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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

B4

[redacted]

FILE: [redacted] OFFICE: NEBRASKA SERVICE CENTER Date: OCT 0 6 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, Nebraska 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 that was organized in the State of [redacted] It seeks to employ the beneficiary as its treasurer and financial director. 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 grounds of ineligibility: 1) the petitioner failed to provide sufficient evidence establishing that the beneficiary's foreign and U.S. employers have a qualifying relationship; 2) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and 3) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On appeal, counsel asserts that the petitioner was not allowed sufficient time in which to submit certain evidence that was requested in the RFE. Counsel refers to the additional evidence the petitioner has submitted with regard to the foreign entity's ownership.

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 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.

The first issue in this proceeding is whether the petitioner established that it has a qualifying relationship with the beneficiary's foreign employer.

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 the United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *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 general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

In the present matter, [redacted], acting on behalf of the petitioner, submitted a letter dated February 22, 2009 in support of the Form I-140 claiming that the petitioning entity and the beneficiary's foreign employer are both owned by the same individuals, each individual having the same percentage of ownership. The petitioner also submitted the foreign entity's certificate of incorporation dated September 25,

1997, its memorandum of association, and its articles of association. Each of the two latter documents was accompanied by an ownership breakdown dated September 22, 1997, which listed a total of five shareholders, each owning 1,000 shares of the foreign entity. It is noted that the record did not contain documentation addressing the ownership of the U.S. petitioner.

Accordingly, the director issued a request for evidence (RFE) dated August 26, 2009 instructing the petitioner to submit, *inter alia*, evidence establishing the existence of a qualifying relationship between the beneficiary's foreign employer and the U.S. entity that seeks to employ the beneficiary. The director noted that evidence of ownership must include stock certificates and stock ledgers or, in the case of a limited liability company, evidence of the percentage of ownership belonging to each member. The director also asked the petitioner to provide its operating agreement.

In response, the petitioner provided an October 6, 2009 letter from counsel, who stated that some of the requested documentation must be sent from Pakistan and that the petitioner would therefore require additional time in which to provide the requested evidence. Accordingly, based on the claim that certain documents were not available at the time of the request, the petitioner did not provide further evidence addressing the foreign entity's ownership. With regard to the U.S. entity, a certificate of incorporation was submitted showing an effective date of November 27, 2002. The petitioner also provided its articles of incorporation in which Article VI stated that the petitioner would be authorized to issue 100,000 shares of its stock and Article VII stated that in order to commence doing business, the petitioner required a minimum of $500 in consideration for the issuance of stock. The petitioner also provided its corporate tax returns from 2006-2008. It is noted that Schedules K-1 in all three tax returns name Noman Rashid as 100% owner of the stock of the U.S. entity. Additionally, all three returns' Schedules L, Item #22 show that the petitioner received $100 in exchange for the issuance of stock. The petitioner did not provide the requested stock certificate(s) or stock ledger.

On November 30, 2009, the director issued a decision denying the petition, concluding that the petitioner failed to submit sufficient documentation establishing that the beneficiary's foreign and U.S. employers have a qualifying relationship.

On appeal, counsel asserts that the petitioner should have been allowed more time in which to comply with the RFE and relies on a 2007 service memorandum in support of his argument. However, the AAO finds counsel's argument to be unpersuasive. Contrary to the implication in counsel's statement, U.S. Citizenship and Immigration Services (USCIS) memoranda merely articulate internal guidelines for service personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir.1987)).

Furthermore, by the time the petitioner filed its Form I-140, 8 C.F.R. §103.2(b)(8) had been amended and no longer contained provisions for the compulsory issuance of an RFE or a notice of intent to deny (NOID) under any circumstances. Specifically, 8 C.F.R. §103.2(b)(8)(ii) states that "USCIS *in its discretion may* deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS." (Emphasis added.) Additionally, 8 C.F.R. §103.2(b)(8)(iii) allows USCIS the same degree of discretion in deciding whether or not to issue a NOID or RFE with regard to any additional evidence. In either scenario, the regulations do not require USCIS to grant the applicant or petitioner a set amount of time in which to respond to such notices, as

the time period for providing a response is also at the discretion of USCIS. Thus, counsel's claim that the petitioner was not allowed sufficient time in which to respond to the RFE is without merit.

Regardless, even if, *arguendo*, the regulations required USCIS to allow extra time where the requested evidence is located overseas, such provisions would be irrelevant with regard to a large portion of the RFE, which focused heavily on documents concerning the ownership of the U.S. entity, whose documents are presumably located within the boarders of the United States. Moreover, if insufficient allowance of time was the reason for the petitioner's failure to provide the requested documents, it is unclear why, the petitioner failed to submit the requested evidence on appeal. 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).

Additionally, the petitioner's claim with regard to its ownership is inconsistent with the information submitted in the petitioner's 2006, 2007, and 2008 tax returns. As indicated above, each of the three tax returns contained a Schedule K-1, which identified [redacted] as the petitioner's sole shareholder. This information is inconsistent with the petitioner's initial claim in its February 22, 2009 support letter where the petitioner indicated that it had multiple owners and that the owners were the same as those with ownership interests in the foreign entity. The AAO further notes that Article VII of the petitioner's articles of incorporation is inconsistent with the information provided in Schedules L, Item #22 of the petitioner's tax returns. Specifically, while the latter documents indicated that the petitioner received only $100 in exchange for issuance of stock, Article VII indicates that the petitioner would have to have received a minimum of $500 as consideration for issuance of stock in order for the entity to commence doing business. 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). Here, the petitioner has not provided documentation to reconcile either of the above-described inconsistencies.

