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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

[REDACTED]

B4

DATE: APR 06 2011 OFFICE: TEXAS SERVICE CENTER FILE: A87 377 067
SRC 09 077 51733

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

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

ON BEHALF OF PETITIONER:
[REDACTED]

INSTRUCTIONS:

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 \$630. 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 Florida 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 would employ the beneficiary in a managerial or executive capacity; 2) the petitioner failed to establish that it has the ability to pay the beneficiary's proffered wage; and 3) the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer. On appeal, counsel submits a brief disputing and addressing all three of the director's conclusions.

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 first issue addressed by the director in his decision is the beneficiary's employment capacity in the proposed position with the U.S. entity.

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 beneficiary, in his capacity as the president of the petitioning entity, submitted a letter dated December 8, 2008 on his own behalf, claiming that he "began to operate the business from its Houston[, Texas] office" upon arriving to the United States. Examples of such business operation included applying for a social security number, obtaining a federal tax identification number, and opening a business bank account. The beneficiary stated that he traveled to various states in pursuit of business opportunities. The beneficiary explained that the first convenience store/gas station operation was purchased in early 2008 and further noted that he has since hired a store manager and employees to run the operation. The beneficiary also stated that the petitioner has purchased a second business, also involving a convenience store/gas station operation, at another location in the State of Florida. The beneficiary claimed that the position of corporation manager was filled to assist him in his proposed position as the company's president

and further indicated that his role is essential to the set-up and expansion of the petitioning entity as well as to the marketing, recruitment of key personnel, and financial management of the corporation.

After reviewing the supporting documents, the director determined that the petitioner failed to establish eligibility and thus issued a denial notice on July 7, 2009, concluding that the record does not establish that the beneficiary's proposed employment would be within a qualifying managerial or executive capacity.

On appeal, counsel generally challenges the propriety of the denial, relying on the lack of request for evidence (RFE) as a basis for the challenge. Counsel cites an internal U.S. Citizenship and Immigration Services (USCIS) memorandum in support of his argument. The AAO notes, however, that 8 C.F.R. § 103.2(b)(8) was revised, effective June 18, 2007, and no longer requires that the director issue either an RFE or a notice of intent to deny (NOID) under any circumstances. Under the revised provisions the director has absolute discretionary authority to determine the need for an RFE or NOID, thus allowing the director to issue an adverse decision without issuing any prior notices at all. The AAO further points out that the appeal process itself affords the petitioner ample opportunity to submit supplemental evidence and/or information in an effort to establish eligibility. Therefore, the director committed no procedural error by not issuing an RFE or NOID prior to denying the petitioner's Form I-140.

With regard to the beneficiary's proposed employment, the beneficiary provided a separate letter dated July 28, 2009, which he signed in his capacity as the petitioner's president. The beneficiary repeated information that was previously provided with regard to the proposed position and appended the following list of his proposed duties and responsibilities:

1. Approval on the market development plan;
2. Set up the business hierarchy structure;
3. Establish the goals and policies of the business;
4. Decision making on business expansion, new business purchasing, acquiring;
5. Receive report from the general manager on market research study information and blueprint on the new business plan;
6. General supervision on the general manager's function and duties;
7. Overall financial authority and oversee the financial transactions;
8. Decision making on the final terms and conditions on the business acquiring contracts;
9. Decision making on the terms and conditions on the contracts with financial institutions;
10. Meetings and decision making, approval on the contract based attorneys, CPA's products and advices; [sic]
11. Receive reports from the general manager and general supervision on the rules and regulations compliance issues;
12. Meetings with local government authority on important negotiations involving business expansion, acquiring permission issues.

The petitioner also provides an organizational chart, which shows the beneficiary at the top of the hierarchy as the company's president, a general manager as the beneficiary's direct subordinate, and two existing retail operations, one containing a store manager, a kitchen manager, and two clerks and the other containing one store manager and two store clerks as part of their respective personnel structures. Although four other store locations are also included in the chart, all four are projected acquisitions and were not part of the petitioner's organization at the time the Form I-140 was filed.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The AAO will then consider this information in light of the petitioner's organizational hierarchy, the beneficiary's position therein, and the petitioner's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks. In the present matter, the record fails to convey a detailed description of the job duties the beneficiary was assigned to perform within the organizational structure that existed at the time the petition was filed. Although a number of the items included in the above restated list conveys a general notion of the beneficiary's discretionary authority, the record is unclear as to the beneficiary's actual day-to-day job duties. For instance, the petitioner claims that the beneficiary approves the market development plan, sets up the business hierarchy, establishes goals and policies, supervises the general manager, and makes decisions regarding contracts, finances, and administrative issues. However, the petitioner does not explain what specific underlying tasks the beneficiary actually carries out on a daily basis to meet these broad job responsibilities. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient. The actual duties themselves will 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).

