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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**

B4

[redacted]

DATE: DEC 12 2011

OFFICE: NEBRASKA SERVICE CENTER

[redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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

The petitioner is a Michigan corporation that seeks to employ the beneficiary as its chief executive officer. 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 four grounds of ineligibility. The director concluded that the petitioner failed to establish that (1) the petitioner and the beneficiary's foreign employer have a qualifying relationship; (2) the beneficiary has the requisite period of employment with the foreign employer; (3) the beneficiary was employed abroad within a qualifying managerial or executive capacity; and (4) the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

On appeal, counsel disputes the director's decision and contends that the petitioner meets the relevant eligibility criteria. Counsel's statements and all relevant submissions will be addressed in the discussion below.

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 to be addressed in this proceeding is whether the petitioner submitted sufficient evidence to establish that it 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.

Additionally, 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 (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 supporting evidence that was initially submitted with the Form I-140 did not include documentation establishing the ownership of the U.S. petitioner or the beneficiary's foreign employer. Accordingly, the director issued a request for evidence dated March 11, 2009 instructing the petitioner to supplement the record with documentary evidence that would establish that it and the beneficiary's employer abroad share common ownership and control. The director provided examples of the types of documents that can be submitted to establish ownership of the petitioning and foreign entities.

In response, the petitioner provided documents pertaining to the ownership of the U.S. entity and [redacted] Leather Agency (ASLA), the beneficiary's foreign employer, located in India. With regard to the foreign

entity's ownership, the petitioner provided an undated statement signed by [redacted] who stated that he is a proprietor of the foreign entity. The petitioner also provided an undated copy of the foreign entity's executive summary, which names [redacted] and [redacted] as partners in promoting the foreign entity's business venture. With regard to the U.S. employer, the petitioner provided a copy of its articles of incorporation, which names [redacted] as the petitioner's initial director and shows that the petitioner is authorized to issue 2,000 shares of its stock.

On September 27, 2009, the director denied the petition basing his decision, in part, on the conclusion that the petitioner failed to establish that it has a qualifying relationship with ASLA, the beneficiary's claimed employer abroad. The director observed that the Executive Summary, which named [redacted] as partner promoters of the foreign entity, appeared to be in conflict with [redacted] own statement in which he indicated that he was the sole proprietor of the foreign entity. The director also observed that none of the submitted documents regarding the U.S. entity established who in fact owns the petitioner and further noted that the response to Question 5 of Schedule K of the petitioner's 2007 tax return indicates that no individual, partnership, or corporation owned 50% or more of the petitioner's voting stock.

On appeal, counsel summarizes the documents previously submitted, contending that the statement from [redacted] confirming the relationship between [the petitioner] and the foreign corporation" is sufficient to establish the common ownership and control shared by the two entities. Counsel also refers to the petitioner's stock certificates that have been newly submitted on appeal to establish ownership of the petitioning entity.

The AAO finds that neither counsel's statements nor the newly submitted documents are sufficient to overcome the director's findings and observations.

First, with regard to [redacted] statement, the AAO notes 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)). Counsel's assumption that a statement from the foreign entity's alleged owner is sufficient to establish the foreign entity's ownership is incorrect. The written statement is nothing more than an extension of the petitioner's claim and is not considered "documentary evidence" of the foreign entity's ownership, particularly in light of the confusion that was created by the petitioner's submission of the foreign entity's executive summary, which seemingly indicates that the foreign entity may have more than one owner—a factor that is inconsistent with [redacted] claim. 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).

