U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: OCT 16 2008

EAC 06 077 51094

IN RE: Petitioner:
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:

[redacted]

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 New York not-for-profit corporation which claims to be an "affiliate" of Farooq Welfare Center, located in Pakistan.[1] 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 it would employ the beneficiary in a managerial or executive capacity.

On appeal, counsel disputes the director's findings, asserts that the beneficiary will be employed in either a managerial or executive capacity, and submits a brief and additional evidence in support of his 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.

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[1]It is noted that, according to the corporate records of the State of New York, the petitioner's corporate name is "[redacted]"

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 job duties as "chairman" and "executive officer" in the United States in a letter dated March 23, 2005 as follows:

> [H]e is responsible for directing the affairs of the organization. Being the Chairman he is subject to the control and supervision of the Board, the Chairman is the Chief Executive Officer and general manager of the Corporation and generally supervises, directs, and controls the activities, affairs and the officers/volunteer of the Corporation. The Chairman presides at all meetings of the Board which are bi-monthly. The Chairman has such other powers and duties as may be prescribed by the Board or the Bylaws.
>
> Working with the Board Members in continuously considering and reviewing the long-term vision for [the petitioner], and developing concepts and ideas to present to the Board of Directors for consideration, approval, and development. Chairman represents and speaks for [the petitioner] to other organizations, the public, and media. Serves as chairperson of the Executive Committee, ensures that the scope, goals and theme of [the petitioner] are upheld throughout all activities, as well as creating the yearly budget.

Furthermore, the petitioner submitted state and federal wage reports and tax returns, which collectively indicate that the beneficiary was the petitioner's only employee in 2004. The petitioner also indicates in the Form I-140 that it currently employs one worker.

On June 23, 2006, the director requested additional evidence. The director requested, *inter alia*, a list of the beneficiary's duties, a breakdown of the percentage of time to be devoted to each duty, a list of subordinate workers who will report directly to the beneficiary, and job descriptions for the subordinate workers.
In response, the petitioner submitted a letter dated August 14, 2006, in which it further describes the beneficiary's proposed duties as "chairman" as follows:

> The Chairman of [the petitioner] [p]rovide[s] ideas for new projects, Chair Project Committee, Make company more cost effective with widely accepted projects, Learn how other companies operate, Provide better services to community members, Develop professional contacts, Learn from peers, Achieve personal and professional growth, Contribute towards progress in the industry or in a technical field, Guide and lead the organization, Preside over all meetings of the organization, Call special meetings, Call to the attention of the membership and developments affecting the organization or of concern to the members, Maintain close liaison with the executive director concerning the collection of dues, the maintenance of the organization's financial records, and the maintenance of the organization's membership records, Arrange for the participation of the organization inprojects [sic] and programs of other groups that may be deemed beneficial to the organization, Represent the organization in any activities in which the organization may be involved, or provide representation, Assume whatever duties that might be necessary as the occasion arises, subject to subsequent approval by the board of directors. Coordinating the members of the [petitioner] towards attaining the goals established in the By-Laws and the policies defined by the Board of Directors; Executing the programs, policies, and duties as outlined in the [petitioner] By-laws[.]

The petitioner also submitted an organizational chart for the United States operation. The chart shows the beneficiary reporting to a three-person board of directors and supervising a "secretary" and, indirectly, six volunteers. The petitioner did not provide a breakdown of the amount of time the beneficiary will devote to each ascribed duty nor did it describe the duties of the "secretary" or the "volunteers."

On September 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 asserts that the director erred and that the beneficiary will render "duties and responsibilities which are primarily managerial and executive functions."

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

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. In support of the petition, the petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary will direct the affairs of the organization; supervise, direct, and control the "activities, affairs and the officers/volunteer[s] of the [petitioner];" provide ideas for new projects; consider "long-term vision;" develop concepts; and represent the petitioner. However, the petitioner fails to specifically describe these new projects, long-term visions, activities, or affairs, or explain what, exactly, the beneficiary will do to supervise, direct, and control the organization on a day-to-day basis as the petitioner's sole employee. The fact that the petitioner has given the beneficiary a managerial or executive title and has prepared a vague job description which includes inflated job duties does not establish that the beneficiary will actually perform managerial or executive 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. *Id.* 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).

