

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

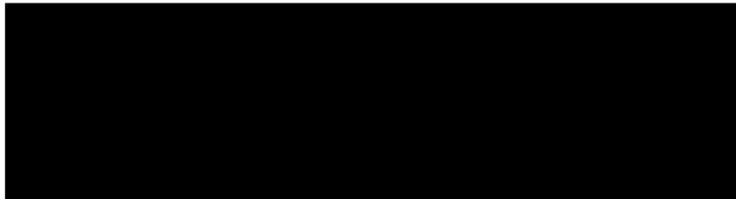
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B4

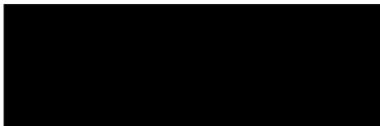


FILE: [REDACTED] OFFICE: TEXAS SERVICE CENTER Date: **SEP 14 2010**

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 California corporation that seeks to employ the beneficiary in the position of owner's representative. 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 the determination that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On appeal, counsel disputes the director's conclusion, asserting that the beneficiary supervises two of the petitioner's employees, employees who work for foreign affiliate entities, and independently contracted companies who provide various services. Counsel also asserts that, in addition to managing employees, the beneficiary manages an essential function and also fits the statutory definition of executive capacity.

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 the petitioner submitted sufficient evidence to establish 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 an undated letter in which the beneficiary was described as the representative of the petitioner's shipping activity in the United States, Mexico, and Canada. The petitioner indicated that the beneficiary's responsibilities would include supervising independent contractors and U.S. employees, including a commercial manager, a vice president, sales, and "

On February 5, 2009, the director issued a request for additional evidence (RFE) instructing the petitioner to explain more fully how the beneficiary's proposed employment falls within the definition of managerial or

executive capacity. The petitioner was asked to describe the job duties of the beneficiary's subordinates and to provide its organizational chart.

In response, the petitioner provided an undated letter explaining that the petitioner, a U.S. subsidiary with a claimed headquarters in [REDACTED], is comprised of locations in the United States, [REDACTED]. The petitioner stated that in addition to supervising its two commercial managers, the beneficiary mostly oversees independent contractors and personnel employed outside of the United States. The petitioner further noted that the beneficiary oversees ship planners and the loading of ships prior to any voyage within the North American Region. The petitioner indicated that planning to load a ship is a highly complex activity that is done by licensed professional captains whom the beneficiary oversees throughout this complex process. The petitioner stated that the beneficiary selects and negotiates contracts with a network of vendors whom the beneficiary oversees.

The petitioner also provided an organizational chart in which the beneficiary was identified as the regional manager and the North America owner's representative. The chart shows the beneficiary overseeing the two commercial managers who work at the petitioner's [REDACTED] location, a Caribbean network of vendors, and the petitioner's [REDACTED] and [REDACTED] operations, both of which also employ a number of agents.

After reviewing the petitioner's submissions, the director determined that the petitioner failed to establish eligibility for the immigration benefit sought and denied the petition in a decision dated April 16, 2009. The director's decision was based on the finding that the petitioner failed to submit sufficient evidence to establish that it would employ the beneficiary within a qualifying managerial or executive capacity.

On appeal, counsel reiterates the petitioner's prior statements with regard to the beneficiary's supervisory authority over the petitioner's two employees and over the foreign employees and the numerous shipping agencies with which the petitioner has contracts. Counsel points to the beneficiary's discretionary authority in hiring independent contractors and negotiating their contracts. Counsel also lists each of the four prongs that comprise the definitions of managerial and executive capacity, indicating that the beneficiary's proposed position fits both definitions. Counsel depicts the beneficiary as both a personnel and a function manager, asserting that the beneficiary has discretionary authority over the entity and its employees.