Second, with regard to the petitioner's ownership, counsel failed to address the valid points made by the director in his assessment of the information provided in Schedule K of the petitioner's 2007 tax return. It is noted that the same information was later reiterated in Schedule K of the petitioner's 2008 tax return. The director properly found that the responses provided in Schedule K are in contradiction with the claim that [redacted] is the owner of the petitioning entity. Although the petitioner supplemented the record on appeal by providing stock certificate nos. 1-5, which indicate that [redacted] was issued 1,020 out of 2,000 shares of the petitioner's stock and that he is therefore the majority owner of the petitioning entity, the stock certificates were neither dated nor signed by an authorized party. In light of these significant deficiencies, the AAO finds that the validity of the stock certificates is greatly diminished and that the information conveyed via the

unsigned and undated stock certificates is unreliable. Moreover, the stock certificates fail to address and reconcile the inconsistent information that is found in Schedule K of the petitioner's 2007 and 2008 tax returns, neither of which is consistent with the petitioner's stock certificates.

In summary, the record contains incomplete and inconsistent documentation that fails to accurately document who owns each entity. As such, the AAO cannot conclude that the U.S. petitioner and the beneficiary's foreign employer are commonly owned and controlled such that a qualifying relationship can be said to exist between the two entities and on the basis of this initial finding the instant petition cannot be approved.

Next, the AAO will address certain filing criteria cited in 8 C.F.R. § 204.5(j)(3)(i), which states, in part, the following:

> A) If the alien is outside the United States, in the three years preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
>
> B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity[.]

After considering the date and purpose of the beneficiary's U.S. arrival, the director determined that the petitioner does not meet the provisions of 8 C.F.R. § 204.5(j)(3)(i)(B) because the beneficiary did not enter the United States for the specific purpose of coming to work for the U.S. petitioner. Even though the director acknowledged that the beneficiary's status was changed to that of an L-1 nonimmigrant on August 1, 2006, he relied on the date and purpose of the original U.S. entry in determining which three-year period would be used as a point of reference in the present matter. In applying the provisions of 8 C.F.R. § 204.5(j)(3)(i)(A), the director determined that the beneficiary was not employed abroad by ALSA for one year within the three years that preceded the filing of the instant Form I-140.

To the extent that the director erred in his determination as to which three-year time period should apply in the present matter, the AAO will withdraw the erroneous portion of the finding. However, the AAO will concur with the director in concluding that the beneficiary does not have the requisite one year of employment abroad during the requisite three-year time period.

In an effort to clarify the partial withdrawal of the director's finding, the AAO notes that the clear language of the statute indicates that the relevant three year period is that "preceding the time of the alien's application for classification and admission into the United States under this subparagraph." § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C). The AAO further notes that the statute is silent with regard to aliens who have already been admitted to the United States in a nonimmigrant classification. In promulgating the regulations on section 203(b)(1)(C) of the Act, the legacy Immigration and Naturalization Service (INS) concluded that it was not the intent of Congress to exclude L-1A multinational managers or executives who had already been transferred to the United States from this employment-based immigrant classification. Specifically, legacy

INS stated the following with regard to the interpretation of the Congressional intent behind the relevant statutory provisions:

> The Service does not feel that Congress intended that nonimmigrant managers or executives who have already been transferred to the United States should be excluded from this classification. Therefore, the regulation provides that an alien who has been a manager or executive for one year overseas, during the three years preceding admission as a nonimmigrant manager or executive for a qualifying entity, would qualify.

56 Fed. Reg. 30703, 30705 (July 5, 1991).

In other words, for those aliens who are currently in the United States in L-1A status, the relevant time period mentioned in the statute should be the three-year period preceding the time of the alien's application and admission as (or change of status to) an L-1A multinational managerial or executive classification.

In light of the above and contrary to the director's finding, the beneficiary's November 5, 2005 M-1 entry into the United States, which was not for the purpose of being employed as a manager or executive within the petitioning entity, cannot be the basis for determining the relevant three-year time period during which the beneficiary's employment abroad would be considered. That being said, the record shows that the beneficiary's status was changed to that of an L-1A nonimmigrant and that such status was valid from August 1, 2006 and continuing through July 31, 2008. Therefore, the relevant three-year time period during which the beneficiary's one year of qualifying foreign employment should have taken place is from July 31, 2003 through July 31, 2006. The record shows that the beneficiary's claimed period of employment with ALSA was from June 2001until June 2004. In applying this three-year time period to the beneficiary's employment abroad, it is clear that the beneficiary was not employed for the full one-year period and that, in fact, she could not have been employed abroad longer than eleven months during that relevant time period. Therefore, on the basis of this second ground of ineligibility, the instant petition must be denied.

