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FILE:

[REDACTED]
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Office: NEBRASKA SERVICE CENTER

Date: **OCT 09 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:

[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.


Robert F. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was organized as a limited liability company in the state of Indiana. It seeks to employ the beneficiary as its president and chief executive officer. 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 denied the petition based on two independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary was employed abroad in a managerial or executive capacity; and 2) the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity.

On appeal, counsel disputes the director's conclusions 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 two issues in this proceeding call for an analysis of the beneficiary's job duties during his employment abroad as well as his proposed job duties in his prospective position with the U.S. petitioner.

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 a letter dated March 15, 2006, which was submitted in support of the Form I-140, the petitioner provided lists of the beneficiary's foreign and U.S. job responsibilities. The petitioner provided a second set of breakdowns, each accompanied by a percentage breakdown, in a letter dated June 27, 2006, which was part of the petitioner's response to the director's April 5, 2006 request for additional evidence (RFE).

In a decision dated September 26, 2006, the director denied the petition, reciting each of the breakdowns and discussing their deficiencies in establishing the petitioner's eligibility.¹ The director focused on the lack of detail in the petitioner's breakdowns, stating that the petitioner provided broad job responsibilities without

¹ As the director provided the position description breakdowns in their entirety, the AAO need not repeat this information in the present discussion.

identifying specific duties that explain how the beneficiary fulfilled his responsibilities abroad and how he would fulfill the responsibilities in his proposed U.S. position with the petitioning entity.

On appeal, counsel asserts that the beneficiary's foreign and proposed U.S. positions can be deemed as "managerial and/or executive," suggesting that the two statutory terms are interchangeable. In support of counsel's assertions, the petitioner provided a letter dated October 26, 2006 from its office manager, who provided the following additional description of the beneficiary's proposed position in the United States:

- **40% Sales and Marketing:** The key focus of building a new business is sales and marketing, and for this reason [the beneficiary] will allocate the majority of his time to supervising this area of the organization. [The beneficiary] has direct control and supervision over both the [m]arketing and [s]ales [d]epartments. He seeks to ensure maximization of return on investment, while overseeing the implementation of marketing strategies and monitoring marketing resource allocation. [The beneficiary] will directly manage and oversee the employees and operational aspect[s] of the [m]arketing [d]epartment. [He] will collaborate on strategic matters, such as the marketing budget, advertising, media relations, customer service and customer satisfaction to ensure that sales and marketing goals are being met. [He] will supervise pricing analysis, competitor analysis and development of a unique value proposition. Our sales focus will be on locating clients on the down stream side of the oil refineries in the North American region Our marketing team will also look at new markets and new product ranges that we can incorporate under our brand and begin trading in petroleum commodities
- **20% Shipping and Logistics:** [The beneficiary] provides direct supervision and control over the [s]hipping and [l]ogistics department of the company. . . . [The beneficiary] will deal directly with setting the goals of getting the product to the customer on time and at a suitable price. As [the beneficiary] has firsthand knowledge of this area, [he] will supervise and assist in the rate negotiation process, transportation mode selection, and supply chain normalization, demand planning, and shipment information management. Current goals set by [the beneficiary] are to find cost effective shipping lanes to and from the U[.]S[.]A. . . .
- **10% Business Strategy and Business Process Management:** [The beneficiary] will have full discretion to lay out the company's business strategy and long-term plan. [He] will create a roadmap for the organization and direct employees in meeting the long-range goals and benchmarks he has created for the company. [He] will oversee and ensure continuous strategy formulation and implementation of adequate processes.
- **10% Accounting, Banking and Financing:** The accounting and bookkeeping has been completely outsourced [The beneficiary] will keep regular meetings with AGS to supervise this task and to ensure that all business financial statements are kept current and presentable at all times. [He] will maintain direct contact with AGS so that he is able to set reasonable goals and strategic plans based on the current financial information of the company. [The beneficiary] is charged with making high level financial decisions for the company based on this information. [He] will also maintain a close working relationship with the bank in order to keep the bank informed on the company's financial progress and

activity. [He] will be involved with securing adequate financing for new projects in order to improve the sustainability of the business.

- 10% Human Resources: All human resources activities will be handled by the [h]uman [r]esources [m]anager, which position is directly supervised by [the beneficiary]. [He] will direct and assist the [h]uman [r]esources [m]anager in the recruitment of new candidates, and has the ultimate authority to hire, fire and recommend personnel actions. As [p]resident and CEO, [the beneficiary] will create and establish all company policies and procedures, and will supervise the [h]uman [r]esources [m]anager in evaluating and implementation of company policies and procedures. He will also supervise and assist in training of all new employees by the [h]uman [r]esources [m]anager.
- 5% Legal: All legal matters have been outsourced [The beneficiary] will be directly involved with all legal matters of the company to ensure that he has full control and knowledge of all legal issues.
- 5% Technology Implementation and Management: [The beneficiary] will maintain control over technology implementation and management. He will supervise and facilitate equipment selection and purchases, budgets and ensure constant management support for the current IT landscape in the company. [The beneficiary] has identified the need for a technologically strong organization to track and manage shipments by sea and by air. The technology strategy is currently being implemented . . . under [the beneficiary]'s supervision.

