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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
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Services

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FILE: [REDACTED]
LIN 08 013 58432

OFFICE: NEBRASKA SERVICE CENTER

Date: NOV 30 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)

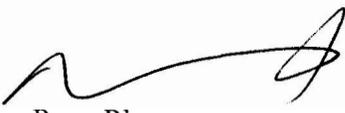
ON BEHALF OF PETITIONER:

[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 or reopen, 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 engaged in the distribution of food products. It 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 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 submits a brief disputing the director's conclusions. All relevant submissions, including counsel's appellate brief, have been considered and will be addressed in the decision below.

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 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 a letter dated August 13, 2007, which includes the following list of the beneficiary's proposed duties and responsibilities:

1. To plan, develop, and establish policies and objectives of business organization in accordance with board directives and [the] corporation charter;
2. Confer with company officials to plan business objectives, to develop organizational policies to coordinate functions and operations between divisions and departments, and to establish responsibilities and procedures for attaining objectives;

3. Review activity reports and financial statements to determine progress and status in attaining objectives and revises [sic] objectives and plans in accordance with current conditions;
4. Direct and coordinate formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity;
5. Plan and develop industrial, labor, and public relations policies designed to improve [the] company's image and relations with customers, employees, stockholders, and [the] public;
6. Evaluate performance of executives for compliance with established policies and objectives of [the] firm and contributions in attaining objectives.

On July 18, 2008, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a detailed description of the beneficiary's proposed day-to-day job duties with a percentage of time assigned to each duty; the job descriptions of the beneficiary's immediate supervisor and subordinates, also accompanied by the percentage of time to be spent on each of their respective job duties; copies of employee work schedules for 2007 and 2008; and any Forms W-2 and/or Forms 1099 that were issued to the petitioner's employees in 2007.

In response, counsel submitted a statement dated August 28, 2008 in which he explained that the petitioner is a full-service natural food distribution company that supplies convenience and grocery stores as well as quick marts with high quality fruits and nuts. Counsel stated that the beneficiary's job duties are limited to overseeing and coordinating the corporate structure, which does not include any of the activities associated with stocking food on a daily basis. In addition, the petitioner provided the following percentage breakdown of the beneficiary's duties and responsibilities:

- 25% Develops the basic objectives and operating plans of the [c]orporation; submits these to the Board of Directors for approval.

25% Insures that adequate plans for future development and growth of the business are prepared, and participates in their preparation; periodically presents such plans for general review and approval by the Board of Directors.
- 15% Prescribes the specific limitations of the authority of employees regarding policies, contractual commitments, expenditures, and personnel actions. Reviews and approves the appointment, employment, transfer or termination of all key employees. Resolves any conflicts arising between operating groups, staff units and other elements under immediate supervision.
- 10% Represents the [c]ompany as appropriate in its relationships with members, sponsor organization(s), major suppliers, competitors, government agencies, other financial institutions, professional societies, and similar groups.
- 10% Analyzes operating results of the [c]ompany relative to established objectives and insures that appropriate steps are taken to correct unsatisfactory conditions.

- 5% Insures that the [c]ompany's policies are uniformly understood and properly interpreted and administered by employees.
- 5% Plans and directs all investigations and negotiations pertaining to mergers, joint ventures, acquisitions, or the sale of major business assets.
- 5% Presents proposed operating and capital expenditures budgets for review and approval by the Board of Directors.

The petitioner also provided its organizational chart, which depicts the beneficiary as the company's general manager, a position that is directly subordinate to that of president. The chart shows that the beneficiary's subordinates include a purchasing associate, an accounting/finance manager, and a sales manager who oversees five account associates. The organizational chart is accompanied by the IRS Forms W-2 and 1099 statements that were issued to the petitioner's employees and service providers. It is noted that based on the wages paid to the sales manager and two of the account associates, it is unclear whether these employees worked for the petitioner on a full-time basis in 2007 and, if so, whether they were employed by the petitioner at the time the Form I-140 was filed.

In a decision dated January 20, 2009, the director denied the petition noting that the petitioner failed to provide its employees' work schedules. The director also referred to the beneficiary's job description, finding that the petitioner has failed to establish that the beneficiary has been effective in developing business plans and objectives or effecting growth and development of the entity, despite the fact that 50% of the beneficiary's time was assigned to these job responsibilities.

