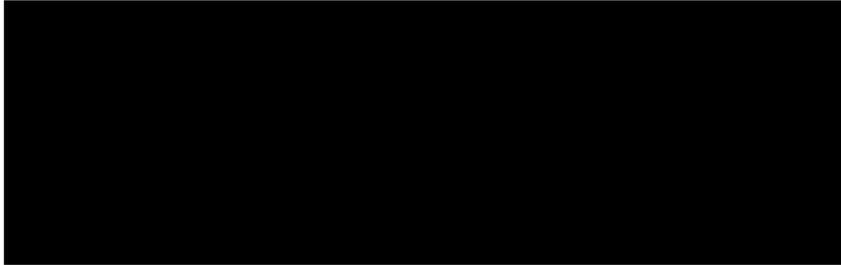


**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy  
PUBLIC COPY**

**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

DATE: **OCT 06 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: SELF-REPRESENTED

**INSTRUCTIONS:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Florida corporation that seeks to employ the beneficiary as its 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 five independent grounds of ineligibility. Namely, the director concluded that the petitioner failed to establish that 1) it has the ability to pay the beneficiary's proffered wage; 2) the beneficiary was employed abroad by a qualifying organization for the requisite time period and that such employment was within a qualifying managerial or executive capacity; 3) the beneficiary would be employed in the United States in a managerial or executive capacity; and 4) that the petitioner and the beneficiary's employer abroad have a qualifying relationship.

On appeal, the petitioner submits a brief disputing the director's findings.

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.

First, the AAO will address the beneficiary's employment capacity in her respective positions with the foreign and U.S. entities. In order to properly address these two issues, the AAO will examine the record to

determine whether the beneficiary was employed abroad and 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 one of two supporting statements dated October 10, 2008, the beneficiary's prospective employment was described as follows:

This position requires the beneficiary to establish the operation of the company, organize and oversee all administrative matters exercise full responsibility for recruiting, hiring, training

and dismissing employees. She will ensure the coordination of the departments and workers, implements policies and adopt strategies to improve [the] business holding full authority over all executive decisions aiming to achieve the profitability goals set by the [c]orporation. . . . She will handle all policy and business decisions such as negotiation of contracts to provide for services, purchases, sales pricing, banking insurance and credit terms and its employees[.] She is also, responsible for insuring that sales and profit goals are met each quarter, has the discretionary authority to reduce costs as she sees fit. Her senior level is established since her function within the organization includes the decision making authority over salary increases, hiring and firing, training of staff, budgetary concerns, and capital expenditures[.] She will have authority to bind the company contractually in any matters. . . .

\* \* \*

The beneficiary and her vast experience will make her the one to be responsible for directing the projects and operations of our company, developing and executing the necessary policies to effectively direct the company's management, hiring, dismissing and supervising lower level employees. . . . She will direct and supervise their activities which will be geared towards the sales of products and services related to [the petitioner.] In addition, she will be responsible for the analysis of the company's revenues, sales techniques and overall operations. She will observe the daily progress of employees, and will include development of marketing strategies in order to determine the potential emerging markets for our services and create materials for marketing, sales training, and presentations. She will assist [the petitioner] with business expansion, productivity and profit. [She w]ill develop solutions to any problems that [s]he perceives based on previous managerial experience.

In the second October 10, 2010 support statement, the petitioner indicated that 30% of the beneficiary's time would be allocated to overseeing and coordinating commercial operations, 30% to establishing business relationships with customers and distributors and reviewing and negotiating deals, 30% to monitoring consumer preferences and marketing opportunities and promoting products and services, and 10% to assigning sales, setting goals, and analyzing sales statistics to determine sales potential and inventory requirements. Neither supporting statement included a description of the beneficiary's employment abroad.

