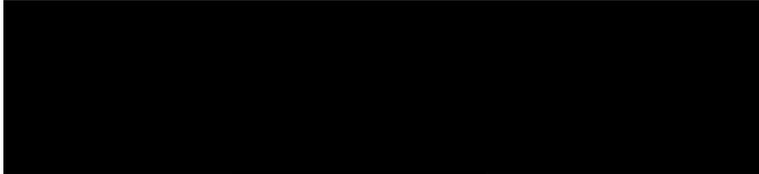


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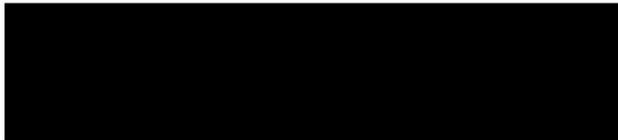
OFFICE: VERMONT SERVICE CENTER

Date:

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, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a North Carolina corporation claiming to be an investment company currently operating two convenience stores. It seeks to employ the beneficiary as its president. 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 determined that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity.

The petitioner subsequently filed an appeal with a combined motion to reopen and/or reconsider. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel disputes the director's findings and submits a brief in support of her 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 primary issue in this proceeding is whether the beneficiary would be employed 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 Form I-140, the petitioner submitted a letter dated July 1, 2005, which includes the following statements about the beneficiary's proposed employment:

As [p]resident, it is expected that the following amount of time will be spent on executive management duties: 39% on strategic thinking/planning, 24% on plan measurement/monitoring, 14% on internal communication, 11% on crisis management/solving acute problems, and 10% on other. The specific duties are broken down as follows: locate investment businesses to purchase (this involves contacting business brokers and evaluating financial records of potential business prospects) or to set up ourselves; determine services we need to provide in our area; establish financial goals for

each investment; analyze financial reports of each investment by reviewing and evaluating reports of daily business operations & establish plans to increase sales, review profit/loss statements; develop marketing strategies to attract additional customers; ensure the smooth operation of each investment through strategic planning and thinking, monitoring of business activity, and communicating with management.

On March 31, 2006, the director issued a request for additional evidence (RFE) instructing the petitioner to provide, *inter alia*, a list of the beneficiary's job duties accompanied by a breakdown of the number of hours the beneficiary would devote to each duty on a weekly basis. The petitioner was also asked to provide its 2005 W-2 and W-3 tax statements, its quarterly tax returns for the first three quarters of 2005, and its 2005 tax return. The petitioner was asked to discuss and provide documentation of any private contractors that were used.

In response, the petitioner provided a list of the six individuals it claims to employ, including the beneficiary as the president, one manager at each of the two convenience markets, an assistant manager shared by the two stores, and a cashier at each of the two store locations. The petitioner complied with the director's request for various tax documents and provided two separate job descriptions for the beneficiary. The first job description listed and provided a percentage breakdown for the following seven focal points where the beneficiary's duties would fall:

- Locate investment businesses to purchase—15%
- Establish financial goals for each investment—35%
- Analyze financial reports of each investment—6 ¼ %
- Establishing plans to increase sales—6 ¼ %
- Review profit/loss statements—6 ¼ %
- Develop marketing strategies—6 ¼ %
- Ensure smooth operation of each investment—25%

In addition, the petitioner supplemented the above list with a more definitive list of duties and responsibilities:

1. Exclusively responsible for decisions affecting profit and loss;
2. Act exclusively to develop, direct and implement overall strategies, policies and procedures of the U.S. company;
3. Research summarized data for financial studies on the economic trends, entry barriers, consumer demands, and supplies;
4. Investment acquisition targets, performing due diligence searches for targets;
5. Arrange the financing of acquisitions, negotiate prices, payment and structure;
6. Analyze requirements for new business opportunities and prepare proposals;
7. Develop and implement various analytical models in collaboration with sales;