While the supplemental description provides an additional overview about the beneficiary's role within the petitioning entity, his actual day-to-day job duties, i.e., the means for carrying out the overall objectives, remain unclear. For instance, while the petitioner stresses the importance of sales and marketing and indicates that 40% of the beneficiary's time would be allocated to this aspect of the business, the petitioner does not explain how the beneficiary will maximize the business profits, oversee employees, and ensure that the sales and marketing goals are met. The petitioner also fails to allocate specific duties to the beneficiary with regard to locating clients in the North American region, which is one of the petitioner's ultimate goals.

The petitioner allocates another 20% of the beneficiary's time to shipping and logistics. Again, while the petitioner discusses the company's goals as well as the beneficiary's supervisory role with regard to shipping and logistics, it does not identify specific duties the beneficiary would perform in assisting the company realize the goals he sets.

With regard to the beneficiary's duties abroad, the petitioner provided a letter dated October 25, 2006 from the foreign entity's director, who provided the following percentage breakdown:

- 5%--Banking, Accounting and Financing: [The beneficiary] attended meetings with the accountants to ensure financial statements are accurate, current, and presentable at all times. Keeping on top of these numbers helped [the beneficiary] to set realistic long-term goals and make necessary changes for future business. [The beneficiary] maintained a strong relationship with our business banker to secure assistance on all of our banking needs. He also supervised and managed the [f]inancial [d]irector of the organization. All

financial budgets and capital expenditure allocations set by the [f]inancial [d]irector were approved and signed off by [the beneficiary].

- 5%--Asset and Equipment Management: [The beneficiary] supervised and directed the [f]leet [m]anager who operated the transportation fleet. Our transportation fleet includes ten road tankers for transportation of liquid bulk into our manufacturing facility and also delivery of our finished products . . . to our client. [The beneficiary] supervised the [f]leet [m]anager who was in charge of transportation and management of 220 x 20 foot shipping containers Vehicle replacement and new vehicle selection, lease versus buy options, redundant vehicle sales, vehicle life cycle management, and efficiency monitoring were all part of the [f]leet [m]anager's portfolio, who in turn was managed by [the beneficiary] to ensure that all necessary key point indicators were met and most value was obtained out of each working asset.
- 10%--Legal: [The beneficiary] had full control and knowledge of all legal matters. This included all contract negotiations and business disputes. [He] worked very closely with . . . legal counsel to the operation.
- 30%--Sales and Marketing: [The beneficiary] supervised and directed the operational aspects of the [s]ales and [m]arketing team to maximize return on investment, implement and monitor marketing resource allocation, and ensure collaboration. . . . [The beneficiary] managed the employees and operational aspects of sales and marketing of our products, and ensured that goals were being met. Our marketing goals were to get our product specifications and sample products into the hands of our clients design and engineering teams. [The beneficiary] supervised pricing analysis, competitor analysis and development of unique value proposition. He set strategic goals and supervised the marketing budget, advertising, media relations, customer service and customer satisfaction.
- 20%--Business Strategy and Business Process Management: [The beneficiary] had sole discretion in setting the long-term business policies and benchmarks for the business. A large part of his time allocated to business strategy was implementing a "One Call" operation that handled production, supply, and logistics through our supply chain net work [sic] eliminating customer concerns and worries about delay and late deliveries. . . . A black economic empowerment strategy has also been implemented to adhere to the Oil Industry Charter and uplift the underprivileged. [The beneficiary] worked to ensure continuous business strategy formulation and implementation by directing the business operations of the organization. He made sure that the roadmap for the organization was realistic and that adequate processes were implemented.
- 5%--Technology Implementation and Management: [The beneficiary] facilitated the implementation of new technology to stay current and keep ahead of competitors. With a clear understanding of all business processes, [he] directed and assisted the [o]perations [d]irector in technology equipment selection and purchases and ensured constant management support of the IT landscape. [The beneficiary] had the final say on all technology changes within the organization.