Accordingly, on April 20, 2009, U.S. Citizenship and Immigration Services (USCIS) issued a request for additional evidence (RFE) instructing the petitioner to provide a list of the beneficiary's job duties in her foreign position as well as her proposed position with the U.S. entity. The petitioner was asked to assign a percentage to each of the listed job duties to indicate how the beneficiary allocated her time in each position. The petitioner was also asked to list the beneficiary's subordinate employees and to provide their job titles, job duties, and educational levels. Additionally, the director requested that the petitioner provide organizational charts for each entity in order to illustrate the beneficiary's position within the respective hierarchies.

In response, the petitioner provided a statement dated May 20, 2009. The petitioner stated that the beneficiary gained experience in the field of interior design by working in a managerial position for "several Brazilian enterprises." The petitioner did not comply with the director's request for a specific list of the beneficiary's job duties with a qualifying entity abroad. Rather, the petitioner's discussion of the beneficiary's foreign employment was limited to general references to the beneficiary's skills and managerial experience and a single paragraph containing a paraphrased list of the elements that comprise the statutory definition of managerial capacity. Additionally, the petitioner failed to clarify the date and duration of the beneficiary's

employment abroad with a qualifying entity. The petitioner claimed that the beneficiary worked in a similar occupation even though she was not directly transferred from the petitioner's foreign affiliate.

The petitioner also failed to provide the requested additional information concerning the beneficiary's proposed employment with the U.S. entity. Although the petitioner referred to "a detailed statement of job duties" in the record, it is unclear whether the job description referenced was the one that was originally submitted in support of the Form I-140. There is no indication that the petitioner actually complied with the director's RFE request for a detailed list of the beneficiary's specific job duties and corresponding time allocations. It is noted that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

After reviewing the petitioner's response to the RFE as well as the documentation that was submitted initially in support of the Form I-140, the director determined that the petitioner failed to establish that the beneficiary was either employed abroad in a qualifying capacity or that she would be employed in such a capacity with the petitioning U.S. entity. Accordingly, in a decision dated July 8, 2009 the director denied the petition listing these deficiencies as two bases for denial.

On appeal, the petitioner challenges the director's decision, claiming that the director failed to allow an adequate time period in which to respond to the RFE pursuant to regulatory provisions.

Contrary to the petitioner's assertion, the regulatory provisions at 8 C.F.R. § 103.2(b)(8) do not mandate a specific time allowance for the submission of a response to an RFE or a notice of intent to deny (NOID). Much like the discretionary authority USCIS has in determining whether to issue an RFE, USCIS has the same authority to determine how much time to allow the petitioner to respond to an RFE or NOID. Thus, while it is common to see an RFE with a response time of twelve weeks, the director has the ultimate discretion in choosing a shorter response time, as was the case in the present matter. The provisions at 8 C.F.R. §§ 103.2(b)(8)(ii) and (iii) expressly state that the petitioner must provide any missing initial evidence or any other evidence "within a specified period of time as determined by USCIS."

Although the appellate brief indicates that the beneficiary had qualifying employment abroad and would have qualifying employment with the petitioning entity, the requested evidence that would have enabled the director to better assess the validity of this claim was not provided. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the description of the beneficiary's job duties. *See* 8 C.F.R. § 204.5(j)(5). The AAO will then consider this information in light of the employing entity's organizational hierarchy, the beneficiary's position therein, and the entity's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks.

In the present matter, the record lacks a comprehensive description of the beneficiary's day-to-day tasks either with her foreign employer or with the prospective U.S. employer. Although the petitioner provided considerably more information about the beneficiary's prospective employment, the job description and the supplemental percentage breakdown, both of which were provided initially in support of the Form I-140, are overly vague as they fail to specify the actual tasks the beneficiary would perform on a daily basis. Moreover, the description of the prospective employment indicated that the beneficiary would perform certain non-qualifying duties, such as negotiating contracts, dealing directly with actual and prospective customers, and promoting the petitioner's products and services. 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 performed in the foreign employment and those tasks she would perform in the course of the U.S. employment are only incidental to her proposed position. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Here, the petitioner failed to provide a definitive statement of the beneficiary's actual daily tasks in either of her positions. 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). Furthermore, the petitioner failed to provide the requested organizational charts illustrating the beneficiary's alleged managerial position abroad and with the petitioning U.S. employer. The petitioner's failure to provide this essential requested evidence precludes the AAO from being able to affirmatively conclude that the beneficiary was employed abroad and that she would be employed in the United States in a qualifying managerial or executive capacity and based on these two initial findings, the instant petition cannot be approved.

