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20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:

SRC 07 800 07270

Office: TEXAS SERVICE CENTER Date:

NOV 03 2008

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann". There is a small checkmark or flourish at the end of the signature.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a Florida corporation¹ which claims to be in the business of nutrition supplies and to have a qualifying relationship with the beneficiary's previous employer in Brazil. 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 concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity.

On appeal, counsel to the petitioner disputes the director's findings, asserts that the beneficiary will be employed in a primarily managerial capacity, and submits additional evidence in support. Counsel further argues that the director's Request for Evidence was vague and failed to give the petitioner "the opportunity to correct any documentation deficiency."

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.

¹It must be noted that, according to Florida state corporate records, the petitioner's corporate status in Florida was "administratively dissolved" on September 26, 2008. Therefore, since the corporation may not carry on any business except that necessary to wind up and liquidate its affairs, and the petitioner has not taken steps under Florida law to seek reinstatement, the company can no longer be considered a legal entity in the United States. See Fla. Stat. 607.1421 (2006). If this appeal were not being dismissed for the reasons set forth herein, this would also call into question the petitioner's continued eligibility for the benefit sought. It is also noted that the petitioner's correct corporate name on file with the State of Florida appears to be "[REDACTED]"

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.

Title 8 C.F.R. § 204.5(j)(3) explains that a petition filed for a multinational executive or manager under section 203(b)(1)(C) must be accompanied by a statement from an authorized official of the "petitioning United States employer" which demonstrates that:

- (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
- (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
- (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
- (D) The prospective United States employer has been doing business for at least one year.

The primary issue in this proceeding is whether the petitioner provided sufficient evidence to establish that it will employ the beneficiary 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) 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.

The petitioner described the beneficiary's proposed position in the United States in the Form I-140 simply as "financial manager." The petitioner also claims to employ four workers. The initial petition is otherwise devoid of supporting evidence.

On July 14, 2007, the director requested additional evidence. The director noted that the "petitioner failed to submit any of the required supporting evidence" and requested that the petitioner "submit evidence that clearly establishes eligibility for the classification sought."

On October 15, 2007, the petitioner responded to the director's Request for Evidence. The petitioner submitted the following documentation as explained in a letter from counsel dated October 1, 2007:

- US corporation's Articles of Incorporation[;]
- US corporation's Occupational License[;]
- US corporation's Income Tax Returns[;]
- US corporation's invoices, utility bills, etc[.];
- Foreign corporation's Articles of Incorporation[;]
- Foreign corporation's Income Tax Returns;
- Foreign corporation's utility bills, invoices, payroll records;
- Beneficiary's pay stubs for the period he worked for the Foreign corporation[.]

However, the petitioner did not submit any evidence pertaining to the beneficiary's proposed job duties, his job duties abroad, the job duties of the beneficiary's subordinate employees, if any, both in the United States and abroad, or the ownership and control of the United States operation.

On November 13, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity.

On appeal, counsel to the petitioner asserts that the beneficiary will be employed in a primarily managerial capacity and submits, for the first time, descriptions of the beneficiary's job duties in the United States and abroad and an organizational chart for the United States operation. The petitioner describes the beneficiary's proposed duties as "financial director" in a letter dated December 4, 2007 as follows:

- Prepare financial information so that outside accountants can complete tax returns.
- Prepare or direct preparation of financial statements, business activity reports, financial position forecasts, annual budgets, and/or reports.
- Maintain current knowledge of organizational policies and procedures, federal and state policies and directives, and current accounting standards.
- Conduct or coordinate audits of company accounts and financial transactions to ensure compliance with state and federal requirements and statutes.
- Receive and record requests for disbursements; authorize disbursements in accordance with policies and procedures.
- Monitor financial activities and details such as reserve levels to ensure that all legal and regulatory requirements are met.
- Develop and maintain relationships with banking, insurance, and non-organizational accounting personnel in order to facilitate financial activities.

The petitioner also submitted an organizational chart for the United States operation. The chart shows the beneficiary, along with two other workers, reporting to an "executive director" who, in turn, is shown reporting to the president. Although the beneficiary is portrayed as supervising "finance & account," "budget planning," and "human resource," it does not appear as if the beneficiary actually supervises any existing subordinate workers. As noted in the Form I-140, the petitioner claims to employ only four workers, and the chart already accounts for five individuals who are either equal or superior to the beneficiary.

Finally, counsel argues on appeal that the director's Request for Evidence was vague and failed to give the petitioner "the opportunity to correct any documentation deficiency."

Upon review, counsel's assertions are not persuasive in establishing that the beneficiary will be employed in a primarily managerial or executive capacity.

