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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



FILE:



Office: TEXAS SERVICE CENTER

Date:

MAY 26 2009

SRC 07 213 52044

IN RE:

Petitioner:

Beneficiary:



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 or reopen, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom

Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Florida. It claims to be in the import and export business, specifically importing surgical goods, knives, martial arts goods, and beauty care products. It seeks to employ the beneficiary as its quality control 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, concluding that the petitioner had not established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner contended that the director's decision is in error and that the beneficiary qualifies as a "function manager." No further evidence was submitted.

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 the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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 that 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. *See* 8 C.F.R. § 204.5(j)(5).

At issue in the present matter is whether the beneficiary will be employed in a primarily managerial or executive capacity by the United States entity.

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 June 28, 2007 filed with the Form I-140, Immigration Petition for Alien Worker, the petitioner described the beneficiary's duties in the United States as follow:

As Quality Control Manager, [the beneficiary] is responsible for quality control of products imported from Pakistan, including selection of products that meet market demands and keep [the petitioner's] products and services competitive. He evaluates processes, including human work factors, quality control, inventory control, logistics, cost analysis and coordination of activities with the overseas company. He hires, trains and fires the workers who produce the goods and services marketed by [the petitioner].

The petitioner stated that it "normally has three to four employees working for the company." However, other than a single Florida Employer's Quarterly Report for the third quarter of 2001 listing the names of four employees and their salaries for that quarter, the petitioner provided no evidence relating to the rest of its staff.

On May 15, 2008, the director issued a request for further evidence (RFE) requesting a dated, signed statement describing the beneficiary's proposed position in the U.S. company. The statement is to include (1) the number, job titles, degree titles and job duty descriptions of all of the beneficiary's subordinates; (2) description of all supervision the beneficiary will receive and the position he will occupy in the organizational hierarchy; and (3) a breakdown of the beneficiary's executive or managerial duties by percentage of time spent performing those duties each day. The director also requested an organizational chart showing the beneficiary's position within the U.S. company and listing all employees by name and title. The director also requested information relating to the beneficiary's position overseas, including the dates of his employment, a breakdown of the beneficiary's executive or managerial duties by percentage of time spent performing those duties each day, and an organizational chart showing the beneficiary's position within the foreign company and listing all employees by name and title.

In a letter dated June 12, 2008 responding to the RFE, the petitioner provided the following description of the beneficiary's duties in the U.S.:

Oversee quality control operations for [the petitioner], including:

- develop review and approve the company's quality systems to insure compliance with regulations of the federal, state and local government, including import and customs regulations (20%);
- perform vendor audits and submit vendor audit reports to the Board of Directors (10%);

- perform internal auditing of all departments of the business and submit reports to the Board of Directors (10%);
- coordinate schedules and approve hiring and firing of employees and independent contractors (10%);
- implement goals for the business and make specific recommendations to Board of Directors for the business to improve the quality of products marketed by the business (20%);
- insure proper customer complaint tracking and reporting (5%)
- insure proper non-conformance tracking and reporting (5%);
- insure proper tracking and reporting of shipping and receiving of products (5%);
- submit weekly manager reports to the Board of Directors (5%);
- submit vendor audit reports to the Board of Directors as necessary (5%); and
- submit internal audit reports to the Board of Director as necessary (5%).

The petitioner further stated that the beneficiary also performs his duties as quality control manager at a second site and represents the U.S. company at trade shows. The petitioner indicated that it uses independent contractors for shipping activities and for handling imports from Pakistan. An organizational chart was provided which shows the beneficiary as second-in-command, under the company's president. Positions below the beneficiary include a marketing manager, a shipping agent, a general manager and an unspecified number of "workers" at the "Orlando Site" and the "Webster Site." There is no indication as to whether all of these positions are filled, nor were names, educational background or job descriptions provided in connection with any of these positions, as the director requested.

On June 27, 2008, the director denied the petition, concluding that the petitioner had not established that the beneficiary will be employed by the petitioner in a primarily managerial or executive capacity. The director noted that the petitioner failed to provide any information relating to the beneficiary's subordinates, or an organizational chart that lists all employees' names and titles, as requested in the RFE. Without that information, the director found that the record lacks evidence showing that the beneficiary would be primarily supervising a staff of professional, managerial or supervisory personnel who would relieve him from performing non-qualifying duties. The director noted that, although the petitioner stated that the beneficiary's job duties included representing the petitioner at trade shows, documents submitted indicate that the trade shows involve direct retail sale of the company products and, therefore, the beneficiary's attendance at these events do not constitute managerial or executive activities. Further, the director observed that as a retail enterprise, the petitioner must "rely on many labor-intensive functions such as stocking, rotation and pricing of merchandise, daily accounting, supply ordering, record keeping and related tasks." Absent any evidence of a sufficient support staff to perform these day-to-day-functions, the director concluded, the record fails to show that the beneficiary's assignment with the petitioner is primarily managerial or executive.

On appeal, counsel for the petitioner argues that the decision is incorrect because it focuses on the size of the U.S. entity rather than the beneficiary's management of the quality control function of the

company. Counsel restates the beneficiary's job description previously provided and asserts that the beneficiary's duties are managerial in nature. Counsel further states:

[The beneficiary] oversees the quality control operations of the United States company. He is not performing the quality control activities but oversees and manages the performance of these activities. He functions at a senior level in the organizational hierarchy. He reports to the Board of Directors of which he is a member. The function which he manages is essential to the survival of [the petitioner]. [He] hires and fires the workers who perform the actual quality control activities. He exercises discretion over the day-to-day operations of the quality control function. He manages the function and he is not acting as a first line supervisor. As Quality Control Manager, he must deal with other managers in the United States Company and the manager of the company in Pakistan.

