



U.S. Citizenship  
and Immigration  
Services

B4

DEC 08 2009

FILE: [REDACTED]  
LIN 07 079 50328

OFFICE: NEBRASKA SERVICE CENTER

Date:

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

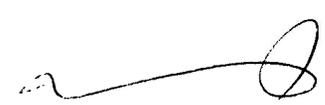
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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 reopen or 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 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.

The director determined that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity and denied the petition on that basis. On appeal, counsel disputes the director's decision, claiming that the denial was erroneous. Counsel submits a follow-up appellate brief in which he argues that the director failed to take into account the nature and size of the petitioner's business. The petitioner also submitted additional evidence.

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 petitioner established that the beneficiary 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.

In support of the Form I-140, the petitioner submitted an organizational chart, marked July 2006, as well as several months of company payroll statements, including the payroll statements for July 2006. The organizational chart depicts the beneficiary at the top of the company hierarchy with an assistant manager, a merchandise manager, and a meat department manager as his three direct subordinates. The lowest tier within the hierarchy shows four cashiers as the subordinates of the assistant manager, who is the only one of the three named managers shown as having any subordinate employees. Although the petitioner submitted all of its payroll statements for July 2006, it is noted that none of the three managers who were named in the organizational chart were also named as company employees for July 2006. It therefore appears that the organizational chart does not match the information contained in the corresponding month's payroll statements. With regard to the job description of the beneficiary's proposed employment, while the petitioner

referred to the supporting documents in Part 6, Item 3 of the Form I-140, none of the supporting documents contained a job description.

Accordingly, on August 1, 2007, the director issued a request for additional evidence (RFE) instructing the petitioner to provide, in part, a detailed description of the beneficiary's proposed U.S. employment to include a list of the beneficiary's specific job duties and a discussion of the types of employees the beneficiary would supervise. The director also pointed out the inconsistency between the payroll documents and the organizational chart, which were previously submitted in support of the Form I-140. The petitioner was asked to indicate each employee's educational level and to state whether the listed employees are employed on a full- or part-time basis. Additionally, the petitioner was asked to provide its 2006 payroll statements and all IRS Form W-2s issued in 2006.

In response, the petitioner provided a letter dated August 21, 2007, signed by its vice president, who stated that the beneficiary would be employed in an executive capacity wherein he would direct the management of personnel regarding production, sales, pricing, and distribution of the company's merchandise. The beneficiary would also have full discretionary authority over all decision-making. The letter further stated that the beneficiary directs two subordinate managers, who are in charge of merchandise display and the store's meat department, and an assistant manager, who oversees four cashiers. Additionally, the beneficiary was described as negotiating contracts and agreements with suppliers and distributors and ensuring compliance with state and local licensing authorities.

The petitioner also provided a duplicate of the organizational chart that was provided earlier in support of the Form I-140, citing the same position titles and employees despite the director's comment regarding the inconsistency between the employees named in the organizational chart and the employees named in the payroll documents that account for the corresponding time period. It is further noted that, while the petitioner provided the educational levels for the employees of the foreign entity, it did not provide this requested information for the employees cited in its own organizational chart. 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).

Lastly, the petitioner provided the requested 2006 IRS Form W-2s for its employees, which included W-2s for [REDACTED] and [REDACTED] whom the organizational chart identified as the merchandise manager and meat department manager, respectively. It is noted that [REDACTED] salary for 2006 was \$978.50 and [REDACTED] salary was \$275, thereby indicating that neither individual was likely to have been employed on a full-time basis. Furthermore, based on the 2006 fourth quarter state wage report, which includes the time period during which the petition was filed, none of the three individuals named in the organizational chart as the beneficiary's subordinate managers was employed during that quarter and therefore none were employed by the petitioner at the time it filed the petition. In fact, of the nine employees named in the relevant fourth quarterly wage report, only the beneficiary was clearly identified in the petitioner's organizational chart. It is therefore unclear which positions were actually filled by the employees the petitioner had at the time of filing.

