

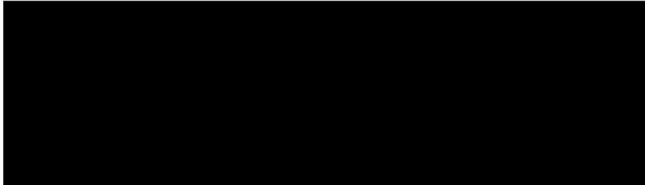
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

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

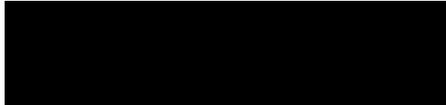


B4

DATE: **JUL 07 2011** OFFICE: TEXAS SERVICE CENTER



IN RE: Petitioner:
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:



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 Connecticut corporation that seeks to employ the beneficiary as its marketing manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director 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 decision, asserting that the director overlooked relevant supporting evidence and misapplied statutory provisions.

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 provided sufficient evidence to establish that the beneficiary 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.

In support of the Form I-140, James Foley, the petitioning entity's vice president, submitted a letter dated December 11, 2008 in which he stated that the beneficiary will assume a key managerial position in which she would be vested with a high degree of discretionary authority in terms of coordinating, directing, and implementing the petitioner's marketing operations. ██████████ stated that the beneficiary would be responsible for developing marketing strategy, creating and overseeing the implementation of a marketing plan, compiling and analyzing market research, and working with the marketing and sales teams as well as the chief executive to develop promotional materials.

On June 4, 2009, the director issued a request for additional evidence (RFE) instructing the petitioner to supplement the record with a more detailed job description and a time allocation showing the portion of time

the beneficiary would spend on each of her assigned job duties. The petitioner was also asked to provide a detailed organizational chart, complete with the departments, teams, employees, job titles, and employees' job duties, illustrating the petitioner's organizational hierarchy.

In response, the petitioner provided a statement dated July 2, 2009, which included the following hourly breakdown of the beneficiary's proposed employment:

1. Develops the marketing and purchasing strategy. (10 hrs)
2. Creates and oversees the implementation of marketing and purchasing plans . . . ; compile[s] and analyze[s] market research; deals with overseas suppliers worldwide. (10 hrs)
3. Works closely with the direct mail and list brokerage teams as well as the chief executive officer to develop effective promotional materials. (10 hrs)
4. Hires, retains, trains, and discharges managerial and professional employees. (5 hrs)

The beneficiary's subordinates were shown to include the following: an e-commerce specialist, a direct marketing specialist, a web merchandiser, and an inventory control analyst. This information was included in the petitioner's organizational chart, which depicts the beneficiary in a mid-level managerial tier with the above four subordinate positions shown at the level directly below the beneficiary. The company's CEO is shown as the beneficiary's direct superior.

The petitioner also provided its wage reports, including those for the quarter that ended December 31, 2008, naming all company employees and their respective wages at the time the petition was filed.

In a decision dated July 25, 2009, the director denied the petition finding that the petitioner failed to provide a job description that enhances an understanding of the beneficiary's specific job duties. The director also commented on the beneficiary's subordinates, finding that they "are not primarily managerial or supervisory within their own job capacities."

On appeal, counsel challenges the director's decision and specifically addresses the director's finding with regard to the beneficiary's subordinates, contending that the director failed to properly apply section 101(a)(44)(A)(ii) of the Act, which states that the beneficiary's subordinates may be managerial, supervisory, or professional employees. Counsel's point is properly made. The director may not place a heavier burden on the petitioner than that imposed by the statutory provisions. That being said, the petitioner's claims, including claims made with regard to the beneficiary's subordinates, must be supported using corroborating documentary evidence. *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 record does not support the claims put forth by the petitioner with regard to the beneficiary's subordinates. More specifically, after thoroughly examining the petitioner's wage reports, particularly the quarterly reports for the fourth quarter of 2008, the AAO found that two of the four employees who were named as the beneficiary's subordinates—[REDACTED]—were not included in the list of employees who were paid wages during the quarterly period in which the petition was

filed. It is therefore unclear who, other than the beneficiary, was available to carry out the job duties of the e-commerce specialist and the web merchandiser at the time of filing the petition.

