U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: [redacted] OFFICE: NEBRASKA SERVICE CENTER Date: DEC 0 1 2009
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IN RE: Petitioner: [redacted]
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:

[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a Kansas corporation engaged in the distribution of telecommunications devices. 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 managerial or executive capacity and denied the petition on that basis.

On appeal, counsel disputes the director's conclusions and submits a brief as well as additional supporting evidence.

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 the United States in a qualifying 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.

In support of the Form I-140, the petitioner submitted a letter from counsel dated October 6, 2006 in which counsel stated that the beneficiary's proposed U.S. position would be within an executive capacity requiring the beneficiary to be responsible for the business operation, supervision of the managing director, setting of goals and policies, and reporting to the board of directors. The petitioner did not submit a separate letter describing the beneficiary's proposed employment. *See* 8 C.F.R. § 204.5(j)(5).

On July 12, 2007, the director issued a request for additional evidence (RFE) indicating that the petitioner has not provided sufficient information about the beneficiary's proposed employment to enable U.S. Citizenship and Immigration Services (USCIS) to determine whether the proposed employment would be within a qualifying managerial or executive capacity. Accordingly, the director instructed the petitioner to provide a

detailed list of the beneficiary's proposed day-to-day duties with a percentage of time assigned to each duty. The petitioner was also asked to provide its organizational chart accompanied by employee names, job titles, and job descriptions. Additionally, the director inquired about the petitioner's organizational structure, asking the petitioner to explain why most of its staff is comprised with managers or executives.

In response, the petitioner provided a percentage breakdown listing the duties and responsibilities assigned to the beneficiary in his proposed position with the U.S. entity. As the director has incorporated the list in the denial, the AAO need not repeat this information in the instant discussion. The petitioner also provided its organizational chart, representing three subordinate employees and untitled positions. The chart depicts the beneficiary at the top of the hierarchy in the position of president. The company's vice president is depicted as the beneficiary's direct subordinate overseeing the general manager of engineering and a radio frequency (RF) engineering manager. The chart indicates that the positions of executive assistant to the beneficiary, sales associate, help desk/technical support were all vacant as of August 1, 2007 when the chart was created.

In a decision dated April 24, 2008, the director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. The director noted that the petitioner's description of the proposed position lacked sufficient detail and failed to clarify the specific tasks the beneficiary would perform on a daily basis. The director also commented on the limited support staff, as illustrated in the organizational chart, and therefore determined that the beneficiary's general oversight responsibilities appeared to be exaggerated.

On appeal, counsel asserts that the beneficiary's prospective employment would be within an executive capacity and that the beneficiary would not be a first-line supervisor, as he would oversee the work of other managerial and executive employees. However, 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).

Here, despite counsel's assertion, the record lacks sufficient evidence to establish exactly whom the petitioner employed at the time of filing. Assuming that the organizational chart submitted in response the RFE, which identified a vice president and two employees with managerial titles, illustrated an organizational hierarchy that could support a managerial or executive employee, the AAO notes that the chart was dated August 1, 2007, which is nearly ten months after the petitioner filed the Form I-140. While the AAO acknowledges that the petitioner's staffing is not the sole factor that determines eligibility, an adequate support staff is a key consideration, as it enables the AAO to gauge whether the petitioner has employees available to perform the daily operational tasks so that the beneficiary would be relieved from having to do so as the primary portion of his proposed position. It appears that the director attempted to elicit this information by requesting the petitioner's 2006 tax return. However, the petitioner provided evidence showing that it obtained an extension on the filing of its 2006 tax return and has not supplemented the record with the requested documentation, despite the fact that additional documentation in support of the appeal was received on May 23, 2008.

Although the petitioner has supplemented the appeal with additional information about the beneficiary's proposed employment, the fact that the job description makes numerous references to a staff of executives and managers, who would arguably carry out some of the necessary operational tasks, further emphasizes the

need for documentary evidence to establish exactly whom the petitioner employed at the time the Form I-140 was filed. Thus, while a detailed description of the proposed employment is clearly significant and expressly required by 8 C.F.R. § 204.5(j)(5), USCIS cannot approve a petition when there is little evidence to support the assertions put forth in the job description. 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). It is therefore essential for the petitioner to not only describe the beneficiary's proposed tasks with sufficient detail, but also to provide sufficient evidence to establish that the petitioner has sufficient support personnel to enable the beneficiary to primarily perform the managerial or executive tasks of the proposed employment.

Furthermore, while the supplemental information provided on appeal focuses on the beneficiary's role in making policy and reviewing the work being completed by other subordinate managerial employees, counsel's argument on appeal refers to regulatory provisions that deal with the filing of an L-1A nonimmigrant visa petition, wherein USCIS recognizes that certain new businesses cannot support an executive position during the early stages of operation. *See* 8 C.F.R. § 214.2(l)(3)(v). The AAO notes, however, that USCIS does not make the same distinction with regard to immigrant petitions, where the petitioner seeks to employ the beneficiary on a permanent basis in a qualifying managerial or executive capacity. The regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) expressly requires that any petitioner seeking to classify a beneficiary as a multinational manager or executive must first establish that it has been doing business for at least one year prior to filing the petition. USCIS may not approve immigrant visa petitions filed by entities that would fall under the definition of "new office" as defined by 8 C.F.R. § 214.2(l)(ii)(F). In fact, the record shows that the petitioner has been doing business for the requisite one-year period and would therefore not fit the definition of a new office even if it were to file a nonimmigrant petition on the beneficiary's behalf. Therefore, counsel's argument, which suggests that the director should have taken into account the petitioner's early stage of development, is not persuasive and appears to either overlook or simply misinterpret the relevant regulatory provisions that apply specifically to the type of immigrant visa petition filed in the present matter.

Precedent case law is clear in requiring a petitioner to establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In the present matter, it appears that the petitioner was not eligible for the immigration benefit sought at the time of filing. While the petitioner has submitted numerous job descriptions in an attempt to comply with the director's adverse findings, the record lacks sufficient evidence to establish that the petitioner was able to employ the beneficiary in a capacity where the primary portion of the tasks he would perform would be managerial or executive. Therefore, on the basis of the above analysis, the AAO cannot approve the instant petition.

Furthermore, the record does not support a finding of eligibility based on at least one additional ground that was not previously addressed in the director's decision. Specifically, 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 claims that it is a wholly owned subsidiary of the beneficiary's foreign employer. In support of this assertion, the petitioner provided its articles of incorporation, which indicates that the petitioner is authorized to issue 30,000 shares of its stock, as well as a document entitled "Written Consent in Lieu of the First Meeting of the Sole Director," which indicates that the petitioner issued 2,000 shares of its common stock in exchange for monetary consideration in the amount of $20,000. The AAO

notes, however, that the petitioner provided no documentation establishing the identity of the party/parties to whom the 2,000 shares were issued. As previously stated, 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. at 165.

Furthermore, Schedule L, Item 22(b) of the petitioner's 2005 tax return indicates that the petitioner received a total of $200,000 in exchange for issuance of stock, thereby indicating that it issued more than the 2,000 shares indicated in the document discussed above. 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; *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, as the petitioner has not provided any documentation identifying the recipient(s) of its stock, the AAO cannot conclude that the petitioner and the foreign entity are commonly owned and controlled by virtue of the foreign entity's sole ownership of the petitioner's stock.

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 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.