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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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FILE [REDACTED] OFFICE: NEBRASKA SERVICE CENTER
LIN 07 012 51657

Date: MAR 04 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, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a District of Columbia¹ corporation that seeks to employ the beneficiary as its president. 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 three independent grounds of ineligibility: 1) the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer; 2) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and 3) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On appeal, counsel disputes all three findings that served as the grounds for the director's decision and submits a brief as well as supplemental documents in support of the appeal.

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

¹ It is noted that, while the petitioner stated in its support letter, dated September 25, 2006, that it "has been established in Maryland" since March 26, 2004, the evidence of record indicates that the petitioner was incorporated in the District of Columbia and remains a District of Columbia entity. The record does establish that as of December 3, 2007, the State of Maryland Department of Assessment and Taxation authorized the petitioner the right to transact business in that state. The reference to March 26, 2004, however, is unclear.

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 first issue to be considered in this proceeding is whether the petitioner has a qualifying relationship with a foreign entity.

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 support of the Form I-140, the petitioner submitted a letter dated September 25, 2006 in which the petitioner put forth the claim that it is the wholly owned subsidiary of [REDACTED], the Colombian entity that employed the beneficiary abroad. The petitioner also provided complete copies of its 2004 and 2005 corporate tax returns in which [REDACTED] is identified as the petitioner's parent entity owning 100% of the petitioner's outstanding stock.

On July 23, 2007, the director issued a request for additional evidence (RFE) instructing the petitioner to submit documentation establishing that the petitioner and the beneficiary's foreign employer are commonly owned and controlled. The director provided the petitioner with a list of the types of documents that could be deemed sufficient to meet the burden of proof.

In response, the petitioner provided its own articles of incorporation, which establishes that the petitioner is authorized to issue 1,000 shares with a par value of one dollar per share, the petitioner's certificate of incorporation, and the foreign entity's certificate of existence and legal representation, accompanied by an English language translation, which establishes that the beneficiary and his wife each own 50% of the foreign entity.

In a decision dated October 27, 2007, the director denied the petition, concluding that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer. The director listed all

of the petitioner's prior submissions in response to the RFE and properly determined that none of the submitted documents establish who owns and controls the U.S. entity.

On appeal, the petitioner resubmits the foreign documents that establish the foreign entity's ownership and supplements the record with a stock certificate, which shows that the petitioner issued 2,000 shares of stock to the beneficiary's foreign employer, and the petitioner's 2006 tax return, complete with Schedule K, which names the beneficiary's foreign employer as the entity that holds 100% ownership interest in the petitioner.

The AAO finds that the submitted documentation fails to overcome the director's determination due to significant inconsistencies that undermine the reliability of the petitioner's claim and supporting documentation. Namely, Article IV, Section A of the petitioner's articles of incorporation, which was executed on May 4, 2001, authorizes the petitioner to issue 1,000 shares of stock at a par value of one dollar per share. However, the petitioner's stock certificate, which was issued on January 2, 2002, indicates that 2,000 shares of stock were issued. Based on the information provided in the stock certificate, the petitioner issued double the amount of the authorized shares, thereby indicating that the instrument that purported to carry out the unauthorized stock transfer, i.e., the stock certificate, was invalid.

Additionally, while the petitioner's articles of incorporation indicated that the petitioner's stock was valued at one dollar per share, Schedule L, item 22(b) of all three of the petitioner's submitted tax returns indicated that the petitioner received only \$100 in exchange for the issued stock. If the foreign entity paid only \$100 for the petitioner's stock, as indicated in the tax returns, then the petitioner either issued only 100 shares of stock, thereby making the stock certificate invalid, or the stock's par value was actually only ten cents per share, thereby making the petitioner's articles of incorporation invalid. Regardless, the AAO questions the validity of the petitioner's stock certificate, articles of incorporation, and all three of its tax returns. 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). Given the inconsistencies in the supporting documentation, the petitioner has failed to corroborate its claim with reliable documentation. Therefore, the petitioner has not established that it has a qualifying relationship with the beneficiary's foreign employer.

The next two 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.

Although the petitioner provided a brief description of the beneficiary's proposed position with the U.S. entity, the director found the description to be lacking in sufficient information about the beneficiary's specific job duties.² The director addressed this deficiency in the RFE, instructing the petitioner to provide a detailed description of the beneficiary's proposed employment, including the specific job duties he would perform on a daily basis accompanied by an assessment of the time that would be devoted to each job duty. The petitioner was asked to provide the same information with regard to the beneficiary's employment abroad and to clearly explain the positions the beneficiary held during his foreign employment within the relevant three-year time period prior to his arrival in the United States to work for the petitioning entity. Additionally, the director instructed the petitioner to provide organizational charts for each entity accompanied by an explanation of each entity's overall structure and the beneficiary's placement within that structure. Lastly, the petitioner was asked to provide copies of all IRS Form W-2 statements issued to its employees in 2006, the year the Form I-140 was filed.

