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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER Date: SEP 04 2009  
LIN 08 033 50485

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

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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

  
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 California corporation that seeks to employ the beneficiary as the operations manager of its import/export division. 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 above as valid grounds for denial and submits a brief in support of his arguments.

Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

\* \* \*

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The two primary issues in this proceeding call for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the beneficiary was employed abroad and whether he would be employed in the United States in a qualifying managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the Form I-140, the petitioner submitted a letter dated October 7, 2007, which includes the following description of the beneficiary's proposed employment with the U.S. entity:

[The proffered] position of [v]ice [p]resident/[o]perations manager is a key managerial position within the [import/export] division, because it is the [v]ice [p]resident/[o]perations [m]anager who oversees the completion of paperwork and monetary transactions associated with international distribution in a timely manner, actively assists in bringing together the team to work on each transaction, supervises their work, sets standards for the work and general guidelines for each assignment which must be followed and executed by the team, and coordinates the various teams to assure that each client and transaction is serviced adequately and on schedule. The [beneficiary] also oversees the quality of outside vendors who provide products to the company, manages the import/export process and ensures compliance with [the] U.S. and foreign government laws and regulations.

The [v]ice [p]resident/[o]perations [m]anager is responsible for conducting general administration affairs of the company, acting as liaison and representative for the petitioner's foreign company in Hong Kong, marketing the services of the company[,] engaging in long-range planning and identifying other business opportunities in the United States and international markets. The [v]ice [p]resident/[o]perations [m]anager has day-to-day discretionary authority in directing the business activities, and supervising other managers and professionals. As the person responsible for assisting company functions, the [beneficiary] must spend a majority of her time coordinating the work of each team, reviewing its quality for conformity to [the petitioner's] standards, and administering the company staff. Strong managerial skills and expertise in the field are needed for the important tasks and functions to be performed by the [v]ice [p]resident/[o]perations [m]anager.

With regard to the beneficiary's employment with the foreign entity, the petitioner stated that the beneficiary was responsible for managing, recruiting, training, hiring, and firing subordinate staff. The beneficiary was also responsible for shipping and trading, as well as coordinating the company's management and assuring that certain quality standards were being met.

On April 11, 2008, the director issued a request for additional evidence (RFE) instructing the petitioner to provide detailed descriptions of the beneficiary's proposed and overseas day-to-day job duties, listing specific tasks and the percentage of the beneficiary's time that would be allotted to each job duty. The petitioner was also asked to provide the foreign and U.S. entities' organizational charts showing the beneficiary's respective positions in relation to her superiors and subordinates within each organization.

In response, counsel provided a letter dated June 9, 2008, stating that 50% of the beneficiary's time would be spent meeting with clients and plant managers; another 25% of her time would be spent supervising subordinate employees; and the remaining 25% of her time would be spent traveling to foreign countries for the purpose of reviewing market trends and preparing forecast planning. In a separate, undated, letter, [REDACTED] the petitioner's president, reiterated that a great deal of the beneficiary's time would be consumed with travel abroad for market research. Mr. [REDACTED] further

added that managers and supervisors below the beneficiary's position would be responsible for personnel management and daily operational tasks.

The U.S. entity's organizational chart was also provided, showing the beneficiary's position as second-in-command, subordinate only to the company's president. In the tier directly below the beneficiary is another vice president and below that is a manager, who appears to be in charge of the office staff, the drivers, the warehouse employees, and the contractors.

With regard to the beneficiary's position abroad, [REDACTED] stated that the beneficiary supervised two sales managers and one assistant manager. The beneficiary's supervisory role with respect to two sales managers and one assistant manager was illustrated in the foreign entity's organizational chart, which also included two office staff, two quality control, and two shipping employees. [REDACTED] further stated that the beneficiary primarily spent her time meeting with clients and factory plant managers, which involved extensive travel. It is noted that the petitioner failed to provide the requested percentage breakdown listing the specific tasks the beneficiary performed during her employment abroad. 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).

