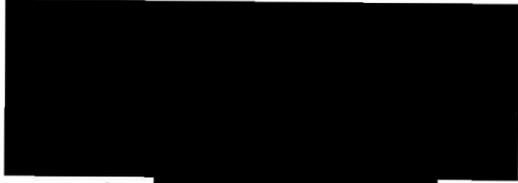




U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



B4

FILE: [REDACTED]
SRC 05 255 53707

Office: TEXAS SERVICE CENTER

Date: MAR 30 2007

IN RE: Petitioner: [REDACTED]
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)

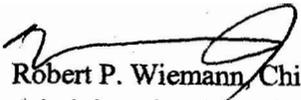
ON BEHALF OF PETITIONER:



PUBLIC COPY

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.


Robert P. Wiemann, 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 limited liability company organized in South Carolina on November 19, 2003. It claims to be engaged in the business of selling electronic components worldwide and seeks to employ the beneficiary as its president and chief executive officer (CEO). 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 determined that the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity and denied the petition.

On appeal, counsel disputes the director's conclusion and submits a brief in support of his arguments.

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 in this proceeding is whether the beneficiary would be employed in a 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 a letter dated December 14, 2004, which contained the following information regarding the beneficiary's proposed employment in the United States:

[The beneficiary] oversees all financial, management and administrative duties within the new U.S. facility. He exercises substantial discretionary decision-making authority for all corporate operating policy and strategy. Additionally, he has full responsibility for determining and approving corporate operation proposals, marketing and corporate financing. [The beneficiary] analyzes and forms business plans for short-term and long-term corporate operating strategy. Finally, he appoints managers for each department and oversees all executive meetings.

On October 24, 2005, the director issued a notice of her intent to deny (NOID) the petition and suggested that additional evidence may assist in establishing the petitioner's eligibility for the benefit sought. The director's notice included a request for the W-2 wage and tax statements issued by the petitioner as well as a number of the petitioner's quarterly tax returns.

In response, the petitioner provided a 2004 W-2 wage and tax statement for [REDACTED] the international sales manager, as well as four of its quarterly tax returns—the last quarterly return of 2004 and the first three quarterly returns of 2005. It is noted that all three of the quarterly returns from 2005 indicate that the petitioner had no payroll expenses.

On December 7, 2005, the director denied the petition concluding that the documentation submitted in response to the NOID suggests that the petitioner lacked a sufficient support staff in the United States to relieve the beneficiary from having to primarily perform the petitioner's non-qualifying operational tasks. The director specifically noted the petitioner's quarterly tax returns for 2005, all of which indicated that the petitioner had no payroll expenses.

On appeal, counsel for the petitioner submitted a letter dated February 2, 2006 in which he explained that the petitioner has 15 employees who are primarily based in Singapore and India. Counsel further stated that 80% of the products sold by the petitioner and its foreign affiliate are supplied by U.S. vendors. Counsel provided the following statements with regard to the beneficiary's role within the petitioning entity:

[The beneficiary] directs the myriad [of] sourcing activities which are carried out by the company's workforce; additionally, he directs and manages design, manufacturing and sales teams who produce electronic parts that are custom-designed for critical government accounts in India and Singapore. He exercises wide latitude in discretionary decision[-]making by directing all of the operations and management functions of the company. He founded the company in 1997 and is a pioneer in sourcing obsolete products in the electronics industry.

Counsel's assertions are not persuasive. In examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5).

In the instant matter, the various statements that address the petitioner's business transactions indicate that the beneficiary's presence in the United States has been and would be extremely limited by the continued need for his direct involvement with the business activity taking place abroad within the foreign entities. Although the petitioner indicated in Part 5, Item 2 of the Form I-140 that it had three employees at the time of filing, the record lacks any evidence to corroborate this claim. To the contrary, the petitioner's third quarterly tax return for 2005, which includes the time period the Form I-140 was filed, indicates that the petitioner had no employees during the relevant time period.¹ If the petitioner continued to engage in business transactions as

¹ Although the petitioner claimed one employee on the Form I-140, no salaries or wages were paid and the alleged employee was not identified. Moreover, the employees the petitioner claims it employs in India and Singapore have not been shown to be employed by the U.S. entity. Contrary to the petitioner's claims, the evidence indicates that these employees were employed by a separate legal entity abroad, not by the petitioner.

claimed, the AAO is entirely unclear, based on the lack of evidence, how the business activity was conducted without a U.S.-based support staff. 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).

Furthermore, while the petitioner's broad statements regarding the beneficiary's proposed employment in the United States indicate that the beneficiary would have the discretionary authority of someone employed in a qualifying managerial or executive capacity, the statements lack a detailed description of the beneficiary's proposed daily activities. 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). Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient. As stated above, the regulations require a detailed description of the beneficiary's daily job duties. *See* 8 C.F.R. § 204.5(j)(5). Where, as in the instant case, the petitioner fails to provide CIS with a specific list of duties, the AAO cannot affirmatively conclude that the beneficiary would primarily perform tasks of a qualifying nature.

