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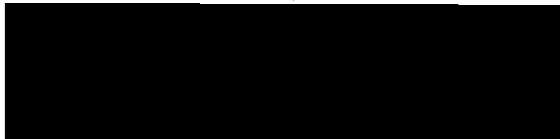
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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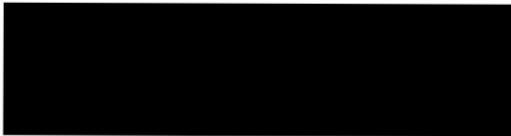
FILE: [REDACTED] OFFICE: TEXAS SERVICE CENTER
SRC 08 150 50272

Date: JAN 21 2010

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 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, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a North Carolina corporation that seeks to employ the beneficiary as its purchase 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 disputes the director's conclusions and submits a brief assessing why U.S. Citizenship and Immigration Services (USCIS) should approve the petition.

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

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

* * *

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

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

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

The primary issue in this proceeding is whether the petitioner established that it would employ the beneficiary 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 March 18, 2008, which includes the following description of the beneficiary's proposed employment in the United States:

- Responsible for all sourcing and purchasing.
- She will be responsible for negotiations and contracts concerning all purchasing.
- Coordinate with [the petitioner's] head office and Chinese suppliers in the trade of casting, spare parts, etc.
- In charge of searching and selecting Chinese suppliers, making report for the quality of samples, and negotiating the contract.

- Responsible for the follow-up with implementation of each contract, tracing the production milestone, getting hold of inventory shipment, finalizing the payment issue.
- Responsible for solving the problem between the customers and Chinese suppliers and inform the company for the outcome.

The petitioner also provided a copy of its organizational chart, which depicts the petitioner's staffing levels at or near the date the petition was filed. The chart depicts a multi-tiered entity comprised of a chief executive officer (CEO) at the top of the hierarchy, a president and a controller directly below the CEO, followed by outside sales representatives, a vice president of sales, a general manager, and an assistant controller at the third tier within the hierarchy. The fourth tier of the hierarchy includes the beneficiary's position of purchase manager as well as inside sales representatives, contract administrators, a warehouse manager, and an accounting clerk. The two remaining employees include a warehouse supervisor, who is subordinate to the warehouse manager, and warehouse personnel, who are subordinate to the warehouse supervisor.

On March 17, 2009, the director issued a notice of intent to deny (NOID), informing the petitioner that additional evidence was necessary to complete the processing of the petition. The director observed that the petitioner filed the Form I-140 with a deficient description of the beneficiary's proposed employment. Accordingly, the director instructed the petitioner to provide a definitive statement listing the beneficiary's proposed job duties and indicating the percentage of time that would be devoted to each job duty. The director also asked for a brief job description and a statement of educational levels of any employees the beneficiary would supervise and, in the alternate, to specify the essential function the beneficiary would manage if she would not oversee any subordinate employees. Additionally, the director asked the petitioner to indicate the beneficiary's level of authority.

In response, the petitioner provided a letter dated April 7, 2009, which included the following supplemental job description and time allotments:

1. Purchasing and sourcing: in charge of all purchase work, selection of suitable vendors for up-coming projects by analyzing inquiries and vendor situations, and monitoring the quoting process. In addition to current suppliers, use resources to search and select new suppliers by cost comparison and quality appraisal, to reach the company goals for cost reduction and quality improvement. When getting inquiries not within current work field, direct and manage the sour[c]ing work in Chinese branches . . . , look for suppliers in new fields and extend company business range. Arrange customer visits to Chinese vendors. Based upon company objective and policy, establish a functional, efficient and diversified supplier base, to strengthen the company's competitive edge and meet customer satisfaction.

Percentage of time used: 55%

2. Communicate between vendors and customers in a timely manner, summarize the overall situation of all vendors and solve major vendor problems. Get vendors' shipping plans, inventory reports and payment requests each week, to coordinate with customers' requirements. Resolve any major, urgent disputes and problems with the vendors on behalf

of the company, such as quality problems, corrective action, chargebacks, term changes, etc. Negotiate and sign agreements with vendors.

Percentage of time used: 35%

3. Summarize and make reports to the company of on-going project status. Obtain the implementation processes from contact administrators. Obtain new customer[s] inquiries from the contact website and arrange the [online] bid for potential projects. Stay informed of industry news, trends, services, competitors, etc. Other duties as the company requires.

Percentage of time used: 10%

The petitioner also stated that the beneficiary would oversee three sourcing managers located in Beijing, Tianjin, and Ningbo, China, respectively. The petitioner provided an amended organizational chart reflecting the three sourcing managers the beneficiary would manage.

In a decision dated May 4, 2009 the director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. The director mentioned the petitioner's staffing and the beneficiary's job duties as the two factors that contributed to the adverse conclusion.

On appeal, counsel provides a confusing statement, asserting that the beneficiary has been and would be performing managerial and executive duties that would include both managing personnel and managing a function. Counsel's statements, however, are not persuasive.

First, the petitioner must clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. 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. Here, counsel provides the statutory definition for the term executive capacity, but incorporates aspects of the definition for managerial capacity, such as personnel management, in his discussion of the beneficiary's proposed position. Such statements fail to firmly establish a basic element of the petitioner's fundamental claim.