Consequently, the record is not persuasive in establishing that the beneficiary will primarily perform qualifying duties in his operation of the organization as the petitioner's sole employee. As noted above, the petitioner asserts that the beneficiary will "direct" the petitioner's activities. However, the petitioner also claims that the beneficiary is its only employed worker. Accordingly, the record does not establish that the beneficiary will be relieved of the need to perform the non-qualifying tasks inherent to his ascribed duties by a subordinate staff. Although the petitioner claims the beneficiary will be assisted by a "secretary" and by "volunteers," the petitioner failed to specifically describe their duties, even though this evidence was requested by the director, or to establish that these individuals are bona fide workers who relieve the beneficiary of the need to perform non-qualifying tasks. 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 record is not persuasive in establishing that many of those duties ascribed to the beneficiary are truly managerial or executive in nature. For example, the petitioner claims that the beneficiary will create the yearly budget, develop professional contacts, maintain records, and assume whatever duties might be necessary. As the petitioner failed to provide a breakdown describing how much time the beneficiary will devote to each of these non-qualifying duties, even though this evidence was requested by the director, it cannot be concluded that the beneficiary will "primarily" perform qualifying duties. Once again, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *Id.* Accordingly, it appears more likely than not that the beneficiary will primarily perform non-qualifying administrative or operational tasks in his administration of the organization. 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).

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 asserted in the record, the beneficiary will directly supervise a secretary and numerous volunteers. However, as noted above, the petitioner failed to specifically describe the duties of these subordinates, even though this evidence was requested by the director, or credibly establish that any of these individuals is a bona fide worker truly being "supervised" by the beneficiary, who appears to be the petitioner's sole employee. Once again, 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). Accordingly, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.[2]

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. The beneficiary's job description is so vague that it cannot be discerned what, exactly, the beneficiary will do on a day-to-day basis. As explained

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[2]While the petitioner has not argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support this position even if taken. 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. The petitioner's vague job description fails to document that the beneficiary's duties will be primarily managerial. Also, 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).

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 it is an "affiliate or subsidiary" of the foreign employer, Farooq Welfare Center, located in Pakistan.

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[.]

In this matter, the petitioner asserts that it is an "affiliate" of the foreign employer. In support, the petitioner submits copies of its certificate of incorporation and bylaws which indicate that the petitioner is a New York non-profit corporation with members and that all management power is vested in the board of directors. The foreign employer is not listed as an initial or current member or director of the petitioner. Also, the certificate of incorporation includes clauses which prohibit the inurement of any of the petitioner's assets to the benefit

of any member or private individual and which direct that, upon dissolution, all assets must be distributed to organizations which qualify under section 501(c)(3) of the Internal Revenue Code. The bylaws indicate that the board or directors and the members are entirely independent in their operation of the petitioner, and the directors may fill vacancies or amend the bylaws or articles without permission from the members. There is nothing in the articles or the bylaws granting the foreign entity, or any other entity, the power to control the assets of the petitioner or the selection of directors, officers, or members.

On June 23, 2006, the director requested the following additional evidence:

> Submit evidence that 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. This may be in the form of stock certificates, copies of corporate bylaws/constitutions, which clearly indicate stock ownership, or copies of published annual reports, which indicate affiliates, and/or subsidiaries and the percent of ownership held by the parent corporation. Corroborating evidence should be included.

In response, the petitioner resubmitted its articles and bylaws. The petitioner also submitted an internally generated organizational chart which portrays the foreign employer as superior to the petitioner. Finally, the petitioner submitted evidence that the foreign employer wired money to the petitioner for charitable purposes.

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 case, the record is devoid of any evidence establishing that the foreign employer has the direct or indirect legal right to control the assets or management of the petitioner. As a non-profit corporation with members, it appears that the right to control the organization is vested in the members, directors, and officers, and not in the foreign employer. Furthermore, as a non-profit corporation, which has included clauses prohibiting private inurement in its articles, it appears that even the members and directors have ceded ultimate control over the disposition of its assets to the judicial system of the State of New York and that these individuals do not truly "control" the entity. Rather, the members, directors, and officers act more like stewards of charitable funds than corporate managers of business assets. Finally, the record is wholly devoid of evidence that the foreign employer has any ownership interest in the petitioner, a non-profit corporation. In fact, it does not appear possible under New York law for any individual or corporation, foreign or domestic, to claim a bona fide ownership interest in such an entity. Such organizations do not issue stock or otherwise vest third parties with ownership interests.

Accordingly, the petitioner has failed to establish that it has a qualifying relationship with the foreign employer, and the petition may not be approved for this additional reason.

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 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, 8 U.S.C. § 1361.

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 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.[3]

ORDER: The appeal is dismissed.

[3]It is noted that the director stated in the decision that the petitioner is in the "dry cleaning/laundry store" business. Upon review, this statement appears to be either factually erroneous or based on evidence outside of the record, and it will be withdrawn. That being said, it does not appear as if this factual statement was relied upon by the director in rendering his decision, and thus it was harmless in nature.