The AAO further points out that regardless of the complexity of the petitioning entity's organizational hierarchy, the petitioner must provide a detailed description of the proposed job duties. 8 C.F.R. § 204.5(j)(5). It is noted 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 present matter, the petitioner's description of the beneficiary's proposed employment is overly broad and, without further explanation, indicates that a significant portion of the beneficiary's time would be allocated to daily operational tasks that are not within a qualifying capacity. Although the underlying element of discretionary decision-making is implied with respect to the beneficiary's role in the marketing and purchasing strategy, the petitioner failed to define what actual tasks the beneficiary would perform in her effort to develop the strategy.

In the appellate brief, counsel supplements the prior job description, stating that the beneficiary's role in marketing and purchasing strategy includes analyzing and implementing market studies, programs and policies; analyzing and studying sales records, inventory levels, and changes affecting supply and demand of the petitioner's products; compiling information on industry trends; and developing planning, and implementing goals, policies, and strategies with respect to promotion, marketing and economic growth. This supplemental information still lacks a delineation of the beneficiary's daily tasks, which are not self-evident with the petitioner's use of broad terminology. For instance, counsel does not explain how the beneficiary would implement marketing studies and strategic planning. Counsel also does not clarify how compiling data and monitoring industry trends can be deemed as qualifying tasks, nor does he provide any further insight into the specific tasks the beneficiary would perform in the course of developing, planning, and implementing goals and policies. Counsel's statements simply fail to contribute to a meaningful understanding of the beneficiary's day-to-day tasks with regard to her role in developing marketing and purchasing strategy.

The petitioner similarly failed to specify what actual tasks would be involved in creating marketing and purchasing plans. In fact, as a result of the petitioner's overly broad statements, the AAO is unable to understand the difference between developing marketing and purchasing strategy and creating marketing and purchasing plans. While counsel attempts to clarify the beneficiary's role with regard to creating and overseeing the implementation of marketing and purchasing plans, his claim that the beneficiary engages in contract negotiation only lends itself to further scrutiny in that contract negotiation, on its face, is not deemed to be a qualifying managerial or executive task, but rather, is indicative of an essential operational task.

The AAO also questions the managerial or executive nature of compiling market research and dealing with overseas suppliers. Counsel adds to the AAO's doubts as to the qualifying nature of the proposed employment by stating that the beneficiary would conduct research studies and develop direct mail programs and campaigns. Similarly, with regard to the beneficiary's role in developing promotional materials, the underlying implication is that other operational tasks would be performed in the course of the beneficiary's day-to-day activity.

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/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, while counsel places great emphasis on the beneficiary's subordinate staff of professional employees, this element is not sufficient to establish eligibility, even if the record were to contain adequate documentation to establish that the claimed staff was in place at the time of filing. Similarly, counsel's repeated references to the petitioner's gross revenues and the size and scope of the petitioner's business suggests that he placed undue focus on various factors other than a detailed description of the proposed employment. As stated above, a determination of the petitioner's eligibility to classify the beneficiary as a multinational manager or executive simply cannot be made without first considering the beneficiary's proposed job duties. Only then will the AAO go on to consider other relevant factors, including 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 petitioner has left unanswered questions regarding the portion of the beneficiary's time that would be allocated to non-qualifying tasks and the sufficiency of human resources, i.e., staff, to carry out the operational tasks associated with the beneficiary's proposed managerial position at the time of filing. While the AAO does not doubt that the proposed employment involves aspects that can be deemed as being within a qualifying managerial or executive capacity, the petitioner has failed to establish that these qualifying aspects would consume the primary portion of the beneficiary's time. Neither the job description nor the organizational hierarchy within the scope of the beneficiary's proposed position is sufficient to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. Therefore, on the basis of this conclusion, the AAO finds that approval of the petition is not warranted.

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 AAO finds that neither the description of the beneficiary's employment abroad nor the subordinate positions that are depicted in the foreign entity's organizational hierarchy establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

Second, 8 C.F.R. § 204.5(j)(3)(i)(C) states that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer. 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 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, while the record indicates that [REDACTED] owns and controls the petitioning entity, the record is silent as to who owns and controls [REDACTED] the beneficiary's foreign employer. The petitioner's July 2, 2009 statement merely indicates that [REDACTED] "is an integral part of [REDACTED]. Although the petitioner adequately documented the holding entity's control over the petitioner's voting shares, the record is silent as to the ownership of the beneficiary's foreign employer. As such, the AAO cannot conclude that the beneficiary's foreign and U.S. employers are similarly owned and controlled.

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.