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

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

*Affiliate* means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

\* \* \*

*Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

*Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In the present matter, the petitioner did not address the beneficiary's employment abroad in the initial supporting statements. As such, the director was unable to determine whether the petitioner maintained the requisite qualifying relationship with the entity that employed the beneficiary abroad prior to her U.S. entry. Accordingly, this deficiency was duly addressed in the RFE that was issued on April 20, 2009. Specifically,

the petitioner was instructed to provide evidence establishing common ownership between the beneficiary's prospective U.S. employer and her foreign employer.

In response, the petitioner provided a translated corporate document pertaining to Living Design Decoracoes Ltda., showing that ownership of that entity was equally divided into thirds among three individuals. The response did not, however, establish that the beneficiary was employed by that foreign entity. Furthermore, the only evidence that addresses the issue of the U.S. entity's ownership is contained within the petitioner's 2006 and 2007 corporate tax returns, which show that [REDACTED] who owns one third of the foreign entity, is 100% owner of the U.S. entity. To confuse matters further, the petitioner did not name any of the beneficiary's foreign employers or assert that the beneficiary was ever employed by the foreign entity that is claimed to be the petitioner's affiliate. The petitioner stated only that the beneficiary was employed abroad in a similar occupation and further claimed that the beneficiary was not employed with the petitioner's affiliate foreign entity directly prior to her arrival in the United States.

In the decision dated July 8, 2009, the director concluded that the petitioner failed to establish that it has the requisite qualifying relationship with the beneficiary's employer abroad.

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.

Although the petitioner's appellate brief restates the relevant statutory definitions and regulatory requirements, it fails to explain how the petitioner meets those requirements.

As the record currently stands, it appears that the petitioner and Living Design Decoracoes Ltda. have one common owner. However, the commonality does not rise to the level of an affiliate or parent-subsidary relationship. While the foreign entity is equally owned by three different individuals, none of whom has majority ownership, the U.S. entity appears to be entirely owned by one of those three individuals. Despite the petitioner's claim on appeal that the two entities are family-owned, the AAO notes that a familial relationship does not constitute a qualifying relationship under the regulations. Furthermore, even if the petitioner were able to establish that the petitioner has either an affiliate or a parent-subsidary relationship with Living Design Decoracoes Ltda., the petitioner neither claimed nor provided evidence to establish that the latter entity employed the beneficiary abroad for the requisite one year duration within the relevant three-year time period. As such, the AAO finds that the petitioner has failed to establish that the petitioner has the requisite qualifying relationship with the beneficiary's foreign employer.

As a side note, the AAO points out that the above definition of the term *multinational* requires the petitioner to establish that it conducts business abroad through an affiliate, parent, or subsidiary entity. As the degree of common ownership between the petitioner and Living Design Decoracoes Ltda. does not rise to the level of an affiliate, parent, or subsidiary, the AAO cannot conclude that the petitioner is a multinational entity.

The final issue to be addressed in the present matter is whether the petitioner has the ability to pay the beneficiary's proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states the following, in pertinent part:

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

In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, while the petitioner claims that it has employed the beneficiary since prior to the filing of the Form I-140 and has the ability to pay the beneficiary's proffered wage, no evidence has been submitted to substantiate this assertion. 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)).

As an alternate means of determining the petitioner's ability to pay, the petitioner's net income figure as reflected on the federal income tax return may also be examined. The AAO notes, however, that the only tax documents the petitioner has provided reflect income that was earned in 2006 and 2007. However, the instant Form I-140 was filed in 2008. As the petitioner's ability to pay must be established as of the date of filing pursuant to regulation, the lack of documentation addressing the petitioner's financial status as of that date precludes the AAO from being able to determine that the petitioner has the ability to pay the beneficiary's proffered wage.

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.