After reviewing the petitioner's submissions, the director issued a decision dated November 27, 2007 denying the petition based upon the finding that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity. The director properly noted that the petitioner failed to provide any evidence establishing its employment of [REDACTED], the individual named as the assistant manager. The director further noted that [REDACTED] and [REDACTED], who were named as the petitioner's two managers and subordinates of the beneficiary, were actually employed by the petitioner on what appears to be

a part-time basis during the first quarter in 2006. The director also acknowledged the petitioner's submission of a second organizational chart, but properly noted that this chart reiterated the same information that was contained in the chart initially submitted in support of the Form I-140.

On appeal, counsel provides an explanation for the discrepancy, claiming that the person who assumed the assistant manager position was actually employed as head cashier and assistant manager at the time the Form I-140 was filed. 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 Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, even if the petitioner were to provide evidence to support counsel's claims on appeal, the petitioner has failed to explain why it provided an organizational chart that listed individuals whom it did not employ either during the claimed period of July 2006 or during the relevant time period of December 2006. 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).

Here, the director initially informed the petitioner of the inconsistency between its payroll records and the organizational chart in the RFE, thereby giving the petitioner ample opportunity to resolve the anomaly. However, the petitioner merely resubmitted the questionable organizational chart in response to the RFE, thereby failing to clarify the confusion or to explain exactly whom it employed at the time the Form I-140 was filed or to identify which employees were employed on a part-time or a full-time basis. As stated previously, 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).

Furthermore, as the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated, counsel's statements on appeal and the updated organizational chart, which now address the director's earlier request, will not be considered for any purpose. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

On review, the AAO finds that the director properly denied the petition. Despite the director's attempt to elicit relevant information pertaining to the petitioner's organizational hierarchy at the time of filing, the petitioner failed to comply with various key portions of the RFE, thereby leaving the AAO with many unanswered questions as to the positions that the petitioner had filled at the time the petition was filed. This information is crucial for the purpose of understanding who was performing the petitioner's daily operational tasks. This information would ultimately help to determine whether or to what extent the petitioner had the ability to relieve the beneficiary from having to primarily perform tasks of a non-qualifying nature at the time of filing. Additionally, the AAO notes that even if the petitioner were able to successfully document the organizational structure that was illustrated in the initially provided organizational chart, the chart shows that at least two of the beneficiary's subordinates—the merchandise manager and the meat department manager—were not managerial or supervisory employees, despite their managerial titles, and no information was submitted to establish that either individual was a professional employee. As such, it appears that some undisclosed portion of the beneficiary's time was spent performing the non-qualifying duties associated with overseeing non-managerial, non-professional, and non-supervisory employees.

Additionally, in examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). In the present matter, the director expressly instructed the petitioner to provide a detailed job description listing specific job duties to be performed by the petitioner in the proposed position. While the petitioner provided a letter generally discussing the beneficiary's proposed position, the job description was overly general and failed to adequately discuss what specific tasks the beneficiary would perform on a daily basis. 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). Relevant case law has further established that 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). Thus, without a definitive list of the beneficiary's proposed tasks, USCIS is unable to determine what portion of the beneficiary's time would be spent performing qualifying tasks and whether the petitioner meets the statutory requirement of establishing that the primary portion of the beneficiary's time would be allotted to qualifying, rather than non-qualifying, tasks. As the petitioner has failed to provide an adequate job description and an accurate illustration of its organizational hierarchy at the time the Form I-140 was filed, the AAO cannot conclude that the petitioner would employ the beneficiary in a qualifying capacity under an approved petition. For this reason, the instant petition cannot be approved.

Furthermore, while not addressed in the director's decision, the record fails 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 provided a document listing the foreign entity's list of stockholders. It is noted that [REDACTED] is identified as the foreign entity's majority stockholder, owning 1,013,798 shares out of a total 1,014,302 authorized shares. Although the August 21, 2007 letter referred to the petitioner as the foreign entity's subsidiary, no evidence was submitted to support this claim. 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)). Therefore, without sufficient supporting evidence, the AAO cannot conclude that the beneficiary's foreign and prospective employers are similarly owned and controlled.

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 ground 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.