Furthermore, given that the petitioner's organizational chart does not readily identify any marketing personnel, the AAO is unclear as to who within the petitioning organization actually performs the marketing-related duties such as preparing the marketing plan for the beneficiary's approval. In other words, while the petitioner has adequately established that the beneficiary would enjoy a heightened degree of discretionary authority with regard to all financial, administrative, and personnel matters, the record does not establish that the petitioner's organizational complexity at the time of filing had expanded to a level that would require an employee who would primarily perform tasks within a qualifying managerial or executive capacity. While a detailed job description is admittedly one major component in determining the petitioner's eligibility, the petitioner is expected to provide sufficient evidence to corroborate the proposed job description. Merely providing a job description that describes a set of primarily qualifying tasks is meaningless if the organization that seeks to hire the beneficiary does not have the human resources to relieve the beneficiary from having to primarily perform non-qualifying operational job duties. Thus, even if the petitioner had provided an adequate job description, further evidence must be presented in order to establish that the beneficiary merits classification as a multinational manager or executive.

In the present matter, aside from the petitioner's organizational chart, which is an internally created document and is not in itself proof of the petitioner's staffing, the petitioner has not provided documentary evidence to establish which employees the petitioner employed at the time the Form I-140 was filed. This information is highly relevant and should be examined, as it allows USCIS to gauge the petitioner's capability to relieve the beneficiary from having to primarily perform non-qualifying tasks at the time of filing. *See Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d at 42; *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). In the present matter, the documentation provided does not establish whom the petitioner employed at the time of filing. As such, it is not apparent that the petitioner was adequately staffed to carry out the petitioner's daily operational tasks. While the AAO acknowledges that no beneficiary is required to allocate 100% of his time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to his/her proposed position. 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).

Here, the record shows that the petition was filed on January 12, 2009. However, the petitioner has not provided documentary evidence to establish that the staffing structure that was in place at the time of filing was sufficient to accommodate the beneficiary in a managerial or executive capacity. 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)). Given the deficient job description and the lack of evidence establishing that an adequate organizational hierarchy was in place to relieve the beneficiary from having to primarily perform non-qualifying tasks, the AAO finds that the petitioner has failed to establish eligibility for the immigration benefit sought. Therefore, on the basis of this initial finding, the instant petition cannot be approved.

The second issue addressed in the director's decision is whether the petitioner established that it has the ability to pay the beneficiary's proffered wage. 8 C.F.R. § 204.5(g)(2) states the following, in pertinent part:

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

As required by the above regulation, the petitioner's ability to pay must be established at the time of filing. As the Form I-140 that is the subject of the current adjudication was filed on January 12, 2009, the petitioner must establish its ability to pay as of that date. While the director's discussion was limited to evidence of the petitioner's 2007 finances based on the evidence that was available for examination, such evidence, even if it established the petitioner's ability to pay in 2007, would be irrelevant for the purpose of establishing eligibility in the present matter, which concerns a petition that was filed in 2009. As the petitioner did not include relevant documentation to establish its ability to remunerate the beneficiary's proffered wage of approximately \$39,000 annually at the time of filing, the director properly relied on this deficiency as the second of three grounds for denial.

On appeal, counsel states that the petitioner has requested an extension of time in which to file its taxes for 2008 and 2009. Counsel asks the AAO to rely on financial statements prepared by the petitioner's accountant and to review the 2008 quarterly wage report, which has been provided as supporting evidence. The AAO notes, however, that neither document is sufficient to meet the above regulatory requirements. With regard to the 2008 quarterly wage report, the AAO refers to the above paragraph explaining that only documentation that establishes eligibility at the time of filing is relevant. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In fact, the AAO points out that the 2008 second quarterly wage report that the petitioner has provided shows that the petitioner paid the beneficiary \$6,000 for the quarter, which would total to \$24,000 annually. This amount is considerably lower than the proffered annual wage of over \$39,000. Furthermore, while the petitioner provided a 2009 income statement and balance sheets, the statement was not audited and therefore does not satisfy the documentary requirement expressly discussed at 8 C.F.R. § 204.5(g)(2).

