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

B4

[redacted]

DATE: OCT 1 8 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: 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 in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a request 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 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 Florida 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.

In support of the Form I-140 the petitioner submitted a statement dated November 14, 2008, which contained relevant information pertaining to the petitioner's eligibility, including an overview of the petitioner's business, the business of its claimed foreign parent entity, and descriptions of the beneficiary's foreign and proposed employment. The petitioner also provided supporting evidence in the form of financial and corporate documents pertaining to both entities.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a request for evidence (RFE) dated March 30, 2009 instructing the petitioner to provide further documentation describing the beneficiary's job duties abroad and in his proposed position with the U.S. entity.

Upon reviewing the petitioner's response, the director determined that the petitioner still had not provided sufficient evidence establishing eligibility. The director therefore issued a notice of intent to deny (NOID) dated May 26, 2009, notifying the petitioner that the record lacked sufficient evidence establishing that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The director instructed the petitioner to list the beneficiary's proposed job duties and to assign the percentage of time the beneficiary would allocate to each enumerated task. The petitioner was also asked to list other employees within its organization and to provide their respective job titles, job duties, and educational levels.

In response, the petitioner provided a statement dated June 2, 2009 from its vice president who indicated that he was resubmitting documents that were previously submitted in response to the RFE, including the following: a statement from the foreign entity regarding the beneficiary's employment abroad and the foreign entity's organizational composition; the U.S. entity's organizational chart and employee job descriptions; and the foreign entity's articles of organization in which the beneficiary was identified as 40% owner. Additionally, the petitioner provided a letter dated June 2, 2009 written by the beneficiary, who identified himself as owner of the petitioning entity and stated his belief that the petitioning entity would increase in size. The beneficiary offered no other relevant information pertaining to the petitioner's eligibility. The AAO notes that the petitioner failed to delineate the beneficiary's specific daily tasks with an assigned time constraint to indicate how much time the beneficiary would spend performing each enumerated job duty. 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).

After reviewing the record, the director concluded that the petitioner failed to establish that the petitioner would employ the beneficiary in a qualifying managerial or executive capacity. The director therefore issued a decision dated September 25, 2009 denying the petition. The director observed that the petitioning entity was comprised of a small staff and would therefore be unable to employ the beneficiary in a position where he would primary perform duties within a qualifying managerial or executive capacity.

On appeal, [redacted] the petitioner's [redacted] disputes the denial on the petitioner's behalf, asserting that the beneficiary is being offered a key executive position within the U.S. entity. [redacted] states that the beneficiary will develop the petitioner's business and financial growth and he will supervise the direction of the managers. [redacted] also offers an additional list of the beneficiary's duties and responsibilities accompanied by a percentage breakdown assigned to four categories of duties and responsibilities. Specifically, [redacted] states that the beneficiary would allocate his time in the following manner: 20% to developing business goals and policies via planning, formulating, and pursuing investments and venture capital, and directing and coordinating business activities according to the company's goals and policies; 40% to developing business opportunities with various companies relevant to the petitioner's business, identifying business opportunities in the United States and abroad, representing the parent company in the United States, and reporting to the parent company regarding the U.S. company's progress, development and investments; 20% to reviewing finances to determine the strengths and weaknesses of sales and corporate directions and allocating financial resources to products and services; and 20% to hiring and firing employees and directing key personnel, overseeing the establishment and launching of the local office and showroom, and coordinating company growth and expansion with other managers.

The AAO finds that the above statements are not persuasive and fail to overcome the director's denial. The discussion below will provide an analysis of the relevant documentation and will explain the underlying reasoning for the AAO's decision.

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):
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> * * *
>
> > (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 managerial or executive employment capacity in his proposed position with the petitioning U.S. entity.

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--
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> (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
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> (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. *See* 8 C.F.R. § 204.5(j)(5). The AAO will then consider this information in light of other relevant factors, such as 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 company's daily operational tasks.

The job description the petitioner initially provided in response to the RFE indicated that the beneficiary's proposed position would include sitting on various committees, overseeing officers, hiring an "executive manager," and creating financial programs to fund operations. The petitioner provided no follow-up information to explain what committees the beneficiary would participate in or how they relate to the petitioner's business operations; nor did the petitioner clarify what job duties the anticipated "executive manager" would perform or where within the petitioner's organization this position would be placed. Lastly, the petitioner did not elaborate on the financial programs the beneficiary would create or how this task falls within the definition of managerial or executive capacity.

The information provided on appeal with regard to the beneficiary's proposed position with the U.S. entity is primarily comprised of overly vague job responsibilities and broadly-cast business objectives, none of which are sufficient in terms of meeting the regulatory requirement for a detailed description of the beneficiary's job duties. *See* 8 C.F.R. § 204.5(j)(5). Merely stating that the beneficiary will develop goals and policies or oversee the launching of new offices and showrooms conveys no substantive knowledge of the beneficiary's specific daily tasks, which are crucial for the purpose of gaining a meaningful understanding of what the beneficiary actually does in the scheme of the petitioner's business operation.

In an organization that is comprised of five employees, including the beneficiary, it is unrealistic to claim that any significant portion of the beneficiary's time would be spent hiring and firing employees, as there is no indication that the petitioner has experienced a regular staff turnover. The petitioner failed to explain what actual tasks are entailed in launching an office or showroom, nor is any information given to clarify who actually takes part in these tasks on a daily basis. Without this relevant information, it is unclear which subordinates the beneficiary would actually supervise and whether such individuals are managerial, professional, or supervisory employees.

The petitioner indicated that 40% of the beneficiary's time would be allocated to business development tasks, which would include meeting with client companies to explore business opportunities and looking for ways to market the petitioner's products in U.S. and international markets. The petitioner has not explained how these marketing-related tasks, which focus on finding new venues to sell the petitioner's products, can be deemed as anything other than tasks that are necessary to provide services. Any 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 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 the proposed position. The petitioner has not established that the primary portion of the beneficiary's time would be allocated to performing managerial- or executive-level tasks.

In light of the above analysis, the AAO finds that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. On the basis of this conclusion, the instant petition cannot be approved.

While not previously addressed in the director's decision, the AAO finds that the record lacks sufficient evidence to show that the petitioner has a qualifying relationship with the beneficiary's foreign employer pursuant to 8 C.F.R. § 204.5(j)(3)(i)(C).

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 (Assoc. Comm'r 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 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.

The petitioner initially claimed to be the subsidiary of [redacted]. In support of this claim, the petitioner provided a photocopied undated stock certificate. The petitioner's original claim and stock certificate (the value of which is undermined by the fact that it does not contain a date of execution) are not consistent with the beneficiary's claim on appeal, where he indicates that he is the owner of the petitioning entity. 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 inconsistency in this matter with regard to a crucial element of the petitioner's eligibility precludes a finding that the petitioner has a qualifying relationship with the claimed foreign entity. For this additional reason, this petition cannot be approved.

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).

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.