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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: MAY 29 2012 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

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:
This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 of the Texas Service Center revoked the previously approved preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the petition will be revoked.

The petitioner is a Texas corporation that operates a convenience store. 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.

On January 15, 2010, the director revoked the petition concluding that the petitioner did not submit sufficient evidence in rebuttal to the United States Citizenship and Immigration Services' ("USCIS") Notice of Intent to Revoke ("NOIR") and has not overcome the grounds for revocation.

The record of proceeding before the AAO contains: (1) the Form I-140 and supporting documentation; (2) the director's NOIR, dated May 6, 2008; (3) the petitioner's response to the NOIR; (4) the director's January 15, 2010 notice of revocation; and, (5) the timely filed Form I-1290B. The AAO reviewed the record in its entirety before issuing its decision.

On November 18, 2002, the petitioner filed the Form I-140 to classify the beneficiary as an employment-based immigrant. The director approved the petition. On May 6, 2008, the director notified the petitioner of his intent to revoke approval of the immigrant petition. In the notice of intent to revoke, the director stated that "during the processing of the applicant's adjustment application (Form I-485), issues have become apparent that cause the proprietary of the underlying visa petition (I-140) approval to be questioned." Specifically, the director noted that there is insufficient evidence to establish a qualifying relationship between the beneficiary's employer abroad and the petitioner. The director also noted that the evidence does not establish that the beneficiary functions primarily within an executive or a managerial capacity. The director noted that the tax documents for the year the petition was filed indicate that the petitioner employed three individuals, two of whom appear to work part-time. The director also noted that the petitioner did not provide sufficient evidence to establish that the beneficiary was in an executive or managerial capacity when employed abroad. In addition, the director noted that the petitioner has not established that it can pay the proffered salary to the beneficiary. Finally, the director noted that the petitioner has not established that the beneficiary's foreign employer remains an active business enterprise.

In response to the director's NOIR, counsel for the petitioner provided evidence that the petitioner is able to pay the proffered [redacted] year to the beneficiary by submitting payroll records showing that the beneficiary [redacted] per year, and corporate tax returns for 2004 through 2007, and profit and loss statement and balance statements for 2004 through 2007.

Counsel also submitted evidence of the ownership of the foreign company. As evidence, counsel submitted "Form D, [redacted] and Establishment Registration showing that [the beneficiary's] business has been registered as a shop pursuant to the Bombay Shop and

Establishment Act, 1948." However, upon review of this document, the beneficiary is listed as the employer and not as the owner. This document does not list the owner of the foreign employer. Counsel also submitted a letter from [redacted] Acting President of the foreign company in the beneficiary's absence. The author of this letter does not state that the beneficiary is the owner of the foreign company. He states only that the foreign company is the parent company of the petitioner but does not provide any additional evidence to establish this claim. The author stated that the beneficiary held the position of President with the foreign company until he was transferred to the United States. Finally, counsel provided contracts naming the foreign company as a wholesale buyer but once again, this is not sufficient evidence to establish the beneficiary as the owner of the foreign company.

In the response, counsel for the petitioner also provided job descriptions for the positions held by the beneficiary both abroad and with the petitioner. Counsel also provided an organizational chart and a brief job description for the petitioner's employees.

Finally, counsel for the petitioner submitted documentation evidencing that the foreign entity is an active business enterprise such as business tax returns, copies of original payroll records, electric bill, and one photo of the foreign company.

On January 15, 2010, the director revoked the approval of the petition concluding that the petitioner did not submit sufficient evidence in rebuttal to the NOIR and has not overcome the grounds for revocation. The director revoked the petition on the following grounds: (1) the petitioner failed to establish that the beneficiary's proposed employment with the U.S. entity would be within a qualifying managerial or executive capacity; (2) the petitioner failed to establish that the beneficiary's employment abroad was within a qualifying managerial or executive capacity; (3) the petitioner failed to establish the existence of a qualifying relationship; and (4) the petitioner failed to establish that the foreign company continues to operate as a business.

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 submitted sufficient evidence to establish that it 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 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). Published case law clearly supports the pivotal role of a clearly defined job description, as 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); *see also* 8 C.F.R. § 204.5(j)(5). USCIS reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the petitioner's business, the employment and remuneration of employees, as well as the job descriptions of the beneficiary's subordinates, if any, and any other facts contributing to a complete understanding of a beneficiary's actual role within a given entity.

