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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

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FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER

Date: NOV 03 2010

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:**

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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a California corporation that 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 the determination 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 conclusion, stating that the decision is arbitrary and capricious in light of the evidence that has been submitted in support of the petition.

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 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 March 22, 2007 in which the petitioner stated that [REDACTED] is the petitioner's fictitious name. A Fictitious Business Name Statement was submitted in support of the petitioner's claim. The petitioner's statement includes the following description of the beneficiary's proposed employment:

[The beneficiary] will continue to be responsible for executing all corporate decisions, strategy, and policy. Furthermore, he will continue to plan and develop the overall business expansion, strategy; he will also continue to conduct hiring and training of managers and supervisors in order to insure proper conduct of employees in the company.

[The beneficiary] will continue to have the sole authority to hire and fire personnel of the company. He will also continue to institute training programs for staff and have the appropriate manager supervise such instruction. He will also continue to negotiate, arrange,

sign all contracts on behalf of the company, and periodically report progress of the company to his partners on the Foreign Board of Directors. In his executive capacity with our company, [the beneficiary] will have full control of the direction of the corporation and will continue to be responsible for decisions in regards to all the aforementioned. Furthermore, [he] will continue to oversee the extent and scope of the company's market expansion and acquisition plans.

Additionally, the beneficiary submitted a separate job description in which he stated that he oversees five department managers in his position as the petitioner's president. The beneficiary supplemented the record with the following description of his proposed position:

1. Initiate, [p]lan, direct, lead, guide and implement various business programs . . . . Conducts meetings for the improvement of any [sic] company's performance, direct[s] and instructs department concerned for [sic] the solution of each problems [sic] in the course of every operations [sic]. Coordinate and negotiate with some various potential clients on the other possible business prospects . . . .
2. Manage and monitor [m]arketing operations under [redacted] as [m]arketing [m]anager, more specifically[,] the projection on the clients['] requirements. Instruct and input some updated development on the clients to realize, maintain and capture some of the prospective clients['] new requirements. Help in the maintenance of corporate accounts . . . . Represent the company in some of the supposed bidding of supply and contracts on all prospective and existing clients['] requirement[s]. Review monthly sales reports and instruct the department on the supposed actions that should be taken to improved [sic] some accounts.
3. Manage and help [c]oordinate with various principals overseas for the best pricing and immediate deliveries of the placed orders. Negotiate, coordinate and instruct [f]orwarders and brokers overseas for the easy facilitation of all incoming shipments and outbound cargos to support all the pending deliveries . . . . Negotiate on the manner of handling the supposed incoming shipment [s] should be. . . . Review all shipment report[s.]
4. [M]anage[,] [d]irects [sic] and monitor the accounting department operations ([redacted] as manager) particularly on the accounts receivables and payables. Instruct them on all the priorities to be covered and demand an [sic] immediate actions and results on all pending receivables and payables from various clients. The one that approves and sign[s] all priority payments to various suppliers . . . . Plan and implement all the annual budget to all departments in operations. Review [m]onthly financial report[.]
5. In charge of reviewing the intended [p]urchases by the [p]urchasing department under [redacted] as [m]anager and the one that approves whatever materials needed per job order. Also, the one that approves the items to be purchased overseas from various suppliers and prioritize the items with the earliest date of delivery. Communicate with the local supplier on some items . . . and the one that negotiate[s] and approves on [sic] the supplier in which the items is [sic] to be procured from. Evaluate all supplier's [sic] offer[s] . . . . Review all the inventory stock reports and plan for the immediate sale on all the slow

moving items in stock. Also review all [sic] the material requirement planning report before its proper implementation[.]

6. In charge in [sic] the review and approval on [sic] all [t]echnical works accepted in fabrication and assembly works before its final implementation. Monitor all the pending and on going works to synchronize with the supposed deliveries. Responsible in the detailed specifications on all the accepted job works including its testing and commissioning before delegating it to the technical staff to eliminate the improper waste of man-hour and materials for a specific projects [sic] and to conform to the supposed date of deliveries. Review all the aspects of operations in the technical side including the mechanical and electrical aspects of works and monitor all the safety compliance of the company to eliminate accidents on the job. Directs supervision to [the] Technical Manager.

