

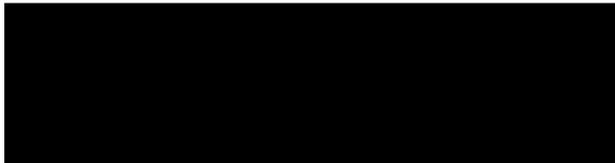
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

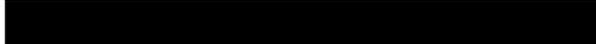
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DATE: JUL 08 2011 OFFICE: NEBRASKA SERVICE CENTER

FILE: 

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

The petitioner is a 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 two grounds of ineligibility. First, the director determined that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity and second, the director found that the petitioner failed to establish that it has the ability to pay the beneficiary's proffered wage.

On appeal, counsel disputes the director's decision and submits an appellate brief and additional documentation addressing the issues that served as grounds for denying the petition. The AAO finds that the petitioner submitted sufficient evidence to overcome the second ground that served as a basis for denial. Therefore, the remainder of this decision will focus on the first ground discussed in the director's decision—the beneficiary's employment capacity in his proposed position with the U.S. entity.

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 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 provided the following list of the beneficiary's proposed functions and responsibilities with the U.S. entity:

1. Make decisions considering the political, financial and social environment and is also responsible for the company before governmental and financial institutions.

2. Make decisions regarding direction of new business opportunities.
3. Decides together with the Administration and Finances manager the economic policies of the company.
4. Directs and supervises along with Administration and Finances Management, the reduction of liabilities generated by the operations.
5. Review, advise and approve plans, suggestions, strategy changes or new alternatives for a better development of the operations and obtain a better profitability in the business of the corporation.
6. Develop strategies to improve operations; review operations and make innovations regularly.
7. Attend periodic meetings of executives of prospective client companies, institutional management, US consulate and US government officials to exchange ideas and know their language training needs in each region or country.
8. Make negotiations with client company executives, institutional management, government officials, consultants, and suppliers.
9. Meet with client company executives elaborating on their plans for new business to identify requirements for project needs for new Russian Reports, contracts, solutions and services.
10. Formulate the marketing plan of our Russian Reports products and services with managers.
11. Establish contractual policy of the company.
12. Directs and supervises the productivity of the operations through Sr. Managers and Department Heads to optimize human resources of the company
13. Check the monthly reports from the operation's departments.
14. Make decisions regarding the managerial staff.
15. Review engineer managers in fulfillment of strategic plans given by the corporation.
16. Supervise the division managers of the business units.
17. Review and recommend training department the training programs.
18. Make periodic trips with the purpose to review and reinforce or fortify the activities performed by the division managers and the departments of their various business units to the industries which the company serves.

The petitioner also provided a copy of its organizational chart depicting the beneficiary at the top of the hierarchy as [REDACTED] and a development specialist as his two direct subordinates. Although the chart also shows a center programs coordinator and a linguistic support specialist as subordinate to the beneficiary, both position titles are surrounded by a dashed line, thus indicating that the positions may have been unoccupied at the time the petition was filed. The chart also names a web-based training solutions engineer and an assistant editor as two of the positions that are directly subordinate to the CIO, while indicating that the positions of marketing coordinator and instructional design specialist remained unoccupied at the time of filing.

On February 10, 2009, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a more detailed description of the beneficiary's proposed job duties accompanied by a percentage breakdown showing how much time would be allocated to each job duty. The petitioner was also asked to provide a Form W-2 for each employee the beneficiary would supervise.

In response, the petitioner provided a percentage breakdown of the beneficiary's functions and duties in his proposed employment with the U.S. entity. The petitioner allocated 15% of the beneficiary's time to business proposals and project outlines for prospective clients and partners. The petitioner indicated that the beneficiary reviews project proposals, budget estimates, and other forecasts, which are prepared by subordinates. The petitioner allocated 10% of the beneficiary's time to each of three job responsibilities: conferring with board members to effect policy changes, presenting methods for implementing certain strategies regarding projects and solutions, and conducting online meetings and phone and video conferences with the staff in Russia to monitor progress in executing the business plans; another 15% of his time would be allocated to using the company intranet to direct and coordinate assignments of project team members; 5% of his time would be allocated to each of the following three job responsibilities: meeting with business partners and clients to negotiate agreements and orders and identify new business opportunities; prepare, review, and approve budgets; and approve contracts and agreements with vendors and service providers; and the remaining 25% would be allocated to directing, leading, and evaluating progress of the U.S. operations and communicating with the foreign entity in an effort to develop services, serve as local support for U.S. clientele, and provide organizational support to U.S. centers in the study of the Russian language and culture. The petitioner also indicated that the beneficiary "occasionally" participates in lectures and presentation in an effort to promote the company's services and directs and coordinates efforts to publish training and educational software for U.S. government agencies and educational institutions.

With regard to its organizational hierarchy, the petitioner provided a list of its U.S. staff, which was comprised of seven individuals, including the beneficiary as [REDACTED] a marketing coordinator, an editor, an assistant editor, an academic exchange specialist and an accounting specialist. In a supplemental organizational chart, which depicts the petitioner's and the foreign entity's organizational hierarchies as of December 1, 2008, the petitioner indicated that within the scheme of the U.S. entity, the beneficiary directly oversees the work of the CIO, the marketing and academic exchange coordinators, and the accounting specialist. Also included among the petitioner's supporting documents were its 2008 third and fourth quarterly wage and withholding reports. The report for the third quarter showed that the petitioner had at minimum three, but no more than four, employees at any given time during that quarter. The fourth quarterly report showed that the petitioner had grown to six employees in December 2008.