In the present matter, an analysis of the record does not lead to an affirmative conclusion that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

On review, the petitioner provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner stated vague duties such as "develop and implement goals, policies and priorities related to the operation of the convenience store," "oversees the functions of the management and evaluates the effectiveness of the management with regard to business development, completion of projects and profitability." The petitioner did not define the petitioner's goals and policies. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. The petitioner's descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature.

The job description also includes several non-qualifying duties such as the beneficiary will spend 90 percent of his time "devoted to business expansion by executing contracts with other vendors and directing and providing operational guidance to the General Manager in order to expand the company's services and increase its profitability." The petitioner also stated that the beneficiary

"represents the company on all matters issues with regulatory and funding agencies," "directs the central purchasing of the company," "assists in developing the annual company budget and administers implements and monitors the budget," and "receives reports and complex analysis including legal requirements, accounting techniques, data processing, and statistical studies." The petitioner did not indicate who will be in charge of the market research, the development of the marketing program, or the development of the expansion strategies. It appears that the petitioner will be negotiating contracts and creating new partnerships without the assistance of any subordinate employee. The petitioner stated that the beneficiary will review reports and assist in developing the budget but it did not state who would write the reports and prepare the budget with the petitioner. 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 Intn'l.*, 19 I&N Dec. at 604.

In the instant matter, the job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will perform.

On appeal, counsel for the petitioner states that the beneficiary "does not work in the front of the store." Upon review of the tax records at the time the instant petition was filed, however, it does not appear that the petitioner had sufficient subordinate employees to enable the beneficiary to avoid working in the store. According to Form 1120, U.S. Corporation Income Tax Return for 2002, the year the instant petition was filed, the petitioner [redacted] to the beneficiary and [redacted] and wages. It appears that the petitioner employed the beneficiary and one other individual who may have worked part-time. Given that the petitioner employed only two employees, it is possible to conclude that the beneficiary was required to perform the duties of cashier, purchasing, inventory, shelving and all of the store operations since it is open for 16 hours a day, seven days a week. Even in the tax returns of 2008, the petitioner was only [redacted] in salaries and wages. In an affidavit submitted on appeal, the beneficiary states that the "employees were paid by the company both with checks and cash," and that the "cash income was not reported on the corporation tax returns." Again, this is not sufficient evidence to corroborate the claim that the petitioner employs five individuals since the petitioner does not have any documentation of these payments. Nor is it legal to not report the earning paid to employees. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Thus, it does not appear that the beneficiary has had subordinate employees to assist him in the day-to-day duties of running the convenience store. 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 Intn'l.*, 19 I&N Dec. at 604.

As the beneficiary is one of two employees of the petitioner, it is reasonable to assume, and has not been proven otherwise, that the beneficiary is directly performing sales, client relations, and marketing development and implementation and running the day-to-day operations of a convenience store such as cashier duties, inventory, purchasing and shelving. The record does not contain evidence of a subordinate staff supervised by the beneficiary who would relieve him from performing non-qualifying duties associated with the company's day-to-day sales and marketing functions. 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). Accordingly, the director reasonably concluded that the beneficiary will be performing the day-to-day operations and directly providing the services of the business rather than directing such activities through subordinate employees. Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

As noted, the director based his decision partially on the size of the enterprise and the number of staff. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, UCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

The petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible representation of the beneficiary's role within the organizational hierarchy. The record does not demonstrate that the beneficiary has a sufficient number of employees in the United States who could perform the non-managerial tasks associated with operating a convenience store 16 hours a day, seven days a week. The petitioner's general description of the beneficiary's duties and the lack of sufficient personnel to perform these tasks make it impossible to conclude that the beneficiary would perform primarily managerial or executive duties. Accordingly, the appeal will be dismissed.

The second issue in this proceeding is whether the petitioner established that the beneficiary's employment abroad was within a qualifying managerial or executive capacity. In the present matter, an analysis of the record does not lead to an affirmative conclusion that the beneficiary was employed abroad in a qualifying managerial or executive capacity. With regard to the foreign position the petitioner provided a list of job duties performed by the beneficiary which included broadly stated job responsibilities. Due to this overly general information, the AAO is unable to gain a meaningful understanding of how much time the beneficiary spent performing qualifying tasks versus those that would be deemed non-qualifying.

The petitioner explained that the foreign company "engages in the wholesale purchase and distribution of eatable oil (i.e. shortening, vegetable oil) products and products produced by [redacted] involved in the production of cooking products." The beneficiary operated the company as the owner and chief executive from 1996 to 1999.

