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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



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

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[REDACTED]

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FILE: [REDACTED] OFFICE: TEXAS SERVICE CENTER Date: **MAR 24 2011**

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 New Jersey corporation that seeks to employ the beneficiary as its executive. 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 challenges the director's decision, emphasizing the petitioner's early stage of development.

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 established 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, the petitioner submitted a letter dated June 2, 2008, which includes the following description of the beneficiary's proposed employment:

The Executive Manager is charged with management of overall function, operations and profitability of [the petitioner]. The position requires that an applicant be knowledgeable about the language of Gujarati, the cultural background of the state of Gujarat and attuned to the demands of the local Indian population. An Executive Manager must also exhibit strong managerial skills, a background in education and curriculum implementation and adept financial instincts. Such a position also requires that such a Manager oversee the hiring of staff and general company management.

On June 9, 2009, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a detailed description of the beneficiary's proposed day-to-day duties with a percentage of time

assigned to each duty. The director also asked for a description of the beneficiary's proposed position within the U.S. entity's organizational hierarchy.

In response, the petitioner provided the following job description supplemented by a percentage breakdown:

1. Creation and direction as to overall mission of [the petitioner] and incorporation of [the] mission statement into organizational culture, including institution of all company-wide policies, ranging from salary configuration, individual job duties, employee conduct, etc. (30% of overall time spent towards this specific job duty (approximation));
2. Absolute discretionary control regarding all financial, employee or operational decisions for [the petitioner]. Supervision of professional employees, instructors and staff members, including the ability to hire and fire any and all U.S. employees (15%); ; [sic]
3. Implementation and oversight as to student admissions and cultivation of business opportunities to maximize admission rates and public interest (15%);
4. Designing and preparation of completed cultural and educational curriculum for Gujarati-specific [sic] classroom requirements. Oversight as to implementation of language-based curriculum, including gauging effectiveness of instruction, review of diagnostic examinations and participation in meetings geared towards improvement of student understanding (15%);
5. Management as to business objectives and financial priorities. Provides additional directives as to the specific use of resources for purposes of salary distribution, securing physical premises, management of financial accounts, outlays, revenues and communication with all other professionals with regards to operational propriety (15%);
6. Liaison to Bhagwathari-Prem Society (parent organization) as to proper functioning of [the petitioner] and counsel to BPS as to overall company health, needs and direction (5%);
7. Arrangement of meetings with parent groups and New Jersey community to boost public profile and enhance awareness of Gujarati [sic] curriculum (5%)[]

Also included in the response to the RFE was an organizational chart in which the beneficiary was depicted at the top of the hierarchy supported by two language instructors, a clerical staff, and financial and legal employees and independent contractors. The petitioner's 2008 quarterly tax return for the third quarter shows that the petitioner had one employee during the time period when the Form I-140 was filed.

On August 4, 2009, the director denied the petition questioning the petitioner's need for a full-time executive when it had only one employee at the time of filing the petition. The director determined that in light of the fact that the petitioner did not employ a support staff to assist the beneficiary, the petitioner would be unable to relieve the beneficiary from having to primarily perform non-qualifying tasks.

On appeal, counsel focuses on the petitioner's business goal and points out that the petitioner has not been doing business long enough to rival other institutions of its kind. Counsel urges U.S. Citizenship and Immigration Services (USCIS) to consider the petitioner's stage of development, which required limited

staffing due to its "fledgling" operations, and points out that the petitioner's staffing grew in the 2008 fourth quarter. Counsel cautions USCIS not to lose sight of the bigger issue by allowing the director to set a precedent that would preclude small businesses from petitioning for the continued employment of their executive officers. Counsel's statements, however, are not persuasive in establishing that the beneficiary merits immigrant classification as a multinational manager or executive.

Counsel's emphasis on the petitioner's stage of development overlooks the fact that the petitioner ultimately has a statutory burden to establish that the beneficiary's proposed employment with the U.S. entity would primarily involve the performance of managerial- or executive-level tasks. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties). Despite the underlying implication in counsel's argument, the petitioner's stage of development does not excuse the petitioner from having to meet this burden. In other words, any petitioner that is not ready and able to employ their beneficiary in a qualifying managerial or executive capacity at the time the petition is filed is not eligible for the immigration benefit sought herein. This includes having the ability to relieve the beneficiary from having to primarily engage in non-qualifying operational tasks. In the instant matter, counsel argues that denying the petitioner's Form I-140 is indicative of USCIS' prejudicial treatment of small entities. However, at the core of counsel's argument is the implied suggestion that different, more relaxed, statutory burdens should be applied to small entities. Counsel has offered no statute or precedent case law to support this argument.