In a decision dated May 29, 2009, the director denied the petition concluding that the petitioner failed to establish that the beneficiary's position with the U.S. entity would primarily involve tasks that are within a

qualifying managerial or executive capacity. The director noted that there is a distinction between one who operates a business and one who manages an organization, pointing out that merely managing a small business does not establish that the position fits the definition of managerial or executive capacity.

On appeal, counsel asserts that the director erred in deeming the petitioner a small business, noting that the petitioner has a foreign affiliate which has been operating since 1988 and that the petitioner itself has been operational for over four years. Counsel further contends that the director should not rely on the petitioning entity's size as the sole factor for determining eligibility. Counsel points to the foreign entity's work force of 29 employees and the petitioner's own work force of seven degreed professionals.

After reviewing the petitioner's submissions in light of the statutory and regulatory requirements, the AAO finds that counsel's arguments are not persuasive in overcoming the ground cited as a basis for denial.

First, the AAO notes that there is no basis for counsel's assumption that the denial was based on the size of the petitioner's business. Rather, it appears that the director's statement was merely meant to point out that a beneficiary who is the head of a small business cannot establish eligibility simply by focusing on his or her managerial role within a relatively small staffing hierarchy. Like a beneficiary who seeks to work for a business with multiple managerial tiers, a beneficiary who seeks employment within a small organizational hierarchy must primarily perform tasks of a qualifying nature in order to merit classification as a multinational manager or executive.

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).

In light of the above, it appears that by differentiating between someone who operates a business and someone who manages an organization the director meant to clarify that the former is not a multinational manager or executive because while that individual may assume a supervisory or top-level role in leading the organization, he or she nevertheless carries out that organization's operational tasks. While it is true that eligibility does not solely hinge on the size of an organization, the AAO cannot ignore the possibility that a minimally-staffed entity may be unable to relieve the beneficiary from having to allocate the primary portion of his or her time to non-qualifying operational tasks based on the needs of the organization. Thus, the first step in establishing that the beneficiary would primarily perform tasks within a qualifying managerial or executive capacity is to provide a detailed description of the beneficiary's specific job duties. See 8 C.F.R. § 204.5(j)(5). 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).

The AAO notes, however, that while a detailed job description is critical to establishing eligibility, the petitioner is expected to provide sufficient evidence to corroborate the proposed job description. In other words, 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. In the present matter, the record does not adequately establish that the organizational structure that was in place at the time of filing was sufficient either to support or require the services of an individual whose time would be primarily allocated to the performance of tasks within a qualifying managerial or executive capacity. While the petitioner's December 2008 organizational chart and corresponding quarterly wage report indicates that the petitioner's staffing size increased, a petitioner must establish eligibility at the time of filing; 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).

Here, the information provided in the Form I-140, Part 5, No. 2, indicates that the petitioner had only three employees at the time of filing. The petitioner has not provided sufficient evidence to establish that a staff of three, which appears to have included the beneficiary himself, was sufficient to relieve the beneficiary from having to primarily perform non-qualifying tasks. Regardless of the staffing size of the petitioner's foreign affiliate, the petitioner itself is an entirely separate entity. As such, the petitioner must establish that its own staffing was sufficient to warrant the employment of the beneficiary in a qualifying managerial or executive capacity. If the petitioner was relying on employees of the foreign entity to perform certain operational tasks, this must be documented in the form of payroll expenses. 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)). The record in the present matter lacks sufficient documentation to establish that at the time of filing the petitioner was able to relieve the beneficiary from having to primarily carry out non-qualifying tasks either by employing its own support staff or by hiring outside contractors, which may include employees of the foreign entity.

In summary, the AAO finds that the petitioner has not provided sufficient documentation to establish that it was able to employ the beneficiary in a managerial or executive capacity at the time the petition was filed. Based on the evidence furnished, the instant petition does not merit approval.

Additionally, while not addressed in the director's decision, the AAO finds that the record lacks sufficient documentation to establish that 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"). In the present matter, the petitioner claims that it and the beneficiary's employer are affiliates by virtue of being owned by the same two individuals in equal shares.

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.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

In the present matter, the petitioner has failed to provide relevant documents establishing its own ownership. While the AAO acknowledges the petitioner's submission of its own tax returns where the petitioner identified its owners, tax returns are not sufficient proof of ownership. The petitioner did not provide its corporate stock certificate ledger, stock certificate registry, corporate bylaws, or the minutes of relevant annual shareholder meetings to establish its ownership and control. Therefore, the AAO cannot affirmatively conclude that the petitioner and the beneficiary's foreign employer are similarly owned and controlled.

Lastly, the AAO finds that the petitioner has failed to submit sufficient evidence to establish that it meets the criteria specified at 8 C.F.R. § 204.5(j)(3)(i)(D), which states that the petitioner must establish that it has been doing business for at least one year prior to filing the Form I-140. The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office." Again, while the AAO acknowledges the petitioner's submission of several of its tax returns, the tax returns do not show the frequency of the petitioner's business transactions and thus cannot be relied upon to determine whether an entity is conducting business on a "regular, systematic, and continuous" basis. *See id.* Although the petitioner has described itself as a service provider, the record lacks contracts or agreements establishing that the petitioner has been providing language and intercultural communication services on a "regular, systematic, and continuous" basis for one year prior to the filing of the instant petition.

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.