In addition to the job descriptions, the petitioner also provided its organizational chart in which the beneficiary is depicted as the head of the company at the top management tier. The chart is vertically divided to represent the petitioner's two phases. The left side of the chart depicts the trading and merchandising phase, which includes a bookkeeper and a marketing and shipping clerk as the beneficiary's two subordinates with an office and administrative clerk as the latter employee's subordinate. The right side of the chart depicts the consulting and services phase, which depicts a financial and accounting manager as the petitioner's direct subordinate with two accountants as his direct subordinates. The chart indicates that three claims coding contractors perform services under the supervision of one of the accountants, while the other accountant will oversee a billing data entry employee when such an employee is hired.

On March 31, 2009, the director issued a request for evidence (RFE), instructing the petitioner to clarify certain aspects of the previously provided job description and to provide IRS Form W-2s that were issued by the petitioner in 2006 and 2007.

In response, the petitioner provided a letter dated April 10, 2009, which includes a brief description of the positions listed in the previously provided organizational chart and further clarification of the beneficiary's own job description. Specifically, the petitioner indicated that the beneficiary would allocate 15% of his time to training the marketing staff in the proper sales techniques with regard to various products and clients. The petitioner explained that the beneficiary conducts research by attending technical support seminars and passes that information on to his staff. Another aspect of the beneficiary's training responsibility includes training the company's staff in new tax rules and guidelines as well as the various government guidelines within the context of the home health care business.

The petitioner indicated that another 15% of the beneficiary's time would be allocated to negotiating, arranging, and signing contracts. The petitioner indicated that the beneficiary's role in contract negotiation is to use his technical knowledge in manufacturing and production operation to narrow down the technical parameters with respect to each client and to engage in continuing negotiations with clients for additional services.

The petitioner stated that the beneficiary would allocate 50% of his time to the market expansion and acquisition plan, which would entail initiating product improvement programs and continuing to research new market opportunities. The petitioner discussed the beneficiary's efforts in initiating exclusive product research that ultimately resulted in the invention of three patented products.

It is noted that the petitioner did not comply with or address the director's request for the submission of its 2007 IRS Form W-2s, which would have accounted for salaries paid during the year in which the Form I-140 was filed. It is noted that 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).

On July 24, 2009, the director issued a decision denying the petition. The director provided a detailed analysis of the beneficiary's expanded job description and determined that the petitioner failed to establish that the primary portion of the beneficiary's time would be spent performing tasks within a qualifying managerial or executive capacity. The director also commented on the various statements that suggested that the petitioner's staffing and operation were not fully assembled at the time of filing, thereby further indicating that the petitioner was not ready and able to employ the beneficiary in a primarily managerial or executive capacity.

On appeal, counsel asserts that the director should have taken into account the petitioner's reasonable needs and its stage of development. Counsel states that the petitioner is in its initial stage of development and requires the beneficiary's "hands-on management" to continue its growth. Counsel's statements, however, place undue focus on the petitioner's needs, which do not supersede the petitioner's foremost burden of having to establish that the beneficiary's daily tasks would be primarily managerial or executive rather than operational in nature. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties). In other words, a petitioner's needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

Counsel also stresses the beneficiary's top rank within the petitioner's organizational hierarchy and the discretionary authority he has in making business decisions. While these are elements that are statutorily required in order for one to be deemed a manager or executive, possessing such characteristics does not establish that the beneficiary would allocate the primary portion of his time to managerial- or executive-level tasks. It is possible in the matter of a small business entity for an individual to be at the top of the hierarchy and possess the highest degree of discretionary authority but not be deemed an employee within a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. In examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The AAO will then consider this information 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. Thus, as explained herein, while the beneficiary's placement within the petitioner's organizational hierarchy is considered, there are other highly relevant factors that may preclude the petitioner from establishing eligibility.

In the present matter, while the beneficiary may be at the top level of the petitioner's organizational hierarchy and while he may possess the discretionary authority as the final decision-maker within the organization, the petitioner has failed to provide an adequate job description or evidence to establish that it has the ability to relieve the beneficiary from having to primarily perform non-qualifying operational tasks.

