



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
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OFFICE: NEBRASKA SERVICE CENTER

Date: DEC 01 2009

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)

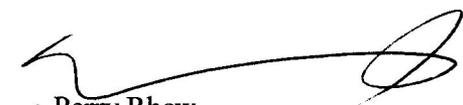
ON BEHALF OF PETITIONER:



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 law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).


Perry Rhew
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 is a Delaware corporation that seeks to employ the beneficiary as its chief accountant. 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 qualifying managerial or executive capacity; and 2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On appeal, counsel disputes the director's conclusions and submits an appellate brief as well as additional documents 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 primary issues in this proceeding call for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the beneficiary was employed abroad and whether he would be employed 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.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In support of the Form I-140, the petitioner submitted a letter dated June 10, 2007, claiming that the beneficiary is currently supervising a customer service executive at the New York office and five employees, including an accountant and four customer service executives, at the Chennai, India office. The petitioner also provided the following description of the beneficiary's proposed employment:

[The beneficiary] has been and continues to be our most senior finance representative in the U[.]S[.], responsible for all accounting and finance matters of our U.S. company, business and operations. His primary responsibilities are to analyze and prepare long and short-term financial budgets for our operations and oversee all related financial matters. He is responsible for handling and overseeing all bookkeeping and accounting functions, including auditing accounts; providing treasury functions to maintain the highest investment rates and lowest finance costs; overseeing monthly and other reports on company's profit and loss, balance sheet, receivables, payables, cash flow statements, maintenance of ledger accounts; overseeing all agent partners' and inter company accounts; overseeing and complying with all appropriate statutory requirements of record keeping, taxation, returns and remittances; participating in decision making regarding company business; formulating annual budgets and exercising budgetary control; analyzing and reporting to senior management on any unusual events or factors at [the] U[.]S[.] operations, ensuring proper implementation of and compliance with all directives from senior management and corporate head office for the effective control of business, and the like. His responsibilities include managing all financial and related matters of our Air/Sea Freight and warehouse operations. This involves supervising billing and accounting staff to ensure accurate billings to overseas agents and prompt approval of vendor pricing information and negotiating contracts and rates. He prepares management reports, makes recommendations and oversees the implementation of new or revised policies on profitability, costs and strategic activities. [The beneficiary] is responsible for managing and ensuring that the quotations and billings are in compliance with our organization's policies and best business practices.

With regard to the beneficiary's employment abroad, the petitioner stated that the beneficiary was promoted to the position of overseas account in 1999. The petitioner stated that the beneficiary was responsible for the Dubai entity's overseas accounting and financial matters, the company's accounts on non-freight issues, and the management of three accountants.

On August 4, 2008, the director issued a request for additional evidence (RFE) instructing the petitioner to provide, in part, a list of the beneficiary's past and proposed job duties with a percentage of time assigned to each job duty. The petitioner was also asked to discuss the beneficiary's subordinates in each position and to include payroll records of the foreign and U.S. employers showing the salaries paid to the subordinates the beneficiary supervised abroad and those currently supervised at the U.S. office. Additionally, the petitioner was instructed to submit its own as well as the foreign entity's organizational charts, clearly depicting the beneficiary's position within each entity and illustrating each entity's staffing levels.

In response, the petitioner provided the following time breakdown of the beneficiary's foreign employment:

- A. Supervise and meet with direct subordinates/accounting staff to review and supervise work performed and delegate work—5-7 hours
- B. Teleconference and other meetings with branch office accountants to review and supervise work and delegate work—5-7 hours