In response, the beneficiary provided an affidavit in which he discussed the various positions he held at the foreign entity, including his position as quality assurance team manager, which he held directly prior to his arrival in the United States. The beneficiary did not provide specific dates during which he held that position, stating only that he developed software until 1997 when he took on a more supervisory role, which required

² See page three of the director's decision for a restatement of the job description provided by the petitioner in the initial support letter.

managing relationships with vendors and clients. Other than stating that he led the teams that designed, developed, and sold the software, the beneficiary did not provide the requested information about the specific daily tasks he performed during his employment abroad or the amount of time that was attributed to each task.

With regard to the employment in the United States, the beneficiary discussed his objectives and general job responsibilities during the time leading up to the date the petition was filed. The beneficiary further stated that since 2006, he has worked on developing relationships with U.S. companies that have been the focus of potential distribution contracts for the petitioner's software. The beneficiary also stated that he performs technology consulting services, serves as analyst for the development of specific software, and researches the needs of the insurance market. The beneficiary indicated that the decision to hire an outside sales team has not yet been made and would depend on the company's progress. However, the beneficiary predicted that personnel who will support the software application would be located in Colombia and assured U.S. Citizenship and Immigration Services that a local team would also exist in the United States, although the beneficiary was uncertain as to the configuration or size of the support team. Despite the director's express request, the petitioner did not provide a list of specific job duties accompanied by assigned time components to indicate the portion of the beneficiary's time that would be devoted to various qualifying and non-qualifying tasks on a daily basis. The petitioner also failed to provide the requested organizational charts for the U.S. and foreign entities, accompanied by a description of the personnel structure and the beneficiary's placement therein with regard to each entity. It is noted that 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).

In the denial, the director found that the petitioner failed to adequately describe the beneficiary's foreign and proposed employment. The director noted that the description of the beneficiary's foreign employment was vague and failed to clarify what specific tasks the beneficiary performed in fulfilling his responsibilities regarding management and relationships with clients and vendors. The director also noted that the petitioner failed to submit the foreign entity's organizational chart and did not provide any information about the team of employees the beneficiary claimed to have led during his employment abroad.

With regard to the beneficiary's proposed employment, the director found that the beneficiary failed to clarify the specific tasks involved in developing relationships with other companies. The director further noted that the duties of a consultant and analyst and performing research would not qualify the beneficiary for classification as a multinational manager or executive whose duties are primarily within a managerial or executive capacity. The director commented on the petitioner's failure to provide any statements discussing the structure of the U.S. entity and determined that nothing in the record establishes that the beneficiary would be relieved from having to primarily perform non-qualifying duties. Lastly, the director found that the reasonable needs of the petitioning entity are not such that would require or support someone who would be employed in a managerial or executive capacity.

On appeal, counsel submits a brief, asserting that the beneficiary is the founder of the foreign and U.S. entities and that he manages both entities, which "operate in conjunction with each other." Counsel states that the beneficiary's current job duties include conferring with vendors and clients to promote the business, creating and reviewing activity reports and financial statements, and reviewing and approving client agreements. Counsel further asserts that the petitioner does not have additional employees in the United States and that the beneficiary relies on the services provided by the employees at the Colombian entity to carry out the petitioner's administrative tasks. Counsel urges the AAO to take into account the petitioner's reasonable

needs in light of its early stage of development. Counsel further contends that the director "does not have unfettered discretion to use 'staffing levels' to determine the qualification[s] of an applicant."

Counsel's arguments, however, are not persuasive and do not establish that the beneficiary's foreign and proposed employment consist primarily of qualifying managerial or executive tasks. In making this determination, the AAO has considered counsel's description of the beneficiary's proposed duties in the United States in conjunction with the supplemental job description provided by the beneficiary on appeal. The AAO finds that neither job description establishes that the beneficiary's proposed position would primarily require the performance of job duties within a qualifying managerial or executive capacity. While the AAO does not object to the assertions made regarding the beneficiary's discretionary authority over both entities, the petitioner has failed to establish that his duties with the U.S. entity are primarily managerial or executive. The beneficiary states that his U.S. employment includes and would continue to include negotiating and analyzing contracts with numerous third parties, including distributors, resellers, suppliers, and vendors. Although the beneficiary indicates that he spends approximately 10% of his time analyzing sales and distribution agreements, he does not specify how much of his time is spent negotiating contracts, a task that is not readily deemed as qualifying.