8. Review solicitations from potential supplies to determine if potential product or service is viable for the business;
9. Monitor monthly inventory movement reports prepared by store managers;
10. Interpret federal and state regulations to develop policy related to the business;
11. Review and evaluate contracts for compliance with department policies and procedures related to the specific program;
12. Research, compile, and prepare data for financial studies of prospective insurances for [the] company;
13. Review and grant advertising/promotions designed by managers for [their] assigned store[s]; review proposals made by store managers to develop, design and review the business marketing plan; develop strategic business plans for marketing product[s];
14. Develop high-level cost/benefit analyses to determine [the] return on advertising and promotion dollars;
15. Develop strategic plans and review [s]tore [m]anagers' tactical plans and tests;
16. Summarize data or other non-quantifiable information, setting forth current and long-term economic or business trends pertinent to the status of the program;
17. Statistically analyze financial statements to determine liquidity, earnings, earnings potential, and overall financial strength;
18. Perform pricing/sales analysis of the company and compare it to competitors and market standard and hold monthly meetings with managers and other members to review and provide suggestive prices;
19. Develop purchasing policies and establish guidelines and measurements for inventory supply and management;
20. Establish budgets and evaluate cost and quality of goods or services;
21. Identify vendors, obtain quotations, negotiate purchase of materials, equipment or supplies and manage vendor contracts and relations; and
22. Perform in-depth analysis of financial records and summarize performance of business to management during quarterly meetings.

On August 21, 2006, the director denied the petition finding that the petitioner failed to establish that it would employ the beneficiary in a primarily managerial or executive capacity. In support of this conclusion, the director observed that the beneficiary's salary is not commensurate with that of a full-time managerial or

executive employee. The AAO notes that there is no statute or regulation that allows Citizenship and Immigration Services (CIS) to take into account a beneficiary's compensation as a factor in determining whether that individual's employment is within a qualifying managerial or executive capacity. That being said, the AAO notes that the record shows a considerable discrepancy regarding the beneficiary's salary, thereby giving rise to doubt as to the credibility of the information and documentation that has been offered in support of the claim at hand. Namely, the petitioner has submitted six W-2 wage and tax statements for 2005, which included two statements issued to the beneficiary and his wife, respectively for a combined total of \$24,000. The beneficiary's personal tax return for 2005 shows additional income in the amount of \$40,753, which counsel (in her appellate brief) indicates is additional income that is part of the beneficiary's compensation package. However, neither the petitioner's 2005 W-3 statement nor its 2005 corporate tax return explains the source of the additional income. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. 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). Moreover, 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). In the present matter, despite counsel's explanation, there is no evidence that the petitioner was the source of the additional income cited in the beneficiary's personal tax return.

The director also found that the beneficiary's subordinates do not appear to occupy managerial or executive positions. The AAO finds that this observation is irrelevant in the present matter. Section 101(a)(44)(A)(ii) of the Act states that where a beneficiary is to be employed in a managerial capacity, the petitioner must establish that the beneficiary oversees managerial, supervisory, or professional employees or manages an essential function within the organization, or a department or subdivision of the organization. In the present matter, the petitioner maintains the claim that the beneficiary would be employed in an executive capacity. Therefore, the requirements listed under the definition for managerial capacity are inapplicable, as the petitioner does not bear the burden of meeting both statutory definitions. Moreover, even if the petitioner were to claim that the beneficiary would be employed in a managerial capacity, the petitioner need not establish that the entire staff is comprised of managerial, supervisory, or professional employees. Rather, the statute requires only that the beneficiary's direct subordinates be managerial, supervisory, or professional employees.

Notwithstanding the flawed reasoning as discussed above, the director specifically addressed the petitioner's description of the beneficiary's job duties, finding that the statements provided were vague and did not list specific qualifying job duties, which is a necessary prerequisite when examining the executive or managerial capacity of the beneficiary. *See* 8 C.F.R. § 204.5(j)(5). The AAO will then consider the stated job duties in light of the petitioner's organizational hierarchy, the beneficiary's position therein, and the petitioner's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks.

In the present matter, the description provided by the petitioner is deficient in a number of ways. First, despite the fact that the petitioner attributed various non-qualifying duties to the beneficiary's proposed employment, there is no indication as to the amount of time allotted to these and other tasks. For instance, the petitioner indicated that the beneficiary's job would entail researching market trends; investigating acquisition targets; researching and preparing data for insurance purposes; and identifying vendors, obtaining quotations, and negotiating the purchase of materials. However, the petitioner did not indicate how much of the

beneficiary's time would be specifically allotted to these non-qualifying tasks, despite the fact that the burden is on the petitioner to establish that the primary portion of the beneficiary's time will be spent performing qualifying, rather than non-qualifying, tasks. 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).