- C. Review and analyze data and prepare progress reports for senior management on weekly, monthly and long-term activities regarding departmental productivity and branch office productivity—2-3 hours
- D. Meet with [the] senior finance manager to discuss [the] status of department operations, personnel and budget—1-2 hours
- E. Engage in top-level review of accounting staff's income, tax profit/loss returns and reports—1-2 hours
- F. Review other financial work papers, prepared by staff, and spot complex legal and financial issues and ensure that staff address issues properly—5-7 hours
- G. Review and analyze agents transshipments tariffs and prepare management and related reports about tariffs—3-4 hours
- H. Review and analyze golden Gulf line financial statements to monitor profitability and efficiency of client and prepare management updates—4-5 hours
- I. Communicate and send reports to outside auditors—1-2 hours
- J. Prepare short-and long-term budget proposals—1-2 hours
- K. Communicate progress to senior management and make recommendations regarding personnel issues, including the hiring and firing of personnel—1 hour

The petitioner also provided the foreign entity's organizational chart, where the beneficiary was employed from June 2000 until October 2002. The chart illustrates a multi-tiered entity, which is divided into a sales and operations division and a finance division. The latter, where the beneficiary's position is depicted, shows a group finance controller as the head of the division with a finance manager as his direct subordinate and the beneficiary's position as the next position in the vertical hierarchy. The chart indicates that the beneficiary's subordinates include two accountants, one accounts assistant, and six branch accounts at the foreign entity's foreign locations.

The petitioner also provided the following hourly breakdown of the beneficiary's proposed employment in the United States:

- a. Analyze and prepare long and short-term financial budgets for company operations and oversee all related financial matters. 3-4 Hours
- b. Handling and overseeing all bookkeeping and accounting functions, including monthly and other reports on the company's profit and loss, balance sheet, receivables, payables, cash flow statements, maintenance of ledger accounts. This includes reviewing reports prepared by subordinates (local and overseas), auditing accounts, meeting with subordinates to discuss and critique work, adjust workloads, give instructions, and monitor progress. 5-6 Hours
- c. Providing treasury functions to maintain the highest investment rates and lowest finance costs. 1-2 Hours
- d. Overseeing and complying with all appropriate statutory requirements of record keeping, taxation, returns and remittances, including researching and analyzing requirements,

reviewing tax returns and statements prepared by subordinates and providing advice, comments and instructions to subordinates. 2-3 Hours

- e. Participating in decision making regarding company business, including meeting with senior management, participating in regular meetings and conference calls with management in New York and overseas offices. 4-5 Hours
- f. Formulating annual budgets and exercising budgetary control, including preparing proposed budgets based on data provided by subordinates and company, reviewing expenditures and using discretion to authorize or invalidate payments. 2-3 Hours.
- g. Analyzing and providing report[s] to senior management on any unusual events or factors at [the] U[.]S[.] operations, ensuring proper implementation of and compliance with all directives from senior management and corporate head office Includes reviewing reports and data, providing statistical analysis, preparing reports and updates to management and head office and making recommendations. 4-5 Hours
- h. Managing all financial and related matters of our Air/Sea Freight and warehouse operations. This includes reviewing financial reports prepared by subordinates, meeting with subordinates to discuss finances, obtain updates, issue instructions, adjust workloads, provide instructions, etc. 4-5 Hours
- i. Supervising billing and accounting staff to ensure accurate billings to overseas agents and prompt approval of vendor invoices and charges and [to ensure] that pricing quotations and billings are in compliance with organization's policies and best business practices. Includes reviewing reports and billings, meetings, telephone conferences, email messages and other communications with subordinates. 3-4 Hours
- j. Analyzing vendor pricing information and negotiating contracts and rates. This includes reviewing information and contracts; and negotiating with vendors, such as airline companies, with the authority to alter terms and conditions. 3-4 Hours
- k. Handle personnel issues, including resolution of complaints against subordinates, adjusting workloads, approving time-off, exercising authority to hire, discipline or terminate employment of staff. 3-4 Hours

The petitioner also provided its organizational chart, which identified a vice president as head of the entire organization and depicted the beneficiary as the vice president's direct subordinate in the position of chief accountant/operations manager. The beneficiary's position is shown as having three subordinates, including the sea operations supervisor, the sales and marketing analyst, and the senior accountant, a position that is located in Toronto, Canada. It is noted that, although the director expressly asked the petitioner to provide proof of salaries of its employees, only the beneficiary's information was actually submitted. 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).