The AAO finds that counsel's statements are not persuasive in overcoming the director's conclusion. First, the AAO notes that in determining whether a position is within an executive or managerial capacity the petitioner's description of the proposed job duties must be examined. *See* 8 C.F.R. § 204.5(j)(5). Published case law has determined that 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 instant matter, the description of the beneficiary's job duties is too general. While the petitioner adequately conveys the beneficiary's degree of discretionary authority and his corresponding placement within the petitioning entity's organizational hierarchy, the petitioner has failed to convey an understanding of what the beneficiary will be doing on a daily basis and how much of his time would be spent on qualifying tasks versus non-qualifying tasks. The record contains vague statements which fail to explain how the beneficiary manages the petitioner's two employees and how the beneficiary proposes to oversee employees that are located abroad.

Additionally, the claim that the beneficiary manages and would manage individuals who are employed by the petitioner's claimed foreign affiliates is not verifiable. Regardless of the common ownership and control that

the foreign entities may share with the petitioner, the entities cannot comingle their respective work forces such that the employees of one entity can also be claimed as employees of the other entity merely by virtue of the two entities' shared ownership. While it is possible that the employees of one of the petitioner's affiliate entities may perform services for the benefit of the U.S. entity, the petitioner must provide corroborating evidence to show that it compensates the foreign entities for the work that their respective employees may perform. Similarly, the petitioner's claims regarding the various outside contractors the beneficiary has hired to perform numerous services are also uncorroborated. 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)).

With regard to counsel's claim that the beneficiary is both a function and personnel manager, the AAO notes that these two terms are distinct, each applying to a specific type of manager. Unlike the personnel manager, who exercises his/her supervision over subordinate employees, 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, counsel's attempt to classify the beneficiary as both a personnel and a function manager suggests an apparent lack of understanding of the glaring differences between the two different types of management.

Nevertheless, the AAO will consider the alternate claim that the beneficiary's proposed position may be that of a function manager. That being said, whenever a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be 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).

In this matter, the petitioner has failed to establish what specific function the beneficiary manages. Furthermore, as discussed above, the petitioner has failed to establish what specific job duties the beneficiary would perform; nor has the petitioner established that it is adequately staffed to relieve the beneficiary from performing the petitioner's daily operational tasks or, if the beneficiary is to be employed as a function manager, that the tasks performed are indicative of managing a function rather than the underlying duties related to the function.

Moreover, it is also noted that any time spent supervising, directing, or overseeing the work of the petitioner's contractors cannot be considered as being a qualifying managerial or executive duty. Whether or not these specific tasks would normally be deemed managerial or executive if performed in relation to the internal staff of the petitioner, they would be deemed in this instance to be tasks necessary to provide a service, albeit a management service, being provided by the petitioner as a general contracting company and thus, would be non-qualifying.

In light of the above, the AAO cannot conclude that the petitioner has adequately established that the beneficiary would be employed within a qualifying managerial or executive capacity. The fact that an individual manages a small business does not necessarily establish eligibility for classification as a multinational manager or executive. As stated above, the petitioner has failed to provide a detailed description of the beneficiary's specific daily tasks. As such, the record does not establish that the primary portion of the beneficiary's time would be spent performing duties within a qualifying capacity. For this reason, the petition may not be approved.

Furthermore, despite the fact that the director's decision is based on a single ground of ineligibility, the AAO finds that the petitioner is ineligible based on 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 his entry to the United States as a nonimmigrant to work for the same employer. In the instant matter, the record lacks sufficient information about the job duties the beneficiary performed during his employment abroad, the foreign entity's organizational hierarchy, or the beneficiary's placement therein. Without this highly relevant information, the AAO is unable to determine that the beneficiary's employment abroad primarily involved the performance of qualifying managerial- or executive-level tasks.

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; *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 has submitted its articles of incorporation, which establishes that the petitioner is authorized to issue 10,000 shares of stock and a single stock certificate establishing that 1,000 shares were issued to the beneficiary's foreign employer. As the record does not contain a stock ledger establishing exactly how many of the 10,000 shares of stock the petitioner actually issued, the AAO cannot conclude that the foreign entity is the sole shareholder. As previously stated, 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. at 165.

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 has not established that it has been generating revenue as a shipping line representative during the time and in the manner prescribed.

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(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.