As a threshold issue, it is noted that counsel's assertion that the director's Request for Evidence was insufficient under the regulations is not persuasive. The issuance of a Request for Evidence where a petition fails to demonstrate eligibility became entirely discretionary on June 18, 2007. 8 C.F.R. § 103.2(b)(8)(ii); 72 FR 19100 (April 17, 2007). Accordingly, the director could have, in his discretion, denied the petition outright without issuing a Request for Evidence due to the lack of initial evidence sufficient to establish eligibility for the benefit sought. 8 C.F.R. § 103.2(b)(8)(ii). It is emphasized that the burden of proof in these proceedings rests entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Furthermore, it is noted that the AAO reviews decisions of the director *de novo*. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). If the petitioner believed that the record of proceeding was inadequate to establish eligibility for the benefit sought, it could have supplemented the record on appeal, and this is exactly what the petitioner chose to do in this case. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). Therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence as the petitioner has already availed itself of this opportunity on appeal, and the AAO will consider this new evidence.

In examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). The actual duties themselves 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).

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary will act in a "managerial" or "executive" capacity. To the contrary, it appears that the beneficiary will primarily perform non-qualifying administrative and operational tasks which will not rise to the level of being managerial or executive in nature. For example, the petitioner claims that the beneficiary will prepare financial information for outside accountants, financial statements, business activity reports, forecasts, budgets, and reports; maintain knowledge of policies, procedures, directives, and standards; conduct or coordinate audits; administer disbursements of funds; monitor financial activities; and liaise with banks, insurers, and other organizations. However, it has not been established that any of these ascribed tasks constitutes a qualifying managerial or executive duty, especially given that it has not been established that the beneficiary will be relieved of the need to perform these tasks by a subordinate staff. The fact that the petitioner has given the beneficiary a managerial or executive title does not establish that the beneficiary will actually perform managerial or executive duties. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Likewise, the petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As noted above, it has not been established that the beneficiary will supervise any subordinates. Furthermore, it has not been established that the beneficiary will manage an essential function of the organization. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary will manage an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. §§ 204.5(j)(2) and (5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the tasks related to the function.

In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. As explained above, the record indicates that the beneficiary will more likely than not primarily perform non-qualifying tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties will be managerial, nor can it deduce whether the beneficiary will primarily perform the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). Accordingly, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will act primarily in an executive capacity. As explained above, it appears more likely than not that the beneficiary will primarily perform the tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that CIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469

F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991)); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for CIS 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. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Accordingly, the petitioner has failed to establish that the beneficiary will primarily perform managerial or executive duties, and the petition may not be approved for that reason.

Beyond the decision of the director, the petitioner has also failed to establish that the beneficiary was employed abroad in a primarily managerial or executive capacity.

As noted in the petitioner's letter dated December 4, 2007, "[t]here is little or no difference between the beneficiary's position abroad and the one he has been and will continue to occupy in the United States in terms of the level of hierarchy." Accordingly, the petitioner submitted a job description for the beneficiary's position abroad which is substantively identical to the description submitted for the proffered position.

Therefore, as the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity, the petitioner also failed for the same reasons to establish that the beneficiary was employed abroad in a primarily managerial capacity. For the same reasons explained above, it appears more likely than not that the beneficiary primarily performed non-qualifying administrative and operational tasks as the foreign employer's "financial manager," and the petition may not be approved for this additional reason.

Beyond the decision of the director, the petitioner has also failed to establish that it is an "affiliate or subsidiary" of the foreign employer in Brazil.

A "subsidiary" is defined at 8 C.F.R. § 204.5(j)(2) as:

[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.

Likewise, an "affiliate" is defined in pertinent part at 8 C.F.R. § 204.5(j)(2) as:

(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[.]

The regulations 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 Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); *see also Matter of Church Scientology International*, 19 I&N Dec. 593. In the context of this 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.

In this matter, the record is devoid of evidence pertaining to the ownership and control of the petitioner. In support of its petition, the petitioner submitted a copy of its articles of incorporation. However, the petitioner did not submit any evidence of its ownership and control. The record does not contain any stock certificates or other evidence which could establish the identity of the owner or owners of the petitioner. Absent such evidence, it cannot be determined whether the petitioner shares common ownership and control with the foreign employer, which appears to be majority owned and controlled by [REDACTED]. 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)). Once again, the burden of proof in these proceedings rests entirely with the petitioner. Section 291 of the Act.

Furthermore, the petitioner's 2005 tax return, which is in the record, indicates in schedule K, question 5, that no individual owns, directly or indirectly, 50% or more of the petitioner's stock. It also indicates in schedule K, question 7, that no foreign entity owns at least 25% of the petitioner's stock. Accordingly, it appears unlikely that either [REDACTED] or the foreign employer is the owner of a controlling interest in the petitioner. As [REDACTED] appears to be the majority owner of the foreign entity, either [REDACTED] or the foreign employer must own and control the petitioner in order for a qualifying relationship with the petitioner to exist. As this does not appear likely given the averments in the tax return, the petition may not be approved for this additional reason.

Accordingly, as the petitioner has failed to establish that it has a qualifying relationship with the foreign employer, the petition may not be approved.

The previous approval of L-1A petitions for this petitioner does not preclude CIS from denying a subsequently filed non-immigrant or immigrant petition based on a reassessment of the petitioner's qualifications. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act.

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 at 1002 n. 9 (noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional ground of ineligibility as discussed above, this petition cannot be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 at 1043, *aff'd*, 345 F.3d 683.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.