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, a number of elements necessary to establish eligibility are missing.

First, the AAO finds that the job description offered in response to the RFE is neither sufficient in the degree of detail offered about the beneficiary's specific daily job duties, nor credible given the organizational hierarchy the petitioner had in place at the time of filing. The petitioner indicated that 30% of the beneficiary's time would be allocated to creating and directing the petitioner's overall mission, including instituting policies as well as assigning job duties and overseeing employee conduct. However, the petitioner did not clearly define the job duties associated with this broad set of responsibilities, nor did it justify its allocation of a considerable portion of the beneficiary's time to human resource-related tasks when the beneficiary was the beneficiary's sole employee. While the AAO acknowledges the petitioner's subsequent hiring of additional employees after the petition was filed, eligibility must be established at the time of filing, not 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). As the additional staff does not help establish the petitioner's eligibility at the time of filing, they are irrelevant for purposes of this discussion. The petitioner also failed to establish what specific tasks the beneficiary would perform in maintaining "absolute discretionary control" over company finances and employees or managing business objectives and financial priorities. Pursuant to published case law, 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).

Second, the AAO finds that the petitioner would have failed to establish eligibility even if an adequate job description had been submitted. Despite counsel's desire to disregard or to diminish the role of the petitioner's organizational hierarchy, the AAO finds that this factor cannot be discounted, as it assists USCIS in being

able to gauge the extent to which a petitioner is able to sustain the beneficiary in a qualifying managerial or executive capacity. While the AAO acknowledges that 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 necessary to relieve the beneficiary from having to primarily perform non-qualifying operational duties. In the present matter, the petitioner's sole employee at the time of filing was the beneficiary himself. Despite whatever the beneficiary's job description suggests or what the petitioner's organizational hierarchy seemingly illustrates, the AAO cannot ignore the fact that the petitioner has failed to provide evidentiary documentation to establish that it was adequately staffed to relieve the beneficiary from having to primarily perform daily operational tasks to keep the entity running and to ensure its progression into the next stage of its development. It is unclear how, in a business that relies on a staff to provide services from which the petitioner derives its revenue, the petitioner can claim to employ the beneficiary in a managerial or executive capacity with the beneficiary as its sole employee. The claims put forth via the petitioner's organizational chart are not persuasive, as no evidence has been provided to establish that the teaching and administrative personnel identified in the chart were actually employed by the petitioner, either in-house or on a contractual basis, at the time the petition was filed. 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 as presently constituted is not persuasive in demonstrating that the petitioner was able to employ the beneficiary in a primarily managerial or executive capacity. The fact that an individual manages a small business does not necessarily establish eligibility for classification as a multinational manager or executive within the meaning of section 101(a)(44) of the Act. As noted above, the record does not establish that a majority of the beneficiary's duties would be primarily within a qualifying capacity. Rather, based on the level of organizational complexity that was in place at the time of filing, the record indicates that a preponderance of the beneficiary's duties would be directly providing the services of the petitioner's business. Thus, based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

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. Although the petitioner supplemented the record with the foreign entity's organizational chart, the record lacks a definitive statement establishing what specific job duties the beneficiary performed on a daily basis during his employment with the foreign entity. As noted above, this information is crucial for the purpose of determining the nature of the beneficiary's employment. Thus, as the record lacks this necessary information, USCIS cannot conclude 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. In the present matter, the only evidence submitted to corroborate the petitioner's claim that it is a subsidiary of the beneficiary's foreign employer was a single

undated stock certificate. 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.

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. As the petitioner has not submitted sufficient documentary evidence regarding its ownership, it has not shown that the requisite qualifying relationship existed between the petitioner and the beneficiary's foreign employer at the time of filing the petition.

Third, 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner must establish that it has been doing business for at least one year prior to filing the Form I-140. The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office." The petitioner has maintained the claim that it is an educational service provider and has been since the beneficiary commenced his employment in the United States in 2006. The AAO notes that no documentation has been provided to establish that the petitioner has, in fact, provided these services during the requisite time period and continued to provide such services when the petition was filed in 2008, or approximately two years after the beneficiary's arrival.

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.