Counsel also argues that the director's decision is incorrect because it focuses on the size of the overseas entity rather than the beneficiary's management of the export function of the overseas entity. The AAO notes that the director did not make any finding relating to the beneficiary's executive or managerial capacity within the overseas entity.

Upon review, the AAO concurs with the director's conclusion that the petitioner has failed to establish that the beneficiary would be employed in the United States in a primarily executive or managerial capacity.

At the outset, it is noted that in the RFE, the director had requested that the petitioner submit the number, job titles, degree titles and job duty descriptions of all of the beneficiary's subordinates, as well as the names and titles of all employees within the company. The petitioner failed to submit this information for any of its claimed employees other than the beneficiary. This evidence is critical as it would have established that the U.S. company actually has the staff it described, and the beneficiary actually occupies the position within the organization and has the job responsibilities the petitioner claimed. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. *See* 8 C.F.R. § 103.2(b)(8). The 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).

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). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

Counsel's claim on appeal that the beneficiary qualifies as a "function manager" is not persuasive. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, *i.e.*, identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). It is the petitioner's obligation to establish that the day-to-day non-managerial tasks of the function managed are performed by someone other than the beneficiary.

In this matter, the petitioner has not provided evidence that the beneficiary manages rather than performs the day-to-day tasks of the quality control function. The AAO does not dispute that a number of the beneficiary's responsibilities as described by the petitioner in its June 12, 2008 letter may be categorized as quality control functions, such as "develop review and approve the company's quality systems to insure compliance with regulations of the federal, state and local government, including import and customs regulations," "insure proper customer complaint tracking and reporting," "insure proper non-conformance tracking and reporting," or "insure proper tracking and reporting of shipping and receiving of products." However, what is absent is evidence that the beneficiary *manages* these functions rather than performing the tasks underlying these quality control functions. As noted, the record is devoid of information relating to the U.S. company's staff other than the beneficiary. The petitioner claimed that it "normally has three to four employees" and that it uses independent contractors for shipping and customs-related responsibilities. However, the petitioner failed to identify by name or provide job descriptions for any of its employees other than the beneficiary. As such, the evidence does not show that there is actually a staff to perform the duties relating to the quality function that the beneficiary purportedly manages. Absent evidence of an actual staff that performs the day-to-day quality control tasks, counsel's claim that the beneficiary manages the quality control function cannot be substantiated.

With respect to counsel's contention that the size of the U.S. company should not be the focus of the director's analysis, the AAO acknowledges that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that Citizenship and Immigration Services (CIS) "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316

(9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). In this instance, the director's decision to deny the petition is based not on the number of employees within the company, but on the lack of evidence that the petitioner indeed has staff to perform the non-managerial operations of the company and support the beneficiary in his managerial function, as discussed above.

In light of the foregoing, the AAO concurs with the director's conclusion that the petitioner has failed to establish that the beneficiary would be employed in a primarily executive or managerial capacity in the United States. For that reason, the petition will be denied.

Beyond the decision of the director, the AAO finds the evidence is insufficient to establish that the petitioner has a qualifying relationship with the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity. *See* section 203(b)(1)(C) of the Act. 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 U.S. and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *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.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In this matter, the record contains substantial inconsistencies regarding the petitioner's ownership and control. In its letter dated June 28, 2007, the petitioner claimed that the U.S. company "is owned by the foreign company, [REDACTED] a partnership located in Pakistan." The petitioner indicated in the same letter that "[REDACTED]" is doing business as [REDACTED]. The record includes a partnership deed dated October 3, 2002, among the partners -- [REDACTED] and [REDACTED] -- stating, among other things, that the name of the partnership is changed from "[REDACTED]" to [REDACTED] " as of that date. In fact, all documents relating to the foreign company dated after the date of the partnership deed states the entity's name as "[REDACTED]" As such, it is unclear whether [REDACTED] continues to exist as a legal entity.

With respect to the U.S. company's shares, the petitioner submitted a copy of its articles of incorporation, dated October 11, 1996, stating that the company is authorized to issue 100 shares. However, the evidence also includes a copy of a single undated stock certificate showing that [REDACTED] " owns 200 shares, representing all of the U.S. company's 200 authorized shares. In addition, Schedules E and K of the company's Internal Revenue Service Form 1120, U.S. Corporation Income Tax Return, for the years 1996, 1997, 1998, 2000 and 2005 all show that the company was 100% owned by [REDACTED] rather than the foreign entity.

No stock ledger or other evidence documenting change in the company's authorized shares or ownership was submitted. As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and 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, CIS is unable to determine the elements of ownership and control.

In light of the above information, the record does not show conclusively, as the petitioner claimed, that the foreign entity is a legal entity in Pakistan with the registered name "Pluto Surgical Company," or that it wholly owns the U.S. company. The record lacks any documentation or

explanation that would reconcile or clarify these inconsistencies regarding the foreign entity's identity and purported ownership of the U.S. company. 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. *Matter of Ho*, 19 I&N Dec. at 591.

In light of the above, the AAO finds the petitioner has not established that there exists a qualifying relationship between the U.S. and foreign entities. For this additional reason, the petition will be denied.

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). When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows 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.

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. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.