On appeal, counsel contends that the director has taken several of the petitioner's previously made statements out of context, asserting that the beneficiary is at the top of the petitioner's organizational hierarchy and further stating that "the clear executive nature" of the beneficiary's proposed position has been established. Counsel goes on to discuss the beneficiary's supervisory control and states that the beneficiary has the managerial and executive experience "required in managing an essential function within the organization." Counsel's statements employ the terms executive and managerial almost interchangeably, while continuing to refer to the beneficiary as a function manager. The AAO notes, however, that a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

Counsel next addresses the director's criticism of the petitioner's job description, claiming that it is not uncommon for the head of a corporation to devote 25% of his time to setting corporate objectives, developing a business plan, and preparing a strategy for attaining business goals. While counsel's assertion is valid, counsel is reminded that 8 C.F.R. § 204.5(j)(5) requires the petitioner to clearly describe the duties to be performed by the beneficiary in his/her proposed position. This requirement is further supported by precedent case law, which has firmly established the need for specifics when describing the proposed employment, as the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). In the present matter, the AAO finds that the job description lacks sufficient detail. Simply claiming that the beneficiary would spend 25% of his

time developing objectives and operating plans fails to explain exactly what types of tasks the beneficiary performs in his efforts to develop objectives and operating plans, nor is there any indication as to how these broad job responsibilities apply specifically to the petitioner's food distribution business.

The director also commented on the portion of the job description that allots 25% of the beneficiary's time to making plans for growth and development of the business. Specifically, the director questioned the validity of this portion of the job description in light of the lack of evidence to establish that the petitioner has in fact grown or progressed to a new stage of development. Counsel addresses this comment, explaining that while the petitioner experienced growth in 2005 and 2006, the subsequent changes in the U.S. economic climate caused the petitioner to move to "a survival maintenance mode," thereby implying that the beneficiary's job duties had somehow changed to accommodate the change in the economy. However, the petitioner did not explain how the beneficiary altered his job duties in light of the economic changes, nor did the petitioner's statement indicate that the petitioner had undergone any changes at all. In other words, if the economic climate had made it impossible for the petitioner to develop and grow, it would therefore make no sense for the beneficiary to commit 25% of his time to making plans for growth and development. This anomaly leaves the AAO to question what specific tasks the beneficiary would perform given the petitioner's current "survival maintenance mode," which, according to counsel, currently eliminates the need to plan for the petitioner's growth and development.

Additionally, the petitioner indicated that another 10% of the beneficiary's time would be spent representing the company in its relationships with members, sponsors, suppliers, competitors, government agencies, and financial institutions. However, without further explanation, the AAO cannot conclude that this would be time spent performing qualifying managerial or executive tasks. Thus, in light of this observation as well as the above findings, it appears that 60% of the beneficiary's time may be spent performing non-qualifying tasks. Without more specific information as to the tasks that would consume 60% of the beneficiary's time and without further information establishing that the beneficiary's representation of the company can be deemed a qualifying responsibility, the AAO cannot conclude that the beneficiary's time would be primarily spent performing tasks within a qualifying 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). For this reason, the instant petition cannot be approved.

Additionally, while the director did not issue a specific finding, he made several adverse comments about the petitioner's failure to establish its ability to pay the beneficiary's proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by

documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, while the record shows that the petitioner employed the beneficiary since prior to the filing of the Form I-140, the wage paid to the beneficiary at the time of filing was approximately \$26,430, which is approximately \$15,570 less than the proffered wage of \$42,000.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. In the present matter, while the RFE specifically instructed the petitioner to submit either its tax return or its audited financial statements for 2007, this information was not provided. Therefore, the AAO finds that the petitioner has failed to provide sufficient documentation establishing that it had the ability to pay the beneficiary's proffered wage at the time the Form I-140 was filed and for this additional reason the petition cannot be approved.

Next, the AAO must address another ground for eligibility which was not previously addressed in the director's decision. More specifically, 8 C.F.R. § 204.5(j)(3)(i)(C) states that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer.

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 explained in its initial support letter that it is a subsidiary of the foreign entity that employed the beneficiary abroad. The foreign entity was also referred to as the petitioner's parent company. Contradicting these claims, the only documentation contained in the record regarding the petitioner's ownership is an ownership certificate dated March 24, 1999, which indicates that Hernando Valencia is the owner of 100% of the petitioner's units.

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.*, 19 I&N Dec. 362. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control. In the present matter, the petitioner contains nothing more than a share certificate, which directly conflicts with the petitioner's prior claims as to the issue of its ownership. It is noted that 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)). Furthermore, 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). In the present matter, there is an overall lack of sufficient documentation. This deficiency coupled with the anomaly regarding who actually owns the petitioning entity preclude the AAO from being able to conclude that the U.S. and foreign entities 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 grounds 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.