Lastly, in a supplemental letter dated December 29, 2009, counsel stated that two of the individuals who had been named as shareholders of the foreign entity were deceased as of the date the petition was filed and therefore did not have an ownership interest at the time of filing. The petitioner has submitted additional documents showing that the two individuals did, in fact, pass away prior to the filing of the instant petition. The petitioner also provided a document establishing the six individuals who were named as the legal heirs of the shareholder who died most recently. However, the AAO notes that the petitioner provided no documentation specifically naming the new shareholder structure of the foreign entity.

In summary, the petitioner has provided deficient and inconsistent documentation to establish its own ownership and the ownership of the beneficiary's foreign employer. As such, the petitioner has failed to establish that the two entities are commonly owned and controlled such that they have a qualifying relationship. Therefore, on the basis of this conclusion, the AAO finds that the petition must be denied.

The two remaining issues in this proceeding call for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the beneficiary was employed abroad and whether he 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 provided descriptions of the beneficiary's foreign and proposed employment. As the director restated both job descriptions in the denial, the AAO will not repeat this information in the instant decision.

After reviewing the information with regard to both of the beneficiary's job descriptions, he determined that the descriptions failed to adequately describe the beneficiary's past and proposed job duties. Accordingly, the August 26, 2009 RFE instructed the petitioner to specify the individual tasks the beneficiary performed as part of his overseas employment as well as the tasks he would perform in the course of his proposed employment. The petitioner was asked to assign time constraints to indicate the percentage of time that had

been and would be allocated to each task. The petitioner was also asked to provide an organizational chart illustrating each entity's staffing hierarchy and the beneficiary's placement therein.

In response, the petitioner provided a letter dated October 6, 2009 from counsel, who claimed that the petitioner's representative was abroad visiting his ailing mother and would need additional time in which to provide some of the requested information. As stated above, there is no statutory or regulatory provision that mandates USCIS to oblige the petitioner's request for an extension of the time limit for responding to an RFE. The record does not establish that the only person with access to the requested information about the beneficiary's foreign and proposed job duties was the single employee who had been out of the country when the RFE was issued. As previously noted, 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). Here, the record shows that the petitioner did not provide any supplemental information regarding the beneficiary's job duties either with the entity abroad or his proposed job duties with the U.S. entity.

The petitioner did, however, provide an organizational chart in an effort to illustrate its own organizational hierarchy. The chart shows [redacted], the beneficiary's brother, as president of the entity. The president is shown as overseeing the position of manager followed by an assistant manager. The remainder of the organization includes two technicians and a painter. It is noted that the beneficiary's proffered position of treasurer/financial director was not included in the petitioner's organizational chart. While the AAO acknowledges that the beneficiary may not currently be working for the U.S. petitioner, as indicated in the Form I-140, the RFE clearly instructed the petitioner to include the beneficiary's proffered position to adequately illustrate where within the petitioner's organizational hierarchy his position would fall. It is further noted that the petitioner did not provide the requested organizational chart of the beneficiary's foreign employer. 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, in the director's November 30, 2009 denial of the petition, the director concluded that the petitioner failed to establish that the beneficiary was either employed abroad or that he would be employed by the petitioning entity in a qualifying managerial or executive capacity. The director noted that the beneficiary's proposed position was described using general terminology that failed to provide a comprehensive description of the beneficiary's specific job duties.

On appeal, no further information was provided with regard to the beneficiary's positions with the foreign or U.S. entities. In fact, the record shows that counsel did not specifically dispute the director's findings with regard to the beneficiary's managerial or executive capacity in his foreign or U.S. positions.

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). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; 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 case the description of the beneficiary's job duties is too general to convey an understanding of exactly what the beneficiary was and would be doing on a daily basis and how much of his time was and would be spent on qualifying tasks versus the non-qualifying ones. Although the petitioner was expressly instructed to provide this crucial information with regard to the beneficiary's positions with both entities, the petitioner did not supplement the record with this information either in response to the RFE or on appeal. 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. at 604. Without a detailed description of the tasks that comprised the beneficiary's position abroad and those tasks that would comprise the proposed position, the AAO cannot affirmatively conclude that the beneficiary would primarily perform managerial or executive duties.

Additionally, while not addressed in the director's decision, the record lacks evidence to establish that the petitioner met the filing requirement described at 8 C.F.R. § 204.5(j)(3)(i)(D), which states that the petitioner must establish that it has been doing business for at least one year prior to filing the Form I-140. The regulation at 8 C.F.R. § 204.5(j)(2) defines doing business as "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office." In the present matter, although the petitioner provided its tax returns for 2006-2008, a tax return does not show the frequency of the petitioner's business transactions and therefore cannot be relied upon to determine whether an entity is conducting business on a "regular, systematic, and continuous" basis. *See id.*

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 ground 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.