After reviewing the petitioner's submissions, the director determined that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity and issued a decision dated August 4, 2008 denying the petition. The director noted that the petitioner failed to list the beneficiary's specific day-to-day job duties and corresponding percentage breakdowns for the beneficiary's positions abroad and in the United States. The director determined that the information submitted regarding the beneficiary's foreign and U.S. job duties failed to establish that the primary portion of the beneficiary's time abroad and in the United States had been and would be spent performing duties within a qualifying managerial or executive capacity.

**On appeal,** [REDACTED] the petitioner's president, provides a letter dated August 22, 2008 on behalf of the petitioner. [REDACTED] provides the following supplemental list of the beneficiary's job duties and responsibilities regarding her proposed position with the U.S. entity:

1. Overseeing the completion of paperwork and monetary transactions associated with distribution in a timely manner;
2. Actively assisting in bringing together her team of employees to work on each transaction;
3. Supervising the work of all the employees of the company;
4. Setting standards for the work and general guidelines for each assignment which must be followed and executed by the team;
5. Coordinat[ing] the various teams to assure that each client and transaction is serviced adequately and on schedule;
6. Oversee[ing] the quality of outside vendors who provide products to the company;

7. Manag[ing] the import/export process and ensur[ing] compliance with U.S. and foreign government laws and regulations;
8. Conduct[ing] general administrative affairs of the company;
9. Market[ing] the services of the company[,] engaging in long-term planning and identif[ying] other business opportunities in the United States and international markets;
10. Oversee[ing] the acquisition and/or development of new distribution companies in the United States;
11. Has day-to-day discretionary authority in directing the business activities, and supervising other managers and professionals;
12. Spend[ing] a majority of her time coordinating the work for each team, reviewing its quality . . . and administering the company staff;
13. Develop[ing] and implement[ing] plan[s] to ensure at least a minimum of 10% growth from year to year; and
14. Develop[ing] and implant[ing] plans to meet all goals set forth by the company.

further argues that the beneficiary's responsibilities are those of "an executive and/or managerial position." The AAO notes, however, 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.

Furthermore, the petitioner's submissions are not persuasive in establishing that the beneficiary was employed abroad and that she would be employed in the proposed position in a qualifying managerial or executive capacity. With regard to the beneficiary's employment abroad, the petitioner failed to comply with the express instructions in the RFE and has failed to provide any further information regarding the beneficiary's daily tasks during her employment abroad. While the petitioner has repeatedly commented on the beneficiary's discretionary authority, 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). As the petitioner has failed to provide the requested information regarding the job duties the beneficiary performed during her employment abroad, the AAO cannot determine whether the beneficiary was employed abroad in a qualifying capacity as claimed.

While the petitioner has provided more information with regard to the beneficiary's proposed employment than it has with regard to the beneficiary's foreign employment, the content of the information provided is deficient. In examining the executive or managerial capacity of the

beneficiary, U.S. Citizenship and Immigration Services (USCIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The director has repeatedly stressed the importance of providing a detailed description of job duties in addition to what has been expressly stated in the regulations. *Id.* In the instant case, however, despite the petitioner's numerous attempts to comply with the director's request, the information provided remains devoid of the necessary details regarding the specific tasks the beneficiary would be expected to perform on a daily basis. For instance, in [REDACTED] latest job description, he states that the beneficiary will be setting standards and guidelines and coordinating various teams. However, no prior explanations have been provided to clarify what standards and guidelines the beneficiary would be setting and what teams she would be coordinating in the context of the petitioner's food distribution enterprise.

Although [REDACTED] actively refers to the beneficiary's "team of employees" and further claims that the majority of the beneficiary's time would be spent coordinating the various teams, there is absolutely no clarity as to the composition of these teams. This claim is somewhat suspect in light of prior statements, which indicate that the beneficiary's primary focus would be on traveling for the purpose of conducting market research. In fact, [REDACTED] had previously stated (in response to the RFE) that the petitioner's staff would be managed by the "[m]anagers and supervisors below" the beneficiary, thereby indicating that the beneficiary would not devote any significant portion of her time to personnel management. Thus, [REDACTED] prior and current statements seem to be at odds with one another with respect to the extent of the beneficiary's role as a personnel manager. 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).