In a decision dated October 31, 2008, the director denied the petition, pointing out discrepancies between documentation that was submitted in support of the petitioner's previously filed Form I-140 and the current Form I-140 that is being adjudicated in the present proceeding. Namely, the director observed an inconsistency between the foreign entity's organizational charts, where the chart that was submitted in support of the earlier petition shows the beneficiary with only one subordinate, while the chart submitted in support of the more recent Form I-140 shows the beneficiary as having supervised two additional positions as well as branch accountants at offices located in six other countries. The charts also list the beneficiary's direct supervisor under different job titles with the first chart listing the supervisor as chief account and the second chart listing him as finance manager.

Additionally, the director pointed out that while the foreign organizational chart shows the beneficiary as having three direct and six indirect subordinates, the petitioner's counsel as well as a separate document, which describes the beneficiary's foreign employment, both indicate that the beneficiary had only two direct subordinates. The director also found the petitioning entity consists of only three employees and therefore lacks an organizational complexity that would warrant the services of multiple managerial or executive employees, given that the I-140 petition filed on behalf of the beneficiary's supervisor, also under the classification of a multinational manager or executive, had been previously approved. Although the director also comments on the beneficiary's salary as yet another indicator that the beneficiary's proposed position in the United States would not be within a managerial or executive capacity, the AAO hereby withdraws the director's comments, as salary is not an accurate indicator as to the nature of the job duties to be performed.

On appeal, counsel argues that the director's decision was arbitrary and capricious and generally an abuse of discretion. In support of these arguments, counsel submits a brief in which he summarizes the director's adverse findings, thereby acknowledging the perceived discrepancies between documents filed in support of the initial Form I-140 and those submitted in support of the current petition. Counsel contends that there is no inconsistency and further explains that the organizational chart provided in support of the current petition is merely meant to clarify the hierarchy of the foreign entity's finance section, which includes an accountant by the name of [REDACTED] who has since departed his employment with the foreign entity. However, 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 Obaighena*, 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). Thus, counsel's explanation alone is inadequate. Moreover, even if an explanation from counsel were sufficient to overcome a factual inconsistency, the explanation provided herein does not address the root of the concern, which is that the more recent organizational chart pertaining to the foreign entity alters the hierarchy of the finance section where the beneficiary's position was situated.

Counsel further asserts that the above described inconsistency is not with regard to a material fact that alters the beneficiary's job duties or responsibilities. This assertion, however, is also inaccurate, as the petitioner must provide correct information about the foreign entity's hierarchy so as to enable USCIS to determine exactly whom the beneficiary supervised during his employment abroad and whether the hierarchy at that time was sufficient to relieve the beneficiary from having to primarily perform non-qualifying tasks. While a description of the beneficiary's job duties is also germane when making a determination regarding the

petitioner's eligibility, the job description must be considered in light of information pertaining to the foreign entity's organizational hierarchy. Here, in light of the discrepancy discussed by the director, USCIS is unable to ascertain whether the foreign entity was adequately staffed to support the beneficiary in a primarily managerial or executive capacity. Furthermore, as the petitioner has not resolved a considerable factual inconsistency with regard to the beneficiary's foreign employment, the issue of the petitioner's questionable credibility further undermines its claims to eligibility.

Therefore, bearing in mind that the petitioner has failed to resolve a critical inconsistency, any questions regarding the petitioner's credibility also affect the claims made regarding the beneficiary's proposed employment. It is noted that 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Notwithstanding any doubts regarding the petitioner's credibility, the petitioner lacks sufficient evidence to establish that the U.S. entity either requires or can sustain the beneficiary in a managerial or executive capacity so that the primary portion of his time would be spent performing tasks of a qualifying nature.

