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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B4

DATE: OCT 06 2011

OFFICE: TEXAS SERVICE CENTER

[redacted]

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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 $630. 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 Director, Texas Service Center, determined that the petitioner in the present matter is not eligible for the preference visa petition sought herein. The director has certified this matter for review by the Administrative Appeals Office (AAO). The AAO will affirm the director's findings and deny the petition.

The petitioner is a Florida corporation that seeks to employ the beneficiary as its general manager. 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 reviewed the record of proceedings pertaining to the instant petitioner and determined that the petitioner failed to meet three eligibility requirements. The first two findings pertain to the beneficiary's employment capacity. Specifically, the director determined that the petitioner failed to establish that 1) the beneficiary was employed abroad in a qualifying managerial or executive capacity and that 2) the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. Lastly, the director determined that the beneficiary self-petitioned by virtue of having signed the Form I-140 as the petitioner's signatory official.

There is no evidence in the record to indicate that the petitioner has supplemented the record with additional evidence or information in response to the director's adverse findings. Therefore, the record is deemed complete as presently constituted and a decision will be issued on the basis of the documentation that is currently on record.

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 two issues in this proceeding focus on the beneficiary's job duties during his foreign and proposed employment. Specifically, the AAO will examine the record to determine whether the director was correct in concluding that beneficiary was not employed abroad and would not 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 beneficiary provided a statement which contained a general overview of his proposed employment with the petitioning entity. As the director has incorporated the beneficiary's statements into his latest decision, the AAO need not repeat that information at this time. Also included as supporting evidence was a copy of the petitioner's organizational chart in which the beneficiary was depicted as the company's general manager, which is at the top-most tier within the petitioner's six-person hierarchy. The chart indicates that the beneficiary's direct subordinates include a sales and operation manager and a position that was simply titled "administration." The three remaining positions listed in the chart include one sales and one manufacturing employee, both depicted as the sales and operations manager's subordinates, and one assistant to the administration position.

As properly noted in the director's decision, the beneficiary failed to provide a discussion of his employment with the foreign entity. As such, neither the beneficiary's job duties abroad nor his specific employment history with the foreign entity was known to U.S. Citizenship and Immigration Services (USCIS) at the time the petition was filed.

Accordingly, on March 9, 2009, USCIS issued a request for additional evidence (RFE) instructing the petitioner to provide, in part, supplemental job descriptions of the beneficiary's foreign and proposed employment. Specifically, USCIS asked the petitioner to list the beneficiary's job duties with each entity and to provide a percentage breakdown indicating the amount of time that was and would be allocated to the job duties pertaining to the beneficiary's foreign and proposed employment. The petitioner was also asked to disclose the names, position titles, and educational credentials of the beneficiary's subordinates in the foreign and U.S. positions and to briefly describe each subordinate employee's job duties.

The response included the foreign and U.S. entities' respective organizational charts and a percentage breakdown listing the beneficiary's duties and responsibilities with each entity. As the director included both of the job descriptions in the decision that he certified to the AAO, this information need not be restated.

On February 9, 2010, the director issued a decision finding the beneficiary ineligible for immigrant classification in the visa category of multinational manager or executive. In support of his decision, the director made numerous adverse findings. With regard to the beneficiary's proposed employment with the U.S. entity, the director observed that the information contained in the initially submitted organizational chart, which named a total of six employees including the beneficiary, was inconsistent with Part 5 of the Form I-140, where it was shown that the petitioner had seven employees at the time of filing. 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 director properly noted that neither position title nor ownership of an entity establishes that a beneficiary's employment is within a qualifying managerial or executive capacity. The director then addressed the supplemental job descriptions that were provided in response to the RFE, finding that some of the beneficiary's duties with the foreign entity were those of a first-line manager.

Although the AAO agrees with the director's overall conclusion, the director's underlying analysis is not on point with the information that was provided in response to the RFE. While the AAO agrees that some of the items listed in the job description indicate that non-qualifying tasks consumed a portion of the beneficiary's time, the job description as a whole is lacking in sufficient detail and thus precludes the AAO from making an

informed conclusion as to what specific tasks the beneficiary performed on a daily basis and precisely how much of his time was allocated to the performance of non-qualifying tasks.