The beneficiary also states that he seeks out new markets and clients, which includes attending meetings with executives of client companies and monitoring the large distributor corporations that the petitioner utilizes for sales and support services. It is noted, however, 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)). In the present matter, the petitioner has not provided any evidence to establish that anyone other than the beneficiary is available and is actively providing sales-related services. That being said, both counsel and the beneficiary have repeatedly indicated that much of the software development and support services are being carried out by employees of the foreign entity. Such claims suggest that U.S. Citizenship and Immigration Services should treat the petitioner and the foreign entity as one, basing this argument on the presumption that common ownership of the U.S. and foreign entities has been adequately documented. However, as discussed above, the petitioner has failed to establish that it has a qualifying relationship with the foreign entity as required by 8 C.F.R. § 204.5(j)(3)(i)(C).

Furthermore, even if the petitioner had established the requisite qualifying relationship, the record clearly shows that the petitioner is an entity that is separate from the foreign entity. The unsupported assertion that the employees who work for the foreign entity somehow provide services to the petitioner is not persuasive evidence that the beneficiary is relieved from having to primarily perform non-qualifying operational tasks. If the petitioner contends that its business practices involve hiring outside contractors in lieu of in-house employees to perform various necessary services, the petitioner must provide evidence to establish that such contractors have in fact have been retained. As stated above, the petitioner must support its statements with reliable documentary evidence. In the present matter, as pointed out in the director's denial, the tax documentation pertaining to the petitioner indicates that the beneficiary is the petitioner's only paid employee. There is no evidence to suggest that the petitioner employed anyone other than the beneficiary himself at the time the petition was filed. While the beneficiary provided various projections for hiring a support staff in 2008, a petitioner must establish eligibility at the time of filing, not at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). As the petitioner did not provide evidence establishing that it employed anyone other than the

beneficiary at the time of filing, the AAO must determine the merits of the petitioner's claim on the basis of the evidence of record, not on the basis of unsubstantiated claims.

On review, the record shows that at the time of filing the petitioner did not have a support staff and therefore lacked the organizational complexity to justify the employment of someone who would primarily perform tasks within a qualifying managerial or executive capacity. Moreover, the beneficiary's own statements, indicating that he provided consulting and various other support services, negate the notion that the petitioner was capable of relieving the beneficiary from having to primarily perform non-qualifying tasks at the time of filing the petition.

With regard to the beneficiary's foreign employment, the supplemental statement submitted on appeal does little in the way of clarifying and providing a comprehensive understanding of the specific tasks the beneficiary performed on a daily basis. While the beneficiary broadly indicated that he led the foreign entity into the next stage of its development, his leadership role does not establish that he was employed in a qualifying capacity. Rather, 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). Despite the director's express request for a specific list of the beneficiary's daily tasks with the foreign and U.S. entities accompanied by a breakdown of the time attributed to each task, the petitioner has failed to provide this information with respect to both the beneficiary's U.S. and foreign positions. The AAO further notes that the petitioner failed to provide either entity's organizational chart in response to the RFE. As stated previously, 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). While the petitioner now provides the organizational charts on appeal, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding as it existed at the time of the director's decision.

In view of the above analysis, the AAO concludes that a favorable finding is not warranted. Despite the regulatory provisions and precedent case law findings that stress the importance of a detailed job description, the petitioner has failed to provide comprehensive job descriptions for the beneficiary's foreign and proposed positions. The petitioner has also indicated that the beneficiary's foreign and proposed positions include non-qualifying job duties. However, the petitioner has provided no evidence or information to establish what portion of the beneficiary's employment abroad and what portion of the beneficiary's proposed employment would consist of non-qualifying tasks. That being said, the petitioner's lack of a support staff strongly suggests that the petitioner lacked the capability to relieve the beneficiary from having to primarily perform non-qualifying job duties at the time the petition was filed. Given these severe deficiencies, the AAO cannot conclude that the petitioner met the requirements specified in 8 C.F.R. § 204.5(j)(3)(i)(B), which 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 his entry into the United States as a nonimmigrant to work for the same employer. In addition, the petitioner has not met the requirements of 8 C.F.R. § 204.5(j)(5), which states that the petitioner must establish, by means of a detailed description of the beneficiary's proposed employment, that the beneficiary would be employed in a qualifying managerial or executive capacity.

Accordingly, in light of the three initial independent grounds of ineligibility, this petition cannot be approved.

While not addressed in the director's decision, the AAO further finds that the petitioner has failed to meet the provisions of 8 C.F.R. § 204.5(j)(3)(i)(D), which 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 director instructed the petitioner to provide this vital information when issuing the RFE, the only documentation the petitioner provided consisted of the petitioner's 2004 and 2005 tax returns and its various bank statements. However, neither tax returns nor bank statements are sufficient to establish that 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 ground 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.