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

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**U.S. Citizenship and Immigration Services**

**PUBLIC COPY**

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[redacted]

FILE: [redacted] OFFICE: TEXAS SERVICE CENTER Date: MAY 27 2010

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

*Perry Rhew*
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 limited liability company organized in the State of Florida. The petitioner 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 denied the petition based on three independent findings: 1) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity; 2) the petitioner failed to establish that the petitioner has a qualifying relationship with the beneficiary's foreign employer; and 3) the petitioner failed to provide adequate evidence to establish that it has sufficient physical premises to house its business operation.

On appeal, counsel disputes all three of the director's findings and provides additional evidence in support of his assertions.

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 first issue in this proceeding is whether the petitioner would employ the beneficiary 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 dated October 6, 2008 stating that it wishes to expand its business operation into new markets by employing those who are familiar with the parent entity's standards, goals, and policies. The petitioner offered the following description of the beneficiary's employment with the U.S. entity:

- Responsible for development, implementation and optimization of business strategy, tactics and performance for multiple truck lines across international markets.

- Responsible for overseeing commercial activities and the large financial transactions involved with the selection, purchase and subsequent sale of trucks and parts, from

purchasing to inbound and outbound logistics, transportation, customs duties, and entry into various domestic and international markets.

- Responsible for managing and expanding relationships with major truck manufacturers, and providing critical information to them regarding the exact types of truck models, features, and parts for which there is customer demand in international markets, including specific applications, prices and quantities needed for each market.

- Responsible for establishing and overseeing the implementation of truck and product disposition strategies within the region, including budgets (procurement, distribution, marketing), product pricing and selection of in-country representatives.

- Will confer with the board and the [p]arent company regarding his plans for the most important matters, such as expansion of U.S. operations, or launching products in new countries.

- Hire and fire employees, as necessary.

As president, [the beneficiary] will exercise:

- A high level of authority and a broad range of job responsibilities;

- Leadership on development of key operational performance processes and performance indicators;

- The planning function, and formulate policy and direct important functions . . . ;

- Full responsibility for large financial transactions;

- The broadest discretion in developing and directing the activities of the company.

In Part 5, Item 2 of the Form I-140, the petitioner indicated that it currently has four employees. However, in the support letter, the petitioner did not specify a fourth employee, stating only that it employs the beneficiary, a general manager, and a parts and equipment sales manager.

In a decision issued on February 18, 2009, the director denied the petition, concluding that the evidence of record does not establish that the beneficiary would be employed by the U.S. petitioner in a qualifying managerial or executive capacity. The director noted that the petitioner has three employees and found that the petitioner failed to establish that its organization would be able to relieve the beneficiary from having to primarily perform non-qualifying tasks.

On appeal, counsel asserts that a beneficiary may be employed in a qualifying managerial or executive capacity even as sole employee of the petitioning entity. Counsel contends that through the use of outside contractors one may be employed as a function manager. In support of this assertion, counsel refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. The

petitioner has not shown that the circumstances in this matter are analogous to those in the unpublished decision. In any case, the AAO notes that while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all employees of U.S. Citizenship and Immigration Services (USCIS) in the administration of the Act, unpublished decisions are not similarly binding.

Furthermore, counsel claims that the beneficiary would serve as a function manager. A petitioner claiming that a beneficiary is managing an essential function must furnish a written job offer that clearly describes the duties to be performed, 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. 8 C.F.R. § 204.5(j)(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 duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be 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).

In the present matter, while counsel contends that the beneficiary would function as a senior level manager who directs essential functions, the petitioner provided a list of broad job responsibilities, including business development, finances, large financial transactions, and the marketing, purchase and sales of heavy equipment and parts across international markets, regarding which he possesses unique knowledge and experiences. Neither the petitioner nor counsel provides a clear indication as to how specifically the beneficiary would manage an essential function or who would actually perform the underlying duties of the function. Counsel's statements place undue emphasis on the beneficiary's broad discretionary authority with regard to formulating policy, setting company goals, and generally making necessary business decisions. While the beneficiary's broad decision-making authority is relevant in establishing eligibility, this is only one of several elements that will be considered in determining eligibility. The petitioner must establish, with sufficient clarity, the specific job duties the beneficiary would perform and it must provide sufficient evidence to establish that it is adequately equipped, either with in-house staff or with outside contractors, to relieve the beneficiary from having to primarily perform non-qualifying tasks. Here, the petitioner's job description and limited support staff preclude the AAO from approving the petition.

The petitioner's job description, which counsel restates on appeal, indicates that the beneficiary would facilitate the creation of business relationships with major truck manufacturers, create budgets and determine product pricing, and he would be directly involved in overseeing purchase and sales activities, such as transportation and customs of the items purchased and sold. The petitioner has not established that these duties are indicative of managing an essential function. Moreover, given the petitioner's organizational hierarchy at the time of filing, it seems unlikely that the beneficiary's role would be limited to that of a function manager, whose purpose is to manage a function rather than personnel. The record lacks evidence to establish who, if not the beneficiary, would actually manage the petitioner's two remaining employees, who, despite their managerial position titles, do not appear to be supervisory, professional, or managerial subordinate employees. *See* section 101(a)(44)(A)(ii) of the Act.

Additionally, counsel asserts that as part of a cost-cutting strategy, the administrative and clerical personnel would be contracted on a need basis and the technical support personnel would continue to be based in Colombia. However, neither claim is corroborated with documentary evidence. It is noted that 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). As the record lacks the requisite supporting evidence, it is unclear who would perform the administrative and technical support tasks that are necessary for the petitioner's daily operations.