The last two issues the director addressed in the denial dealt with the beneficiary's job duties in her foreign and proposed employment. Specifically, the director examined the record and concluded that, even if the beneficiary was employed abroad for the entire one year during the relevant three-year time period, her employment was not within a qualifying managerial or executive capacity. The director also concluded that the beneficiary would not be employed in the United States in a qualifying managerial or executive capacity.

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

> The term "managerial capacity" means an assignment within an organization in which the employee primarily--
>
> (i) manages the organization, or a department, subdivision, function, or component of the organization;
>
> (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

> The term "executive capacity" means an assignment within an organization in which the employee primarily--
>
> (i) directs the management of the organization or a major component or function of the organization;
>
> (ii) establishes the goals and policies of the organization, component, or function;
>
> (iii) exercises wide latitude in discretionary decision-making; and
>
> (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In an addendum to the Form I-140, the petitioner provided the following list of the beneficiary's job responsibilities in her proposed employment in the United States:

- Monitor general operations to ensure that they efficiently and effectively provide clients with ordered products while staying within budgetary limits;
- Review financial statements, sales and activity reports, and other performance data to measure productivity and goal achievement and to determine areas needing cost reduction and program improvement;
- Determine staffing requirements and interview hire, and train personnel;
- Direct and coordinate [the petitioner]'s financial and budget activities to fund operations, maximize investments, and increase efficiency;
- Market products through advertising campaigns and sales promotions and promote products to the leather apparel community.

It is noted that no job description was provided concerning the beneficiary's employment abroad.

Accordingly, in the March 11, 2009 RFE, the director instructed the petitioner to provide organizational charts depicting the organizational hierarchies of the beneficiary's foreign and U.S. employers. The director also asked the petitioner to provide detailed descriptions of the beneficiary's past and proposed job duties listing specific tasks and assigning a percentage that represents what percentage of time the beneficiary allocated or would allocate to each item on the list. Additionally, the director asked the petitioner to submit its state quarterly withholding returns for all four quarters of 2008.

In response, the petitioner provided an undated statement from [redacted] who claimed to be the foreign entity's proprietor. [redacted] stated that in the position of business development manager for the foreign entity the beneficiary managed the business development department, supervised the quality control department, promoted exports, and was responsible for market research, office management, and business promotion. He also stated that the beneficiary was authorized to sign documents and business contracts and that she directly supervised eight to nine administrative staff members and indirectly supervised technical staff at the tanneries. The record shows that no time allocations were assigned to any of the items included in the beneficiary's foreign job description.

The petitioner also complied with the director's request for the foreign entity's organizational chart, which depicts the beneficiary as the second in command, subordinate only to the company's president and sole proprietor. The chart indicates that the beneficiary's direct subordinates included one manager, who supervised three export executives and one office assistant; one marketing executive and one accountant, neither of whom had any subordinate employees; and one chief quality controller, who supervised two quality inspectors.

With regard to the beneficiary's proposed employment the petitioner provided its own organizational chart, which lists [redacted] at the top of the hierarchy in the position of director, followed by the beneficiary in the position of "president, treasurer, [and] secretary," followed by a vice president/marketing executive. In a separate statement dated March 12, 2008, the beneficiary provided her own job description, claiming that she would be responsible for introducing the company and its products to retailers and distributors, signing business contracts, placing orders with Indian suppliers based on buyer specifications, clearing the products through customs, supplying the buyers with their respective products, receiving and issuing payments, maintaining bank records, attending shows and business conferences, setting up booths to promote the petitioner's products, conducting market research, and discussing company activities, future plans, and business promotions with the company's director.

The petitioner also provided copies of the beneficiary's IRS Form W-2 for 2007 and 2008. Both documents indicate that the beneficiary was paid a salary of $45,000 for each year.

