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U. S. Citizenship and Immigration Services  
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FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER Date: MAR 30 2009  
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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.

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).

John F. Grissom  
Acting 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 engaged in the business of trading and selling computer services. The petitioner seeks to employ the beneficiary as its general manager. 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 a brief statement addressing a supplemental organizational chart addressing the beneficiary's employment abroad and the beneficiary's proposed employment and additional job descriptions.

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.

In support of the Form I-140, the petitioner submitted a letter dated May 3, 2007, which includes brief job descriptions and percentage breakdowns of the beneficiary's job responsibilities with regard to his foreign and proposed employment. As the director included these job descriptions in the denial, the AAO need not repeat this information in the current decision. After reviewing this information, the director determined that further information was needed in order to determine whether the beneficiary was employed abroad and whether he would be employed by the U.S. petitioner in a managerial or executive capacity.

Accordingly, on August 22, 2007, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a list of specific job duties the beneficiary performed during his employment abroad and those he would perform within his proposed position for the U.S. petitioner. The director specified that the each list of job duties is to be accompanied by an estimate of time allotted to each duty with the beneficiary's respective positions. The petitioner was also instructed to provide organizational charts for each entity, listing the beneficiary's position with respect to others within each entity's hierarchy.

In response, the petitioner provided a letter dated September 24, 2007, which included the following description of the beneficiary's foreign employment:

1. Development and implementation of administrative and operational functions; executing efforts against pre-established plans to ensure growth and profitability; developing business plans, providing guidance and assistance in the planning, implementation, and evaluation of operations, systems, and procedures; creating processes to ensure smooth operations; evaluating the company's performance and determining areas of improvement; (20% of time);
2. Management and supervision of personnel, including hiring, firing, training, work allocation, development and problem resolution, assisting personnel in successfully negotiating and closing outstanding bids, ensuring a high performance and morale among personnel by effectively selecting, developing, and assisting individuals with potential for advancement, while ensuring customer satisfaction; selecting and overseeing the work performed by service providers; (20% of time);
3. Planning and identification of business opportunities, developing business relationships and managing key accounts; identifying, assessing and developing marketing opportunities to generate business growth; achieving revenue targets, developing sales presentations, managing and executing all aspects of product development; (20% of time);
4. Marketing the company's products and providing support on marketing/service related issues; planning, developing and implementing overall marketing and sales strategies to retain and grow customer base; (20% of time);
5. Liaising with potential clients and key accounts, establishing appropriate contacts and business relationships with customers, dealing with suppliers and distributors

and negotiating deals; developing specific customer-relations programs; (10% of time);

6. Achieving financial objectives by preparing annual budgets, scheduling expenditures, analyzing variances, initiating corrective actions; reviewing and interpreting financial and operation information; ensuring the efficient and profitable operations of the company; attending to various administrative aspects of the business, approval of expenditures, management of budgeted numbers, accounting activities; monitoring costs associated with business activity to ensure compliance with budget and corporate standards; (10% of time).

The petitioner also provided the foreign entity's organizational chart as requested in the RFE. The chart identified the board of directors at the top of the hierarchy, a managing director as the individual directly subordinate to the board of directors, and the beneficiary as operations manager directly subordinate to the managing director. The beneficiary's subordinates were identified only as departments, to include administrative, technical support, and projects departments.

The petitioner also provided the U.S. entity's organizational chart showing the beneficiary as general manager at the top-most position with the hierarchy. The administrative manager is depicted as the beneficiary's direct subordinate. The administrative manager's subordinates include systems operations and two systems analysts. It is noted that each position within the U.S. organizational chart is qualified with the name of the individual or company assuming the duties of the position, totaling four named employees (including the beneficiary) and one company assuming the systems operations duties. The petitioner also provided the following percentage breakdown of the beneficiary's proposed position with the U.S. entity:

1. Developing business proposals focusing on understanding and capturing business value opportunities, setting direction and vision for the company's sales and marketing activities, following up on [the] company's performance issues; development and implementation of administrative and operational functions; executing efforts against pre-established plans to ensure growth and profitability; developing business plans, providing guidance and assistance in the planning, implementation, and evaluation of operations, systems, and procedures; creating processes to ensure smooth operations, evaluating the company's performance and determining areas of improvement; (20% of time);
2. Formulating and implementing growth strategies, encompassing identification of new business opportunities, providing strategic support and recommendations on related issues, developing and assisting with the implementation of business goals based on our corporate model; planning and identification of business opportunities, developing business relationships and managing key accounts; identifying, assessing and developing marketing opportunities to generate business growth; achieving revenue targets, developing sales presentations, managing and executing all aspects of product development; (20% of time);

3. Developing and pursuing business opportunities at a local, regional and national level to generate new business activities and ensure growth and profitability; marketing the company's products and providing support on marketing/service related issues; planning, developing and implementing overall marketing and sales strategies to retain and grow [a] customer base[;] (20% of time);
4. Dealing with suppliers and distributors, negotiating deals and entering into contracts on behalf of the company, liaising with potential clients and key accounts, establishing appropriate contacts and business relationships with customers and developing specific customer-relations programs[;] (20% of time);
5. Management and supervision of personnel, including hiring, firing, training, work allocation, development and problem resolution, assisting personnel in successfully negotiating and closing outstanding bids, ensuring a high performance and morale among personnel and effectively selecting, developing, and assisting individuals with potential for advancement, while ensuring customer satisfaction; selecting and overseeing the work performed by service providers; (20% of time).