Counsel also asserts that the beneficiary's assigned job duties are squarely within the job description of president/top executive as described in the Department of Labor's *Occupational Outlook Handbook (Handbook)*, 2008-09 Edition. However, regardless of whether counsel's assertion is accurate, there is no indication that the *Handbook* incorporates the key elements of the statutory definitions of managerial and executive capacity as defined in the Act. In other words, meeting the general standards provided in the *Handbook* in no way establishes that the petitioner has satisfied the relevant statutory criteria that defines managerial or executive capacity.

In the present matter, the petitioner has failed to establish that its business operation has advanced to a stage of development that requires the services of someone who will primarily perform tasks within a managerial or executive capacity; nor did the petitioner provide sufficient evidence to establish that its organizational composition is sufficient to relieve the beneficiary from having to primarily perform daily operational tasks that are necessary to produce a product or to provide services. Therefore, the AAO cannot conclude that the beneficiary's proposed position with the U.S. entity would be within a qualifying managerial or executive capacity, and the petition may not be approved for that reason.

The second issue in this proceeding is whether the petitioner submitted sufficient evidence to establish that it has a qualifying relationship with the beneficiary's foreign employer.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

> *Affiliate* means:
>
> (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
>
> (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;
>
> * * *
>
> *Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.
>
> *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In the October 6, 2008, support letter, the petitioner stated that it is the subsidiary of [redacted], a Colombian entity. The petitioner expressly stated that it is 100% owned by the Colombian entity where the beneficiary was previously employed. In support of this claim, the petitioner provided Membership Certificate No. 2, dated April 30, 2007, naming [redacted] as the member holding 100% ownership interest in the petitioning entity. The petitioner also provided its completed IRS Form 1065, U.S. Return of Partnership Income.

In the denial, the director commented on the petitioner's failure to submit stock certificate no. 1 and a stock register showing a transfer of stock ownership. The petitioner also focused on Schedule K of the petitioner's IRS Form 1065, where the petitioner named two owning partners, both listed as domestic entities. In essence, the director took into account the missing membership certificate and the conflicting information found in the petitioner's Form 1065 tax return and concluded that a qualifying relationship cannot exist between the petitioner and a qualifying foreign entity.

On appeal, counsel challenges the petitioner's reference to stock certificates, given the fact that the petitioner is not a corporation and does not issue stock certificates to its owners, but rather is a limited liability company that issues membership certificates to its members. Counsel also explains that the first membership certificate was void due to a spelling error and provides a copy of the voided membership certificate in support of the explanation.

With regard to the information provided in Schedule K of the petitioner's Form 1065, counsel states that [redacted] has 99% of the petitioner's profits and losses and contributes 99% of the capital. Counsel also suspects that the foreign entity was claimed as a domestic entity in error based on the U.S. business address that was provided. However, no documentary evidence was submitted to corroborate counsel's explanation. As stated earlier, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534.

Furthermore, counsel's references to Schedule B of the Form 1065, where the filing entity is asked to identify itself as a foreign or domestic entity, are irrelevant, as the director did not make an adverse finding on the basis of any information provided by the petitioner in that portion of the tax return. Rather, the director's adverse finding was directly related to information provided in Schedule K of Form 1065. To explain further, the petitioner originally claimed to be a wholly owned subsidiary of a single foreign entity. However, Schedule K of the petitioner's Form 1065 not only shows two partners with an ownership interest in the petitioning entity, but also identifies both of those partners as domestic rather than foreign, despite having claimed earlier that it is a wholly owned subsidiary of a foreign entity. 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, there is not one, but two inconsistencies regarding the ownership of the petitioning entity. Not only has the petitioner potentially mischaracterized the foreign or domestic origin of its owning partner(s), but it has also been inconsistent with regard to the number of partners that share in its ownership. 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. As the petitioner has failed to present consistent and reliable evidence establishing its ownership, USCIS is unable to examine one of two key factors that must be explored when determining whether a qualifying relationship exists. Accordingly, the AAO cannot conclude that the U.S. petitioner and the beneficiary's foreign employer are similarly owned and controlled such as to be deemed as having a qualifying relationship. For this additional reason, the petition may not be approved.

The third issue in this proceeding is whether the petitioner has provided adequate evidence to establish that it has sufficient physical premises to house its business operation. In the denial, the director properly quoted a portion of No. 7 of the business lease, which noted that the lessee was expressly limited in its use of the leased premises. Specifically, the lease stated, "Tenant shall use the premises for Internet Access Service, Sale of Telephone Cards, Facsimile and Printing Services and for no other purpose." The director also pointed out that the petitioner is in the business of exporting truck parts, as indicated at Part 5, Item 1 of the Form I-140.

On appeal, counsel asserts that the petitioner "has two lines of businesses," one of which is the exportation of truck parts and the other a money transfer office, which operates under the name '[redacted]' Counsel asserts that the lease submitted in support of the Form I-140 corresponds to the money transfer office, not to the exporting of truck parts. Counsel's statement, however, is not consistent with the evidence of record. First, the record lacks evidence to establish the existence of [redacted]. Second, the lease that was initially submitted does not expressly allow the premises to be used for a money transfer office and clearly names the petitioner as the leasing party and user of the leased premises. While the petitioner submits a different office lease in support of the appeal, provision No. 2 of that lease limits the use of the premises to an administrative office. The record does not indicate that the petitioner is an administrative office. Therefore, the petitioner has not overcome the director's adverse finding. For this additional reason, the petition may not be approved.

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.