In summary, the AAO finds that the petitioner has failed to provide adequate documentation that would enable a comprehensive analysis of the petitioner's 2009 finances. As noted above, USCIS cannot approve a petition without supporting documentary evidence. *See Matter of Soffici*, 22 I&N Dec. at 165. As the record in the present matter does not include the relevant and necessary documentary evidence establishing the petitioner's ability to pay the beneficiary's proffered wage at the time of filing, the instant petition cannot be approved.

The third issue addressed in the director's decision is whether the petitioner has a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

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.

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 the 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 director determined that, while the record indicates that the beneficiary owns 100% of the petitioning entity, he owns only 40%, or less than a majority, of the foreign entity and that this type of ownership breakdown does not amount to an affiliate relationship between the two entities based on the above definition. *See id.*

On appeal, counsel asserts that, by virtue of owning 40% of the foreign entity, which is a larger share than the individual ownership interests of the other two shareholders, the beneficiary is therefore the majority owner of that entity. Counsel explains that the foreign entity is a family owned business and claims that one of the other two shareholders appointed the beneficiary to "execute his rights as a shareholder" by proxy. However, the AAO notes that without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The record is devoid of evidence corroborating counsel's claim regarding the beneficiary's control over the foreign entity. In order to establish "de facto" control of both entities by an individual, the petitioner must provide agreements relating to the control of a majority of the shares' voting rights through proxy agreements. *Matter of Hughes*, 18 I&N Dec. 289, 293 (Comm. 1982). A proxy agreement is a legal contract that allows one individual to act as a substitute and vote the shares of another shareholder. See *Black's Law Dictionary* 1241 (7th Ed. 1999). Although counsel uses the term "proxy" to establish the means by which the beneficiary purportedly acquired control over the foreign entity, a proxy agreement has not been submitted. Furthermore, while counsel claims that the foreign company is family owned, the familial relationship does not constitute a qualifying relationship under the regulations. The evidence of record indicates that three individuals own the foreign company with no single individual owning a majority of the shares. The record further indicates that the beneficiary alone owns the petitioning entity in the United States. Accordingly, the two entities are not "owned and controlled by the same group of individuals, each individual owning controlling approximately the same share or proportion of each entity . . ." 8 C.F.R. § 204.5(j)(2). Therefore, the AAO cannot conclude that the beneficiary's foreign and proposed employers are similarly owned and controlled.

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)(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 a definitive statement detailing the actual daily job duties the beneficiary performed during his employment with the foreign entity. As such, the AAO cannot affirmatively conclude based on the documentation of record that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

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." In the present matter, the petitioner filed the Form I-140 on January 12, 2009 and therefore must establish that it had been doing business as of January 12, 2008. Based on the beneficiary's statements, the petitioner could not obtain a federal tax identification number nor open a bank account until February 2008. The record further shows that the petitioner did not purchase its first retail operation until April 2008. In light of these facts, the petitioner could not have been doing business as of January 2008 and therefore does not meet the initial filing requirement specified at 8 C.F.R. § 204.5(j)(3)(i)(D).

Lastly, the AAO notes that counsel refers to the petitioner as a "new entity" and to the beneficiary as a "transferee" who came to the United States to open a "new office." These terms indicate that counsel erroneously relied on the regulations at 8 C.F.R. § 214.2(l), which pertain to the L-1A nonimmigrant visa classification. The regulations that are applicable to the matter at hand do not make a distinction between a new office entity and an entity that has been in operation for an extended period of time. As indicated above, 8 C.F.R. § 204.5(j)(3)(i)(D) expressly states that any entity that wishes to classify a beneficiary in the immigrant category of multinational manager or executive must establish that it has been doing business for at least one year prior to the date the petition was filed. There are no regulations that exempt the petitioner from having to meet this initial filing requirement.

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.