With regard to the beneficiary's employment abroad, the director concluded that the petitioner failed to provide a sufficiently detailed job description specifying the actual job duties the beneficiary performed on a daily basis. The director further noted that because the petitioner failed to provide specific information about actual daily tasks, he was unable to determine the beneficiary's specific role with respect to certain non-qualifying functions, such as market research, business promotion, and follow-up. In other words, if the beneficiary actually carried out the market research, marketing, and customer service-related tasks, this would indicate that some unspecified portion of her time was allocated to the performance of non-qualifying tasks. The director concluded his discussion of the beneficiary's employment abroad by finding that the beneficiary's job description is contradicted by the organizational chart that pertains to that entity in that the

job description indicates that the beneficiary supervised the company's administrative staff while the organizational chart indicates that the beneficiary supervised managerial and professional employees.

In his discussion of the beneficiary's proposed employment with the U.S. entity, the director determined that the beneficiary has been and continues to be the petitioner's sole employee and as such must perform all of the petitioner's daily operational functions. The director also observed that, despite the petitioner's failure to provide the requested percentage breakdowns, which would establish how the beneficiary planned to allocate her time among her various assigned tasks, the job description that the petitioner provided indicates that the primary portion of the beneficiary's time would be spent performing non-qualifying tasks.

On appeal, counsel directs the AAO's attention to a statement provided by [redacted] further discussing the beneficiary's employment abroad. Specifically, [redacted] indicated that the beneficiary allocated three hours of her time to managing business development, which included marketing the company's products, contacting buyers, and relaying buyers' requirements to the quality control department. Although the beneficiary also had the discretionary authority to sign contracts and other business documents, a number of the job duties that came under the heading of business management were non-qualifying operational functions. Furthermore, [redacted] indicated that the beneficiary conducted market research and executed changes in business development, both of which can be deemed as non-qualifying functions. Finally, there is no evidence to conclude that the beneficiary's supervision of technical staff at the tanneries or on office premises can be deemed as a qualifying function, as there is no indication that either the tannery employees or the office administrative staff were managerial, supervisory, or professional employees. Thus, the supplemental information provided by [redacted] does not establish that the beneficiary's time during her employment with the foreign entity was primarily spent performing managerial- or executive-level tasks. While the beneficiary may have enjoyed a high degree of discretionary authority, this factor alone does not establish that the beneficiary was employed within a qualifying capacity. In this matter, the beneficiary's job description fails to establish that the beneficiary allocated the primary portion of her time to the performance of tasks within a qualifying managerial or executive capacity.

With regard to the director's findings concerning the proposed employment, counsel acknowledges that the beneficiary is the petitioner's sole employee and claims that the petitioner continues to take steps to ensure its financial growth. The AAO notes, however, that petitioner must establish its eligibility at the time of filing the petition. 8 C.F.R. § 103.2(b)(1). A petition cannot be approved 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). Thus, while it is possible that the petitioner may ultimately progress to a stage in its development so that it would be able to employ the beneficiary in a qualifying managerial or executive capacity, the record indicates that the petitioner did not have that ability when the petition was filed. Based on the beneficiary's own account of her proposed job duties, the beneficiary would be the one to carry out all of the petitioner's tasks, both qualifying and non-qualifying. The beneficiary could not focus the primary portion of her time on the performance of qualifying managerial or executive tasks if the petitioner simply lacks the human resources to relieve the beneficiary from having to perform its daily operational functions. The petitioner's current needs do not supersede the statutory requirement that only those individuals whose time is primarily devoted to tasks of a qualifying nature can be deemed to be employed within a qualifying managerial or executive capacity.

While the AAO acknowledges that no beneficiary is required to allocate 100% of his or her 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 or 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).

In the present matter, the petitioner has not established that the beneficiary, either in her position with the foreign entity or in her proposed position with the U.S. entity, has primarily performed or would primarily perform tasks within a qualifying capacity. Therefore, the petitioner has failed to establish eligibility on these two additional grounds.

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.