The director reviewed the petitioner's RFE response and the documentation submitted in support thereof and determined that the petitioner failed to establish eligibility. Accordingly, the director denied the petition in a decision dated December 29, 2007. With regard to the beneficiary's employment with the foreign entity, the director found that while the beneficiary's heightened degree of discretionary authority was adequately conveyed, the petitioner failed to establish that the beneficiary primarily performed job duties within a qualifying capacity. The director also found the foreign entity's organizational chart to be lacking in specificity in that the petitioner did not provide the names or position titles of any of the employees whom the beneficiary supervised. The director also found that the beneficiary's foreign job description lacked specific information and failed to properly convey the job duties performed on a daily basis.

With regard to the beneficiary's proposed position with the U.S. petitioner, the director commented on the petitioner's limited support staff, which appears to consist of one individual (other than the beneficiary) who is directly employed by the petitioner and two others who are likely contracted by the petitioner, as there is no payroll information for either one. In light of this supporting documentation, the director found that the record does not establish the petitioner's ability to relieve the beneficiary from having to primarily perform non-qualifying operational tasks on a daily basis.

On appeal, counsel asserts that the beneficiary's foreign and U.S. positions meet the definition for managerial capacity. With regard to the beneficiary's proposed position, counsel contends that the beneficiary will direct and supervise the company's activities, "while the other tasks are performed by subordinate personnel," thereby suggesting that the beneficiary would be relieved from having to primarily perform non-qualifying job duties. However, counsel's argument is not supported by the evidence of record, which lacks definitive documentation establishing exactly whom the petitioner employed at the time the Form I-140 was filed. 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). Although the director speculated that two of the individuals previously named in the petitioner's

organizational chart were contracted by the petitioner, there is no evidence to support this assumption, as the petitioner did not provide any documentation showing that it paid either of the two named individuals in exchange for services. That being said, the petitioner named an entity in its organizational chart, but did not provide documentation establishing its payment in exchange for the services that may have been provided by that entity. 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)).

Additionally, while the petitioner provided a brief job description for each position listed in its organizational chart, none of the information provided, including the beneficiary's own job description, establishes how the petitioner's given organizational structure at the time the Form I-140 was filed was capable of relieving the beneficiary from having to primarily perform the petitioner's daily operational tasks. Even if the individuals named in the organizational chart were to perform the job duties assigned to them in the appended job description, it remains unclear how the beneficiary would be relieved from having to perform the many other non-qualifying job duties that were not assigned to any of his subordinates. In fact, despite the beneficiary's vague job description, which was overwhelmingly comprised of general job responsibilities rather than specific job duties, the petitioner provided sufficient information to indicate that the beneficiary's time would not be primarily spent performing job duties within a qualifying managerial or executive capacity. Specifically, the job description provided in response to the RFE stated that the beneficiary would: 1) generate business for the petitioner, thereby indicating that he would directly engage in selling the petitioner's products and/or services; 2) deal directly with suppliers and distributors as well as potential and existing clients; and 3) manage subordinate personnel, none of whom have been established as being professional, supervisory, or managerial employees. Combined, these non-qualifying tasks would consume approximately 60% of the beneficiary's time. 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 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).

With regard to the beneficiary's employment abroad, the petitioner supplemented the record with an additional organizational chart listing the foreign entity's positions and naming the individuals who occupied those positions at the time the beneficiary was employed abroad. The supplemental organizational chart is accompanied by a brief list of job descriptions for each of the positions within the foreign entity's hierarchy. Although this supplemental information addresses several of the director's adverse findings, the AAO nevertheless finds that the petitioner has failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. To the extent that 20% of the beneficiary's time was allotted to personnel-related supervisory tasks, the AAO finds that the petitioner has not established that the beneficiary's subordinate staff consisted of supervisory, professional, or managerial employees. *See* section 101(a)(44)(A)(ii) of the Act. As such, the AAO cannot conclude that the 20% of the beneficiary's time that was spent managing personnel was spent performing duties within a qualifying managerial capacity. To the extent that a portion of the beneficiary's time would be devoted to such activities as developing client relationships, developing sales presentations, and generating business growth, these activities are also of a non-qualifying nature. However, as they are grouped with other general job responsibilities

that are not defined with more specific job duties, the AAO cannot determine just how much time would be spent specifically performing the non-qualifying tasks discussed in No. 3 of the foreign job description. Similarly, the petitioner stated that the beneficiary was directly responsible for planning, developing, and implementing marketing policies and strategies, as well as communicating with potential and existing clients, suppliers, and distributors. These non-qualifying tasks consumed a total of 30% of the beneficiary's time. Thus, when the AAO reviews the time distribution provided in the RFE response, it appears that the beneficiary's employment abroad required that the majority of the beneficiary's time was allotted to non-qualifying tasks rather than qualifying ones. As noted previously, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be 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. at 593.

In summary, the record shows that the petitioner has been unable to establish that either the beneficiary's employment abroad or his proposed employment with the U.S. entity have primarily involved and would involve, respectively, the performance of tasks within a qualifying managerial or executive capacity. Therefore, based on these two independent findings, this petition does not warrant approval.

Furthermore, 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, 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 filed the Form I-140 on May 15, 2007, indicating that it operates a retail business. However, the earliest sales invoices submitted by the petitioner date back to October 2006. There is no evidence that the petitioner was selling any products and/or services from May through September 2006, which is part of the relevant one-year time period prior to the date the petition was filed. Although the petitioner provided its 2006 tax return as well as copies of its bank statements, neither document is adequate for the purpose of determining whether the petitioner had been doing business during the time period and in the manner prescribed by regulation. As such, the AAO finds that the petitioner failed to establish that it met the requirements specified in 8 C.F.R. § 204.5(j)(3)(i)(D).

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.

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.