Finally, the AAO must question, as the director did in her prior decision, how the petitioner would enable the beneficiary to primarily focus on performing qualifying tasks in light of the lack of a support staff to relieve him from having to directly engage in the performance the petitioner's daily operational tasks which would be a necessary part of the petitioner's daily business operation. The record does not indicate who performs the petitioner's daily administrative, bookkeeping, and sales-related tasks. Despite the indication that the petitioner employs an international sales manager, the record does not establish that this individual was employed in the United States at the time of or subsequent to the petitioner's established priority date. 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)).

While the AAO acknowledges that the petitioner's eligibility cannot hinge entirely on the issue of the petitioner's staffing structure, the relevant statute and regulations state that the petitioner must establish that the beneficiary's proposed employment in the United States would primarily consist of qualifying tasks. Without evidence establishing that the petitioner is able to relieve the beneficiary from having to directly engage in non-qualifying tasks despite the apparent lack of a support staff, the AAO cannot conclude that the beneficiary would primarily perform tasks of a qualifying nature.

Consequently, a review of the record indicates that the petitioner's ambiguous organizational structure, the lack of corroborating evidence regarding its staff, and its failure to submit a detailed description of the beneficiary's proposed list of duties support the director's decision to deny the petition. The petitioner fails to establish that it has reached the point where it can support a primarily managerial or executive capacity position. As such, the petition may not be approved for this reason.

Furthermore, the record supports a finding of ineligibility based on additional grounds that were not previously addressed in the director's decision.

First, 8 C.F.R. § 204.5(j)(3)(i)(C) states that the petitioner must establish that it 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.

In the instant matter, the petitioner claims that it is a subsidiary of the beneficiary's foreign employer [REDACTED] a Singapore company. In support of this claim, the petitioner provides its operating agreement. Article I, Section L of the agreement identifies the beneficiary's foreign employer as the petitioner's only member. Article IV, Section 4.1 further indicates that Exhibit A (which is found at the end of the operating agreement) will address the issue of the capital contribution purportedly made by the petitioner's only member. However, the only information contained in Exhibit A is the name of the foreign entity that was named in Article I, Section L of the operating agreement. There is no indication as to the amount of capital purportedly contributed in exchange for the foreign entity's membership.

Furthermore, the petitioner provided a U.S. Income Tax Return for an S Corporation (Form 1120S), which was purportedly filed to declare the petitioner's earnings in 2004. To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any foreign corporate shareholders. *See* Internal Revenue Code, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if a *foreign corporation* owns it in any part. In the present matter, the petitioner claims that a qualifying organization exists because it is wholly-owned by the Singapore parent company. If true, the petitioner would be ineligible to file as a subchapter S corporation.

Accordingly, since the petitioner would not be eligible to elect S-corporation status with a foreign parent corporation, it appears that the U.S. entity is owned by one or more individuals residing within the United States rather than by a foreign entity. Confirming this fact, Schedule K-1 of the Form 1120S identifies Mythili Gopal, the petitioner's alleged international sales manager, as the petitioner's sole shareholder rather than the Singapore parent company. This significant inconsistency has neither been resolved nor even

acknowledged by the petitioner. 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).

Contrary to 8 C.F.R. § 204.5(j)(3)(i)(C), the petitioner has not established that it has a qualifying relationship with the beneficiary's foreign employer. For this additional reason, the petition may not be approved.

Second, 8 C.F.R. § 204.5(j)(3)(i)(D) 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) states that doing business means "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 instant matter, the petitioner provided a number of invoices documenting the expenses incurred as a result of maintaining office space in the United States. However, as suggested by the definition of doing business, "the mere presence of an agent or office" is not sufficient to establish that the petitioner has been actively providing its products and/or services on a "regular, systematic, and continuous" basis. *See id.* Although the petitioner has submitted lists of U.S. vendors that supply the foreign entity's products, the petitioner has submitted insufficient evidence to establish that it had been doing business prior to or since the filing the Form I-140. Again, the petition may not be approved for this additional reason.

Finally, the AAO notes that the beneficiary was previously granted L-1A nonimmigrant classification based on the same purported qualifying relationship and managerial or executive duties. This nonimmigrant petition (SRC 05 137 50428) has been incorporated into the record of proceeding. Upon review, the petitioner again claims that it is wholly owned by the purported Singapore parent company and yet again submitted its 2004 IRS Form 1120S S-Corporation tax returns. As previously noted, the corresponding Schedule K-1 states that the sole shareholder is [REDACTED] and not Cirrus Electronics PTE Ltd., the Singapore company. Accordingly, the petitioner has not established that a qualifying relationship exists for purposes of the L-1A nonimmigrant petition. Additionally, the petitioner has submitted the same vague and broadly cast description of the beneficiary's duties. The AAO concludes that the statement of facts in the petition were not true and correct and that approval of the nonimmigrant petition involved gross error.

Because the petitioner failed to establish eligibility for the nonimmigrant visa classification and the director approved the petition in gross error, the director shall review the approved nonimmigrant petition and initiate revocation proceedings. *See* 8 C.F.R. § 214.2(l)(9).

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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional grounds 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.

FURTHER ORDERED: The director shall review the approved nonimmigrant petition (SRC 05 137 50428) for revocation pursuant to 8 C.F.R. § 214.2(1)(9).