Second, counsel claims that the beneficiary will manage both personnel and a function, thereby clearly failing to make the significant distinction between the two types of managers. Specifically, 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). Thus, by virtue of claiming that the beneficiary manages a subordinate staff, the term "function manager" would not apply. That being said, the AAO takes particular notice of the organizational chart that the petitioner initially submitted in support of the Form I-140, where the petitioner did not show the beneficiary as supervising any subordinate personnel. Thus, it would appear that in comparing the petitioner's original organizational chart and the one submitted in response to the NOID, the petitioner's earlier and later claims are at odds with one another. Additionally, as the beneficiary's role as personnel manager stems from her oversight of employees who work for a separate entity abroad, it is

noted that any time spent performing any tasks, oversight or otherwise, for the foreign entity cannot be considered in determining whether the beneficiary's prospective employment with the petitioner would be within a qualifying capacity. Even if these specific tasks would normally be deemed managerial or executive with regard to the foreign entity, they would be deemed tasks necessary to provide a service, albeit a management service, on behalf of the petitioner and, thus, would be non-qualifying. 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).

Lastly, in examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). In the present matter, the job description provided by the petitioner indicates that the beneficiary would be expected to perform numerous daily operational tasks, including searching for new suppliers, overseeing and directing the work of foreign employees, directly dealing with vendors and customers to resolve disputes and problems, negotiating vendor agreements, providing project summary reports, and arranging online bidding for projects. While these tasks may be essential for the success and financial development of the petitioning entity, a function manager is someone who *manages* an essential function rather than *performs* the duties related to that function. As stated earlier, being employed in a managerial or executive capacity means that the primary portion of the beneficiary's time would have to be devoted to tasks within that capacity, rather than to the daily operational tasks that are necessary to produce a product or to provide services. 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 604. While the AAO does not find that the petitioner's staffing size is a significant contributing factor in finding ineligibility, it does appear that the petitioner's organization is structured in such a way that managing the purchasing function will require the beneficiary to spend the majority of her time performing service-related tasks related to that essential function. Therefore, the AAO cannot conclude that the petitioner would employ the beneficiary in a qualifying managerial or executive capacity. On the basis of this initial determination, the AAO cannot approve the instant petition.

An adverse finding is further warranted on the basis of additional grounds that were not previously addressed in the director's decision.

First, 8 C.F.R. § 204.5(j)(3)(i)(B) states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to her entry to the United States as a nonimmigrant to work for the same employer. In the instant matter, the percentage breakdown of the beneficiary's job duties with the foreign entity, which was submitted in response to the NOID, indicates that the beneficiary was performing non-qualifying job duties similar to the ones she would be expected to perform in her proposed position with the U.S. entity. For instance, the petitioner indicated that the beneficiary directly communicated with vendors by providing information and resolving problems and disputes, searching for new vendors, and partaking in development and start-up work for new projects. While these job duties may have been essential to the beneficiary's role as purchasing manager, there is no indication that they can be deemed tasks of a qualifying managerial or executive nature. As such, the AAO cannot conclude that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

Second, 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 (BIA 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362; *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;

* * *

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 the present matter, the record includes a document entitled "[redacted] [the petitioner]," which indicates that the petitioner issued 100 shares of stock. The document indicates that the 100 shares were distributed among four people—two individuals were issued 24 shares each, [redacted] was issued 25 shares, and [redacted] was issued 27 shares. Thus, the petitioner's stock was distributed in a way that did not give any one shareholder a majority interest.

With regard to the foreign entity, the petitioner provided a letter dated December 8, 2006 from [redacted], the petitioner's controller, who claimed that [redacted] is the representative of the foreign entity, but that the foreign entity "is fully owned and supported by the U.S. [petitioner]." However, that document is followed by an English translation of another document entitled "Business [L]icense for Sole Proprietorship Enterprise," which identifies the foreign entity by name and indicates that [redacted] as the investor. Neither that document, nor any other that was submitted with regard to the foreign entity, identified the U.S. petitioner as the owner of the foreign 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)). As the petitioner has not provided evidence establishing that it owns and controls the foreign entity, the petitioner's claim of a qualifying subsidiary relationship fails on the basis of a lack of any supporting evidence of such a relationship.

Additionally, while there is some degree of common ownership, as [redacted] owns 25% of the issued shares of the petitioner and also appears to be the sole investor, i.e., owner, of the foreign entity, the fact that

█ appears to be the majority owner of the foreign entity while having only minority ownership in the U.S. petitioner indicates that the two entities are not affiliates based on the definition of "affiliate" as provided by 8 C.F.R. § 204.5(j)(2).

Accordingly, based on the above analysis, the AAO cannot conclude that the beneficiary's proposed and foreign employers have the necessary elements of common ownership and control that are required for the two entities to be deemed as having a qualifying relationship.

Third, 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." In the present matter, the petitioner filed the Form I-140 on April 7, 2008. Therefore, the petitioner must establish that it commenced doing business no later than April 7, 2007 and must have continued to do business up through the date the petition was filed. While the petitioner has provided invoices dated March, April, and May of 2007, there are no other invoices for the remainder of 2007 or for 2008 leading up to the date the Form I-140 was filed. Additionally, while the petitioner provided a copy of an independent auditor's report indicating that its balance sheets as of September 30, 2007 were audited, such a document does not establish that the petitioner was doing business on a "regular, systematic, and continuous" basis, as defined by 8 C.F.R. § 204.5(j)(2). Therefore, the AAO cannot conclude that the petitioner has met the requirements discussed at 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 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.