As pointed out by the director, it appears that the petitioner had only three employees at the time of filing, thus leading the AAO to question how the U.S. petitioner would relieve the beneficiary from actually providing accounting services, which while deemed professional, do not fall within the parameters of what is deemed to be within a managerial or executive capacity. First, the description of the beneficiary's prospective U.S. employment indicates the beneficiary would spend anywhere from 15-19 hours per week overseeing the activities of employees that are outside of the United States and who appear to be working for entities other than the petitioner. It is noted that any time spent performing any tasks, oversight or otherwise, for any entity other than the petitioner cannot be considered in determining whether the beneficiary's prospective employment with the petitioner would be within a qualifying capacity. Even if these specific tasks would normally be deemed managerial or executive with regard to the foreign entity, they would be deemed tasks necessary to provide a service and, thus, would be non-qualifying. It is noted that an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Second, the job description containing the hourly breakdown includes numerous job duties, which, on their face, are non-qualifying. Specifically, the petitioner indicated that the beneficiary would prepare long- and short-term as well as annual budgets, provide investment services, preparing reports for senior management to review with regard to the U.S. petitioner's operations, and conduct contract and rate negotiations, which combined, would consume anywhere from 13-18 hours per week. However, these operational duties are consistent with those deemed as providing services for the U.S. entity and are therefore non-qualifying. When taken into consideration in tandem with the additional 15-19 hours spent providing management services to the foreign entity by overseeing personnel employed abroad, it appears that a majority of the beneficiary's time would be spent performing non-qualifying tasks. As stated above, 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. *Id.* Thus, all credibility issues aside, the

petitioner has simply failed to establish that the primary portion of the beneficiary's time in the proffered position would be devoted to tasks within a qualifying managerial or executive capacity.

In summary, the evidence of record is inconsistent as to the foreign entity's organizational hierarchy at the time of the beneficiary's period of employment. In light of the lack sufficient and reliable evidence, the AAO cannot conclude that the beneficiary was employed abroad in a qualifying managerial or executive capacity. Additionally, per the above analysis, the record indicates that the beneficiary would spend the majority of his time with the U.S. entity providing professional accounting services, which, despite their professional nature, do not fall within the definition of qualifying manager or executive capacity. Therefore, on the basis of these two independent findings, the instant petition cannot be approve.

Furthermore, the AAO finds that the record does not support a finding of eligibility based on at least one additional ground that was not previously addressed in the director's decision. Specifically, the record lacks sufficient evidence to establish that the petitioner has a qualifying relationship with the beneficiary's foreign employer as required by 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 United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 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.

In the present matter, the petitioner claims to have an affiliate 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;

The petitioner claims that its affiliate relationship is based on the fact that the person who owns and controls its shares is the same person who has an ownership interest and "de jure" control of the foreign entity through proxy votes of the foreign entity's shares. *See Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). However, while the record contains evidence establishing that [REDACTED] owns and controls the petitioning entity, there is insufficient evidence to establish [REDACTED] control over the foreign entity. Rather, the record shows that the foreign entity issued 300 shares to be shared by four shareholders. While [REDACTED] is one of the four shareholders, the record shows that he owns only 50 out of 300 shares and that 154, or the majority of the shares, are held by [REDACTED]

In response to the RFE, the petitioner claimed that the majority shareholder executed a power of attorney, which transferred control of the foreign entity to [REDACTED], thus giving [REDACTED] ownership and control over the U.S. and foreign entities. In the present matter, the only evidence submitted in support of this claim is the unsupported written statement of the foreign entity's group vice president of finance, who merely reiterated the petitioner's claim.

As general evidence of a petitioner's claimed qualifying relationship, mere assertions are not sufficient to establish whether a stockholder maintains 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., supra*. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

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)).

Here, rather than providing evidence to corroborate its claim, such as a copy of the actual power of attorney that was purportedly transferred control of the foreign entity, the petitioner has provided a statement from the foreign entity's employee which cannot be deemed as sufficient corroborating evidence. Therefore, the record lacks sufficient evidence establishing common ownership and control of the beneficiary's foreign and proposed U.S. employers and on this additional basis 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 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, this petition will be denied based on the additional ground of ineligibility discussed above.

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.