005. **The director instructed the petitioner to provide the following:** 1) evidence showing the management and personnel structures of the U.S. petitioner and the beneficiary's foreign employer; 2) an hourly breakdown for each of the beneficiary's positions listing the specific duties performed abroad and duties that would be performed in the United States as well as the amount of time allotted to each duty on a weekly basis; and 3) the petitioner's tax returns for 2003 as well as any Forms 1099 and/or W-2 statements issued by the petitioner in 2003 and 2004.

In response, counsel provided a letter dated November 18, 2005 in which he stated that the beneficiary's position abroad involved overseeing a technical and administrative staff that was comprised of accountants, engineers, a surveyor, and technical managers all of whom were described as professionals. With regard to a description of the foreign entity's staffing structure, the petitioner provided a list of names, position titles, and salaries for the employees claimed to be under the beneficiary's supervision during his employment overseas. The petitioner did not include job descriptions for any of the employees listed; nor did the petitioner provide an organizational chart to illustrate the hierarchy within the departments over which the beneficiary had

supervisory authority. With regard to the beneficiary's own job description, counsel provided the following hourly and percentage breakdown:

- Instructed [p]rojects local representatives at worldwide locations for the purpose of compiling company's [p]rojects budgets. Project [m]anagement on day-to-day basis. Contacted project engineers/representatives[,] given them instructions on the way forward for the development of the [p]rojects by commenting on the design developments and setting [sic] out criteria for the best economical and technical approach. (20 hours/week—50%)

Oversaw the technical engineers to prepare design drawings and feasibility studies. (4 hours/week—15%)

Reviewed and commented on technical drawings and reports prepared by the engineers. (2 hours/week—5%)

- Supervised financial staff on preparation of financial status report[s]. (4 hours/week—10%)
- Authorized payments to a third party suppliers and consultants prepared by accountant. (2 hours/week—5%)

Reviewed accounting reports and signed off on [the] company's accounts, which is prepared for the auditors. (2 hours/week—5%)

- Reporting to the management advising them on the progress of the projects. Based on the reports received from various [p]rojects, compiled overall progress for discussions with the [b]oard of [d]irectors. (2 hours/week—5%)
- Made recommendation[s] to management on personnel performance and workload. (2 hours/week—5%)

With regard to the beneficiary's proposed employment, counsel stated that the petitioner has a total of two employees on its payroll including the beneficiary. Counsel also stated that the beneficiary oversees the work of five independent contractors whom he deemed professionals. Based on the payroll information provided, the site superintendent, the only employee other than the beneficiary, works directly for the petitioner an average of 30 to 36 hours per month. Thus, the record does not show any full-time employees aside from the beneficiary himself. With regard to the beneficiary's job description, counsel provided the following hourly and percentage breakdown:

Corresponding with Federal Energy Regulatory Committee on [a] regular basis. Preparing technical reports concerning the operation of high hazard dam. Preparing flow monitoring reports. (4 hours/week—10%)

- Furthering talks with investors on the smaller scale energy projects. Coordinating with [g]overnmental [a]gencies such as [the] Department of Environmental Protections in connection with property and project environmental issues. (4 hour/week—10%)
- Giving instructions to [the] corporate attorney in connection with corporate and property related issues. Authoriz[ing] settlements and strategizing goals and objectives in legal negotiations with the government and private entities. (6 hours/week—15%)
- Giving instructions to [the] company accountant to prepare financial statements of the [p]artnership and [p]roject entity and for preparation [of] the tax returns. Review[ing] analyses of activities, cost, operations and forecast data to determine business progress toward stated goals and objectives[.] (6 hours/week—15%)
- Evaluating performance of engineering contractors' contribution[s] in attaining objectives, [and] decide[ing] on [the] company's hiring and firing policies towards these contractors[.] (16 hours/week—40%)
- Conferring with APIL['s] headquarter[s] to review achievements and discuss[ing] required changes in goals or objectives resulting from current status and conditions; formulating and administering organization policies and developing long-range goals and objectives. (2 hours/week—5%)
- Property [m]anagement including preparation of leases and maintenance. Managing office administration. Plan[ning] and develop[ing] industrial, labor and public relations policies in accordance with the local law. (2 hours/week—5%)

On February 2, 2006 and subsequently on March 31, 2006, the director determined that the petitioner failed to establish eligibility to classify the beneficiary as a multinational manager or executive. With regard to the beneficiary's proposed employment, the director discussed the lack of evidence showing sufficient support personnel to relieve the beneficiary from having to primarily perform non-qualifying tasks. While counsel properly states on appeal that the size of a petitioner's staff cannot be the sole factor in determining the petitioner's eligibility, the significance of support personnel cannot be overlooked. Regardless of whether the petitioner has employees working for it directly or hires outside contractors to assist with the daily operational tasks, the petitioner must explain and provide evidence to show who performs the non-qualifying tasks that are a natural by-product of business operations. Additionally, the petitioner must establish that the beneficiary is not the one who primarily performs these non-qualifying tasks.

In the present matter, counsel repeatedly refers to outside contractors who purportedly assist with the necessary operational tasks. However, the petitioner has provided evidence that shows its employment of a single individual (aside from the beneficiary) whom the petitioner employs on a limited part-time basis and has provided no documentation to corroborate the claim regarding the hiring of outside contractors to assist with other operational tasks. 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)). 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). Thus, the petitioner has not provided sufficient evidence to support the claim that it is ready and able to relieve the beneficiary from having to primarily perform non-qualifying tasks.

