**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**

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

[redacted]

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DATE: APR 0 2 2012

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:

[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 $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 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 multinational corporation that seeks to employ the beneficiary as its systems integration group 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.

In support of the Form I-140 the petitioner submitted a statement dated August 25, 2009, which included relevant information regarding the petitioner's eligibility for the immigration benefit sought as well as brief descriptions of the beneficiary's foreign and proposed employment. The petitioner also provided supporting evidence, including documents that pertain to its finances.

The director reviewed the supporting documents and determined that the petitioner did not provide sufficient evidence to establish that the beneficiary's employment abroad was in a qualifying managerial or executive capacity. The director therefore issued a request for additional evidence (RFE) dated January 6, 2010 informing the petitioner of various evidentiary deficiencies. The director instructed the petitioner to provide a copy of the foreign entity's organizational chart with the names, position titles, and job descriptions of the beneficiary's supervisor and subordinate employees. The director also asked the petitioner to provide a list of the beneficiary's job duties during her employment abroad as well as the percentage of time the beneficiary allocated to each of her tasks.

The petitioner complied with the director's requests, providing the requested documentation that pertains to the beneficiary's employment abroad. Based on his review of the relevant information, the director determined that the beneficiary allocated the primary portion of her time to the performance of non-qualifying tasks. Therefore, notwithstanding the petitioner's compliance with the RFE instructions, the director concluded that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity and denied the petition in a decision dated February 22, 2010.

On appeal, counsel submits a brief, asserting that the petitioner provided ample evidence to address the director's concerns. Counsel states that while the beneficiary did not supervise other employees, she managed the essential function of operations systems and assumed a senior-level position with respect to that function. Counsel asks the AAO to consider an updated statement from [redacted], the foreign entity's corporate affairs senior manager.

The AAO concludes that counsel's arguments are not persuasive and fail to overcome the director's denial. The petitioner's submissions have been reviewed and all relevant documentation that pertains directly to the key issue in this matter will be fully addressed in the discussion below.

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 to be addressed in this proceeding is the beneficiary's employment capacity in her position with the foreign entity. Specifically, the AAO will examine the record to determine whether the petitioner submitted sufficient evidence to establish that the beneficiary was employed abroad 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 examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the beneficiary's job duties with the entity in question. *See* 8 C.F.R. § 204.5(j)(5). Published case law has held 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). The AAO will then consider this information in light of the organizational hierarchy of the entity in question as well as the beneficiary's placement within that hierarchy.

In the present matter, counsel offers an updated statement dated April 9, 2010 authored by [redacted], who reiterated counsel's claims regarding the beneficiary's role as manager of the operations systems function, which he deemed complex and essential to the foreign entity's operations. [redacted] further stated that the beneficiary worked autonomously to design, program, test, migrate, implement, and maintain the company's software and custom applications. The beneficiary was also said to have provided technical support on existing software and applications and to have performed troubleshooting.

[redacted] statement does not establish that the beneficiary's position abroad was primarily comprised of qualifying managerial- or executive-level tasks. The record indicates that a preponderance of the beneficiary's duties involved directly providing the services of the foreign entity. The claim that the beneficiary acted in the role of a function manager simply because she did not supervise subordinates is not persuasive, as the petitioner must provide a job description that demonstrates that the beneficiary *managed* the function rather than *performed* the duties related to the function, as the evidence indicates she did. Further, while the AAO acknowledges that no beneficiary is required to allocate 100% of their time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary performed were only incidental to the position in question. 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).

While the evidence indicates that the beneficiary had the requisite discretionary authority that is required of a function manager, the same evidence also indicates that the primary portion of the beneficiary's time was spent performing the tasks that were necessary to produce a product or to provide the services of the foreign

entity. Based on the evidence furnished, the AAO finds that the beneficiary was not employed abroad in a qualifying managerial or executive capacity. Therefore, the instant petition does not warrant approval.

Additionally, while not previously addressed in the director's decision, the AAO finds that the record lacks sufficient evidence to establish that the petitioner meets the eligibility criteria cited at 8 C.F.R. § 204.5(j)(3)(i)(C), which states that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer.

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary"). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The supporting evidence of the petitioner's claimed qualifying relationship consists of an explanation that the petitioner provided in the initial support letter. The petitioner provided no supporting documentary evidence to corroborate the claimed distributions of ownership that were discussed in the initial support letter. Therefore, the AAO finds that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's employer abroad.

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.

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.