Furthermore, [REDACTED] had previously emphasized the beneficiary's active role in the marketing of the petitioner's food distribution services. In fact, counsel had previously stated that approximately 50% of the beneficiary's time would be spent meeting with clients and plant managers while another 25% of her time would be spent traveling abroad for the purpose of conducting market research. Thus, according to counsel approximately 75%, which is an overwhelming majority, of the beneficiary's time would be spent performing sales- and marketing-related tasks, which are deemed as non-qualifying. In fact, [REDACTED] reiterated counsel's statement regarding the beneficiary's active role in traveling abroad and conducting market research. 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).

While [REDACTED] places great emphasis on the beneficiary's discretionary decision-making and her overall authority with regard to petitioner's business, this is only one of several criteria that must be met in order to establish that the beneficiary's employment can be classified as primarily managerial or executive. Here, despite the lack of sufficient detail in clarifying the beneficiary's day-to-day job duties, the record strongly indicates that the beneficiary has had and would continue to have an active, hands-on role in actually dealing with the petitioner's clientele and conducting her own

market research. As such, the AAO cannot conclude that the primary portion of the beneficiary's time would be spent performing tasks in a qualifying managerial or executive capacity.

Furthermore, the record does not support a finding of eligibility based on additional grounds that were not previously addressed in the director's decision.

First, 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 claims that the beneficiary's foreign employer is its direct subsidiary. In support of this claim, the petitioner submitted the following documentation:

1. The foreign entity's Memorandum of Association, indicating that the company is authorized to issue 10,000 shares.
2. A document dated September 17, 2002, indicating that [REDACTED] was accepting one of the foreign entity's shares on behalf of Hanson Secretaries Limited and one more share on behalf of Hanson Corporate Services Limited.
3. A document entitled, "Notification of Increase in Nominal Share Capital; dated May 27, 2005, showing that the foreign entity increased its authorized shares to total one million shares of which 499,999 were issued to [REDACTED] and an equal amount was issued to the beneficiary.
4. Two separate documents, each dated June 13, 2005, entitled, "Instrument of Transfer," each transferring 250,000 shares to the petitioner for a total of 500,000 shares. [REDACTED] was identified as the transferor in one document while the beneficiary was identified as the transferor in the other document.
5. Stock certificate nos. 5-8, dated June 13, 2005, certifying that [REDACTED] and the beneficiary each owns 250,000 shares of the foreign entity, respectively, while the petitioner owns another 500,000 shares.

The AAO notes that the above documents are inconsistent with regard to the exact breakdown of the foreign entity's ownership. Specifically, the petitioner failed to explain what happened to the two shares that [REDACTED] received on behalf of the above named entities. There is no documentation indicating that either entity surrendered its respective ownership of one share of the foreign entity. Thus, in calculating the overall distribution of shares, neither [REDACTED] nor the beneficiary can end up with ownership of 250,000 shares of the foreign entity, as neither individual is shown to have owned 500,000 shares. As previously stated, the petitioner must 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. at 591-92. Here, the petitioner has not resolved the anomaly described above, thereby leaving the AAO to question the validity of stock certificate nos. 5 and 6, which purport to establish that [REDACTED] and the beneficiary each owns 250,000 shares of the foreign entity's stock, respectively. In light of this unresolved discrepancy, the AAO finds that the petitioner has failed to adequately document the existence of a parent/subsidiary relationship between the petitioning and foreign entities.

Second, 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." Although the record in the present matter contains various tax documents as well as the petitioner's bank statements, none of these documents is sufficient to show the frequency of the petitioner's business transactions. As such, these documents cannot be relied upon to determine whether an entity is conducting business on a "regular, systematic, and continuous" basis. *See id.*

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.

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.