Additionally, the description of the beneficiary's proposed employment is severely lacking in specific information regarding the beneficiary's actual daily job duties. 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). Furthermore, the actual duties themselves reveal the true nature of the employment. *Id.* In the present matter, the petitioner's job description indicates that the beneficiary would spend 40% of his time evaluating the performance of engineers. However, not only has the petitioner failed to provide sufficient documentation to establish its employment of the claimed engineers, but it has not provided a meaningful discussion of the beneficiary's evaluation criteria or the actual job duties involved in such evaluation. The petitioner also indicated that 20% of the beneficiary's time would be spent performing non-qualifying tasks such as communicating with various governmental agencies, preparing technical reports, and communicating with investors. Thus, at least 60%, or a majority, of the beneficiary's time would be spent performing tasks that either have not been specified or those which cannot be deemed as qualifying. When considering this information in light of the petitioner's inability to provide sufficient evidence of an adequate support staff, the AAO cannot conclude that the beneficiary would be employed in a qualifying managerial or executive capacity.

The issue of the beneficiary's employment abroad was not brought up in the director's February 2, 2006 decision. However, in the more recent decision, which was issued on May 31, 2006, the director supplemented his prior findings by adding that the petitioner failed to establish the beneficiary's qualifying employment abroad.

Although counsel disagreed with the director in general, he failed to address the director's finding regarding the beneficiary's employment abroad. **As such, the AAO's determination is based on evidence and information on record.**

On review, the AAO finds that the director's conclusion, despite the lack of a detailed analysis of the beneficiary's employment abroad, was warranted. Specifically, the petitioner indicated that 50% of the beneficiary's time abroad was spent overseeing the work of project engineers. However, the petitioner has not provided the necessary information to establish that these individuals were supervisory, professional, or managerial employees. *See* section 101(a)(44)(ii) of the Act. Although the petitioner claimed to have provided an organizational chart as part of Exhibit G in the response to the RFE, the submission was solely comprised of the names, job titles, and the respective salaries of the employees purportedly under the beneficiary's control during his foreign employment. A chart illustrating the foreign entity's personnel hierarchy, as requested in the RFE, was not submitted. 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, the list of the beneficiary's responsibilities is redundant, reiterating his personnel management role but providing little information about the beneficiary's actual job duties. Specifically, the first three items in the petitioner's list discussed the fact that the beneficiary was charged with overseeing the work of project engineers and assisting them with their technical drawings and designs. It is unclear why the oversight responsibility was paraphrased three different times and allotted a different time constraint each time. If the petitioner meant to suggest that overseeing technical designs is somehow different from reviewing technical

drawings, the general statements provided by the petitioner failed to make the distinction. Moreover, if, as the petitioner suggested, 70% of the beneficiary's time was spent overseeing the various aspects of the work of project engineers, it is unclear why the petitioner failed to specify the actual duties and to assign specific time increments to each task that comprised the various aspects of the beneficiary's oversight responsibilities. As previously stated, an accurate determination of whether the beneficiary was employed in a qualifying managerial or executive capacity requires an account of the beneficiary's specific duties. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary was employed abroad or would be employed in the United States in a primarily managerial or executive capacity. The petitioner has not provided a sufficient illustration of the personnel and management hierarchies of either organization. As such, the AAO is unable to consider the beneficiary's position with respect to others within the foreign and U.S. entities, which are the beneficiary's past and prospective employers, respectively. The petitioner has also failed to provide a comprehensive job description listing the specific duties that comprised the beneficiary's employment abroad and would comprise his employment within the U.S. entity. Additionally, with regard to the beneficiary's proposed employment, the record does not establish that the petitioner is adequately staffed to relieve the beneficiary from having to primarily perform non-qualifying duties. Accordingly, based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity.

The remaining issue in this proceeding is whether the petitioner has a qualifying relationship with the beneficiary's foreign employer.

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 support letter dated July 1, 2004, the petitioner stated that it is 100% owned by Atlantic-Pacific Infrastructure, Ltd. (APIL), an entity incorporated in Bermuda. Although, the record presents sufficient corroborating evidence to establish the existence of a qualifying relationship between these two entities, the

record does not contain adequate documentation to establish that APIL was the beneficiary's foreign employer as initially claimed. In fact, the petitioner's initial claim is significantly undermined by counsel's November 18, 2005 letter in which counsel stated that from July 2001 to December 2002 the beneficiary was employed by Energy World International, Ltd., (EWI), which is located in Hong Kong and is described as an affiliate of Pacific Energy Limited (PEL), APIL's, and therefore the petitioner's, parent company.

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 present matter, while there is adequate evidence of a qualifying relationship between APIL and the petitioner, the petitioner has provided inconsistent information as to which foreign entity actually employed the beneficiary during the relevant time period prior to his nonimmigrant entry into the United States. 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). The petitioner has failed to resolve the considerable inconsistency discussed above by not providing sufficient evidence documenting the beneficiary's employment with APIL during the relevant time period. Rather, the documentation provided in response to the RFE shows that the beneficiary was employed by EWI rather than APIL itself. That being said, the record does not establish common ownership and control between EWI and the petitioner. Specifically, based on the ownership flow chart provided in Exhibit D of the response to the RFE, EWI is entirely owned by [REDACTED]. While EWI also owns shares of PEL, which is the entity that is ultimately the majority shareholder of the petitioning entity, EWI only owns 19.43% of the petitioner's parent entity with the remaining 80.57% owned by "other shareholders." Thus, even if the petitioner's credibility was not an issue, the record does not support a finding of common ownership and control between the petitioner and EWI, the foreign entity, which, based on the documentation provided, employed the beneficiary prior to his employment with the U.S. petitioner.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown 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.