The primary portion of the beneficiary's time was allocated to general job responsibilities that fail to convey a meaningful understanding of the specific tasks that would actually be performed. For instance, the job description indicated that the beneficiary spent 20% of his time overseeing sales managers and their staff. However, no explanation was provided as to the other staff members the beneficiary managed nor did the petitioner establish specifically how much time was allocated to managing sales staff versus the time that was allocated to overseeing the managerial sales staff. Similarly, the petitioner failed to adequately describe what specific tasks that were involved in directing and coordinating sales activities and formulating, directing, and coordinating marketing activities, each of which was also allocated 20% of the beneficiary's time. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). It is noted that the actual duties themselves reveal the true nature of the employment. *Id.* at 1108. As the beneficiary's job duties is one the primary elements that determines whether the employment is within a qualifying managerial or executive capacity, the lack of a sufficiently detailed job description precludes USCIS from being able to fully assess the beneficiary's eligibility for the immigrant classification.

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 beneficiary's non-qualifying tasks are only incidental to his/her position either with the foreign or U.S. entity. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The record in the present matter lacks sufficient information that adequately describes the beneficiary's job duties with the foreign entity. Moreover, the director properly pointed out that the record does not include evidence to establish that the beneficiary was employed abroad as claimed. Therefore, based on these findings, the AAO cannot conclude that the beneficiary was employed abroad during the requisite time period or that he was employed abroad within a qualifying managerial or executive capacity as required by 8 C.F.R. § 204.5(j)(3)(i)(B).

Similarly, with regard to the beneficiary's proposed employment, the content of the job description provided in response to the RFE is devoid of specific information about the beneficiary's proposed job duties. As properly pointed out by the director, the record lacks consistent documentation establishing exactly whom the petitioner employed at the time the Form I-140 was filed. Although a detailed job description is admittedly a key component in determining the petitioner's eligibility, USCIS considers other key factors as well, including the hiring organization's staffing composition. A job description alone would be meaningless if the organization that seeks to hire the beneficiary does not have the human resources to relieve that individual from having to primarily perform non-qualifying operational job duties. Moreover, 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).

In the present matter, the record has not been supplemented with documentation to resolve the inconsistency with regard to the petitioner's staffing composition at the time of filing. Thus, in light of the overly vague job description and the lack of documentation regarding the beneficiary's support staff, the AAO finds that it cannot conclude that the petitioner has the capability of employing the beneficiary in a qualifying capacity where the primary portion of his time would be allocated to managerial- or executive-level job duties.

The remaining issue that was addressed in the director's decision focuses on the beneficiary's signature at Part 8 of the Form I-140. Namely, the director determined that the beneficiary's signature indicates that the beneficiary has self-petitioned and that an employer has not petitioned on his behalf as is statutorily required.

In further addressing this issue, the director reviewed the petitioner's corporate documents, which show that [redacted] not the beneficiary, was named as the petitioner's incorporator, registered agent, and sole director. The director further noted that the beneficiary is not a stockholder of either the foreign or the U.S. entity. The director determined that the beneficiary is not statutorily permitted to self-petition and denied the Form I-140 on this basis as well.

First-preference immigrant status under section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C), requires that the beneficiary have a permanent employment offer from the petitioner. A petitioner who is a nonimmigrant temporary worker is not competent to offer permanent employment to an alien beneficiary for the purpose of obtaining an immigrant visa for the beneficiary under section 203(b)(1)(C) of the Act. *Matter of Thornhill*, 18 I&N Dec. 34 (Comm. 1981).

The petitioner in the present matter has not disputed the director's findings or provided evidence to establish that the beneficiary has not self-petitioned. Therefore, in light of the director's findings, the statutory requirements, and the precedent case law cited above, the AAO concludes that the beneficiary has failed to overcome the adverse finding and will affirm the director's conclusion.

Additionally, while not addressed in the director's decision, the record contains inconsistent documentation with regard to the petitioner's ownership. Namely, while the minutes of special stockholder meeting held by [redacted]. on April 12, 2004 show that ownership of the petitioning entity was conveyed to [redacted], schedule E of the petitioner's 2007 tax return shows that [redacted] owns 100% of the petitioner's stock. The facts contained within these documents regarding the petitioner's ownership are inconsistent and this inconsistency has not been reconciled through any of the documentation on record. *See Matter of Ho*, 19 I&N Dec. 591-92. Moreover, if the assertion made on schedule E of the 2007 tax return is true, it is not clear that the prospective U.S. employer and the foreign entity that purportedly employed the beneficiary abroad have a qualifying parent-subsidiary or affiliate relationship, which would result in an additional adverse finding.

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 findings 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 director's decision dated February 9, 2010, to deny the visa petition is affirmed. The petition will be denied.