First, with regard to the beneficiary's job description, the beneficiary attributed a considerable number of non-qualifying tasks to his proposed position. Specifically, the beneficiary stated that he would be directly involved in implementing solutions to various problems, negotiating with clients, maintaining current client accounts, bidding on supply contracts, and negotiating shipping terms with forwarders and brokers. A

number of these tasks are mentioned multiple times in relation to various different aspects of the petitioner's operation. Additionally, in the response to the RFE, the petitioner indicated that 50% of the beneficiary's time would be allocated to conducting market research for the purpose of finding new products to increase the petitioner's presence in the market and to expand its operation and future profits. While the AAO acknowledges that no beneficiary is required to allocate 100% of his time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to his/her proposed position. 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). In the present matter, the job descriptions submitted thus far indicate that the beneficiary's time would be primarily allocated to non-qualifying tasks.

The AAO now turns to the second item for consideration—the petitioner's ability to relieve the beneficiary from having to primarily perform non-qualifying tasks. In reviewing the organizational chart that follows the beneficiary's job description, the AAO notes that a number of the management positions mentioned in the job description, including the positions of marketing manager, purchase manager, and technical manager, were not included in the chart, thus leading the AAO to question the accuracy and reliability of both the job description and the organizational chart. 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 above described anomaly also leads the AAO to question whether, as of the date the petition was filed, the petitioner was adequately staffed to support a managerial or executive employee who would devote the primary portion of his time to managerial or executive tasks. In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "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).

Accordingly, in light of the unexplained discrepancy it is unclear whether the beneficiary employed a marketing manager, a purchase manager, or a technical manager and if so, why these positions were not included in the petitioner's organizational chart. In the alternative, if these management positions were not filled at the time the Form I-140 was filed, it is unclear who, if not the beneficiary, would have been able to carry out the tasks assigned to these respective positions. As previously noted, any time an employee allocates the primary portion of his or her time to the performance of tasks that are necessary to produce a product or to provide services, such an individual 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. at 604.

In summary, the petitioner in the present matter has failed to submit sufficient evidence to establish that it would employ the beneficiary in a managerial or executive capacity. Although counsel has indicated that the

petitioner is in its initial stage of development and assures the AAO that the petitioner will progress beyond this stage, the petitioner assumes the burden of establishing that it is able to employ the beneficiary within the qualifying managerial or executive capacity as of the date the petition was filed. Here, the evidence of record contains a job description indicating that the beneficiary's proposed employment would include numerous non-qualifying tasks with little evidence to indicate that the petitioner has the support staff to employ the beneficiary in a primarily managerial or executive capacity. As such, the instant petition cannot be approved.

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. Published case law has established that 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 the instant matter, the petitioner did not adequately describe the beneficiary's employment abroad, thus precluding the AAO from determining whether the beneficiary's position with the foreign entity was primarily comprised of qualifying tasks.

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. 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 present matter, the petitioner claimed that it is a subsidiary of the beneficiary's foreign employer. In support of this claim, the petitioner provided stock certificate no. 1, which shows that 6,000 shares of its stock were issued to [REDACTED]. However, Schedule E of the petitioner's 2006 tax return indicates that 60% of its common shares were issued to the beneficiary while another 15% of its common shares were issued to [REDACTED]. Thus, the latter document shows the beneficiary as the petitioner's majority owner than a firm, corporation, or other legal entity, as noted in the definition for the

term subsidiary. See 8 C.F.R. § 204.5(j)(2). As previously stated, the petitioner must provide independent objective evidence to resolve any inconsistencies in the record. See *Matter of Ho*, 19 I&N Dec. 591-92. Such evidence has not been presented in this matter.

Furthermore, it is noted that 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. Thus, even if the petitioner were able to resolve the inconsistency with regard to its own ownership, the record nevertheless lacks sufficient evidence with regard to the ownership of the foreign entity. 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)). As the record lacks sufficient evidence establishing that the U.S. entity and the beneficiary's foreign employer are similarly owned and controlled, the AAO cannot conclude that the petitioner has the requisite qualifying relationship to meet the regulatory requirement noted 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 *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (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.

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.