- 10%--Human Resources: [The beneficiary] supervised the [h]uman [r]esources [m]anager and assisted in the interview to ensure that ideal candidates were hired. [He] provided recommendations in the hiring and firing of personnel. [He] set policies and goals for employees and directed the [h]uman [r]esources manager to carry out the goals and policies of the firm and maintained a high level of adherence to the company policies and procedures.
- 10%--Production, Operations and Manufacturing: [The beneficiary] supervised the [p]roduction [m]anager and the [o]perations [d]irector who plan, direct, and coordinate the production activities required to produce our range of industrial grade products. Collaboration between [the beneficiary] and the [p]roduction [m]anager ensures the production goals of the organization are being met and analysis of the plant's personnel and capital resources to select the best way of meeting the production goals. [He] was also involved in the determination of which machines will be purchased and released allocated funds for machinery and equipment acquisition.
- 5%--Supplier Contract and Rate Negotiation: To ensure company profitability is met, [the beneficiary] was involved in supplier contract negotiations along with the [p]roduction [m]anager and [f]inancial [d]irector. Local supply prices are compared with international supply prices and final sign off was given by [the beneficiary] on the raw material purchasing budget. Annual budgets are set and fixed supply rates are negotiated at the annual rate meeting [The beneficiary], the [p]roduction [m]anager and the [f]inancial [d]irector attended these meetings[.]

Similar to the petitioner's description of the beneficiary's proposed employment, the above description provides a very broad overview of the beneficiary's supervisory responsibilities without conveying an understanding of the actual duties performed on a daily basis. For instance, 30% of the beneficiary's time was purportedly allotted to sales and marketing. Although the foreign entity's director states that the beneficiary supervised and directed the operational aspects of sales and marketing, it is unclear what those operational aspects were or what actual duties the beneficiary performed, i.e., how he managed employees or what means were employed to ensure that the sales and marketing goals were met. Additionally, the director indicated that another 20% of the beneficiary's time was allotted to business strategy and business process management, which involved implementing the "one call" concept. No details were provided, however, to clarify what specific steps the beneficiary took to help achieve this company goal. While another 10% of the beneficiary's time was allotted to supervising the production manager and the operations director, the director did not specify the specific duties entailed in such management.

In examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). 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. Precedent case law further conveys the need for a detailed 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). In the present matter, at least 60% of the beneficiary's time with regard to the foreign and U.S. positions was spent and would continue to be spent performing tasks that are mostly undefined. The petitioner simply failed to include the necessary level of

detail to determine that the primary portion of the beneficiary's time has been and would be consumed performing tasks of a qualifying nature.

While the AAO acknowledges the beneficiary's submission of a statement from [REDACTED] evaluating the beneficiary's employment, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Despite [REDACTED] expert opinion, which he claims he derived from evidence that is included in the present record as well as his interview of the beneficiary, his statement does not convey any further detail regarding the beneficiary's duties than was provided by the petitioner. [REDACTED] stresses the beneficiary's supervisory role in overseeing processes, departments, and employees. However, the beneficiary's actual duties remain unclear and require further explanation in order to fully ascertain what exactly the beneficiary did abroad on a daily basis and what specific duties he would perform as part of his proposed position with the U.S. petitioner. Furthermore, Dr. [REDACTED] reference to the beneficiary as a manager and an executive, without further explanation of the beneficiary's duties, suggests a lack of understanding of the distinction between the statutory definition for managerial capacity, as defined in section 101(a)(44)(A) of the Act, and the statutory definition for executive capacity, as defined in section 101(a)(44)(B) of the Act.

Thus, in considering the evidence submitted, the AAO cannot determine that the beneficiary primarily performed managerial and/or executive duties during his employment abroad, or that he would do so in his proposed position with the U.S. entity. While the petitioner has illustrated organizational hierarchies within which a managerial or executive position may exist, it is unclear that the duties primarily performed by the beneficiary abroad and those he would perform in the United States are primarily within a qualifying managerial or executive capacity. Neither the beneficiary's position title nor the companies' organizational structures relieve the petitioner from having to provide detailed job descriptions. As this necessary information has not been provided in the present matter, this petition cannot be approved.

Furthermore, the record does not support a finding of eligibility based on at least two 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. In the present matter, the petitioner claims that the foreign entity is its sole member and, therefore, is the petitioner's sole owner. The petitioner also claims that the beneficiary owns 80% of the foreign entity. However, the record shows that the beneficiary filed a Form 1040 complete with a Schedule C, reporting all of the petitioner's income. This suggests that the beneficiary, rather than the foreign entity, may be the majority owner of the petitioner. While the petitioner may nevertheless establish the existence of a qualifying relationship with this alternative ownership scheme, the fact that the initial claim is inconsistent with documentation submitted gives rise to doubt as to the petitioner's credibility. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

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." The petitioner claims to be in the business of distributing lubricating products. However, the record lacks any sales or shipping invoices to document its business transactions during the requisite one-year period. While the petitioner submitted its income statements for 2004-2006, this documentation does not establish that the petitioner has been and continues to conduct business on a "regular, systematic, and continuous" basis. *See id.*

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.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

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.