Second, an overwhelming majority of the statements that describe the beneficiary's proposed employment consist of vague job responsibilities that fail to convey an understanding of specific tasks or the means by which the beneficiary will carry out those responsibilities. Precedent case law has firmly established the significance of a detailed description of job duties, stating that 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). In light of this firmly established principle, which is also expressly stated in 8 C.F.R. § 204.5(j)(5), the petitioner must clarify what it means for the beneficiary to be exclusively responsible for decisions affecting profit and loss and what specific duties the beneficiary would carry out in his effort to develop, direct, and implement strategies, policies, and procedures. The actual duties themselves reveal the true nature of the employment. *Id.*

That being said, the petitioner included a number of duties that require preliminary gathering of information. Namely, the petitioner stated that the beneficiary would summarize data and other non-quantifiable information to set forth economic and business trends. However, the petitioner did not elaborate on what exactly is meant by "other non-quantifiable information," nor were any examples given as to the types of trends the beneficiary would set. The petitioner also failed to explain who would gather the underlying data that would serve as a basis for the beneficiary's summaries. Similarly, the petitioner claimed that the beneficiary would statistically analyze financial statements, but did not provide any information as to who would actually compile the information and compose the statements.

Lastly, the petitioner has provided the quarterly tax return that shows its employment of six individuals, including the beneficiary, at the time of filing. However, there is no information as to either store's hours of operation or the number of hours each employee works at his or her designated store location daily. Without this information it is unclear whether the petitioner was adequately staffed such that the beneficiary would be relieved from having to directly perform the daily retail functions within the petitioner's stores.

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).

In summary, the lack of sufficient information about the beneficiary's daily job duties and the petitioner's staffing precludes the AAO from affirmatively concluding that the beneficiary would be primarily employed in a qualifying managerial or executive capacity.

Furthermore, the record does not support a finding of eligibility based on additional grounds that were not previously addressed in the director's decision.

First, 8 C.F.R. § 204.5(j)(3)(i)(B) states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to his entry to the United States as a nonimmigrant to work for the same employer. In the instant matter, the director specifically addressed this issue in the RFE by instructing the petitioner to provide a detailed analysis of the beneficiary's daily activities during his employment abroad. However, the petitioner failed to provide the requested information. Although the petitioner did provide the foreign entity's organizational chart, this document is not sufficient for the purpose of establishing the nature of the job duties the beneficiary primarily performed during his employment abroad. As previously stated, the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

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. In the present matter, the petitioner has provided an unsigned and undated stock certificate to establish the foreign entity's ownership of the U.S. petitioner, thereby giving the AAO cause to doubt the validity of this document. In addition, the petitioner submitted copies of its U.S. Income Tax Return for an S Corporation (Form 1120S) for years 2004 and 2005. It is noted, however, that to qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any foreign corporate shareholders. *See Internal Revenue Code, § 1361(b)(1999)*. A corporation is not eligible to elect S corporation status if a *foreign corporation* owns it in any part. Accordingly, since the petitioner would not be eligible to elect S-corporation status with a foreign parent corporation, it appears that the U.S. entity is owned by one or more individuals residing within the United States rather than by a foreign entity as claimed. 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 conflicting information discussed in this paragraph has not been resolved and, as such, it cannot be found that the petitioner has established a qualifying relationship with the beneficiary's claimed foreign employer.

Third, 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner must establish that it has been doing business for at least one year prior to filing the Form I-140. 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." It is noted that neither tax returns nor utility bills will assist CIS in determining whether an entity is conducting business on a "regular, systematic, and continuous" basis. *See id.* In the present matter, despite the petitioner's claim that it engages in retail transactions, the petitioner has not provided documentation to establish that it has been doing business in the manner described above.

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 grounds of ineligibility discussed above, this petition cannot be approved.

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.

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.