The petitioner provided a list of job duties that was not accompanied by a percentage breakdown. Due to the overly general and vague list of job duties, the AAO is unable to gain a meaningful understanding of how much time the beneficiary spent performing qualifying tasks versus those that would be deemed non-qualifying.

In describing the beneficiary's position with the foreign parent company, the petitioner stated that the beneficiary was responsible for "setting the goals and policies of the business and communicating them to the supervisory and managerial staff," "monitor and oversee the activities of the Sales Managers," and "furthering the business expansion plans of the company." The petitioner has not shown what specific tasks actually fall within these broad categories. Merely using the term "manage" to describe the beneficiary's function does not establish that the tasks the beneficiary performed are of a qualifying nature, particularly when it appears that the beneficiary performed several non-qualifying duties such as being responsible for partnerships and "engaging in high-level negotiations with vendors and consumers in procuring new business and negotiations leading to the signing of distributorship agreements." In addition, the petitioner did not provide job descriptions for the duties performed by the subordinate employees. Without further information, it appears that the beneficiary was providing the services of the business rather than directing such activities through subordinate employees. An employee who "primarily" performs the tasks necessary to produce a product or provide a service 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 petitioner failed to submit the percentage of time the beneficiary spent on each duty, as requested by the director. 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 appeal, counsel for the petitioner asserts that the beneficiary primarily performs executive and managerial duties. The petitioner did not submit any documentation to confirm this assertion. 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).

After reviewing the beneficiary's job description with the foreign entity, the AAO cannot conclude that the primary portion of the beneficiary's time was spent performing tasks within a qualifying managerial or executive capacity. For this additional reason, the appeal will be dismissed.

The third 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. 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").

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

> *Affiliate* means:
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> (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 NOIR, the director requested further evidence of the qualifying relationship between the foreign employer and the petitioner. Counsel for the petitioner submitted "Form D, [redacted] and Establishment Registration showing that [the beneficiary's] business has been registered as a shop pursuant to the [redacted] and Establishment Act, 1948." This document lists the beneficiary as the employer and not as the owner. The document does not list the owner of the foreign employer. Counsel also submitted a letter from [redacted] the foreign company in the beneficiary's absence. [redacted] does not state that the beneficiary is the owner of the foreign company. He states only that the foreign company is the parent company of the petitioner but does not provide any additional evidence to establish this claim. He stated that the beneficiary held the position of President with the foreign company until he was transferred to the United States. Counsel provided contracts naming the foreign company as a wholesale buyer, but this documentation does not establish that the beneficiary is the owner of the foreign company.

The petitioner provided documentation that the beneficiary owned the petitioner but it has not provided sufficient evidence to establish that the beneficiary is also the owner of the foreign

company. The petitioner did not submit sufficient evidence to establish that it has a qualifying relationship with the beneficiary's foreign employer. For this additional reason, the appeal will be dismissed.

The final issue to be addressed is whether the foreign company continues to operate as a business. In order to qualify as a multinational entity, the petitioner must establish that it and its affiliate or its subsidiary conducts business in two or more countries, one of which is the United States. Thus, the petitioner must establish that the qualifying organization abroad is still operating as a business.

In the revocation decision, the director quoted from an October 14, 2009 memorandum from the USCIS Field Office in New Delhi, reported to USCIS Center Fraud Detection Operations (CFDO). The memorandum stated that on September 8, 2009, the field office director and an immigration officer did a site visit to the beneficiary's foreign employer and they "did not find the foreign employer operating at this address, and that they spoke to an individual that purchased shop number 50 two years ago and he "advised that there has never been an establishment doing business as [the foreign employer] located in this vicinity."

The director also noted that the foreign employer in not currently listed at the local business registry office according to the Business Information Report from [redacted] dated July 7, 2009.

On appeal, counsel for the petitioner states: "We are confused as to why the USCIS would rely on the statements from someone who had no personal knowledge regarding the ownership of a neighboring business." Counsel stated that the foreign company was never registered with a local government in India and thus, will not appear on the list provided by [redacted]

Counsel's statements on appeal do not overcome the director's concerns. Counsel did not provide sufficient evidence to overcome the findings of the memorandum and the fact that during the site visit, the foreign company was not found at the address provided by the petitioner. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The petition will be revoked 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. The petition is revoked.