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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: OCT 31 2011 OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

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: 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 three grounds of ineligibility. The director determined that the petitioner failed to submit evidence establishing that (1) the beneficiary was employed abroad in a qualifying managerial or executive capacity, (2) the beneficiary would be employed in the United States in a managerial or executive capacity, and (3) that a qualifying relationship exists between the petitioner and the beneficiary's foreign employer.

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.

The first two issues in this proceeding call for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the beneficiary was employed abroad and whether he 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 statement dated March 25, 2008 in which the beneficiary's proposed employment was described as one involving organizing and overseeing administrative matters, coordinating and hiring and firing company employees, implementing policies and strategies, and negotiating contracts for services, purchases, sales prices, and credit terms. The petitioner indicated that the beneficiary's time would be allocated as follows: (1) 35% to directing the ongoing development of new projects; (2) 35% to establishing contacts and business relationships with customers and distributors, reviewing contract terms, and negotiating favorable deals; (3) 20% to managing and directing marketing efforts; and (4) 10% to reporting to the main office.

In the petitioner's second statement, which was also dated March 25, 2008, the petitioner addressed the beneficiary's employment abroad, stating that the beneficiary played a key role in developing a system of importing and exporting the foreign entity's products. The beneficiary was also responsible for finding and maintaining contact with suppliers and managing and directing the foreign entity.

On August 11, 2008, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a definitive statement describing the beneficiary's proposed job duties with the U.S. entity and his duties with the foreign entity along with the percentage of time that was and would be allocated to each job duty. The petitioner was also asked to indicate the number of employees the beneficiary supervised abroad and would supervise in his proposed position as well as each subordinate's job duties and educational credentials. Lastly, the petitioner was asked to provide a detailed organizational chart of the beneficiary's foreign employer listing the departments, teams, and employees within the foreign entity as well as each employee's job duties and educational credentials.

In response, the petitioner provided two statements dated September 6, 2008. One statement described the beneficiary's employment abroad while the other described the beneficiary's proposed employment. The statement pertaining to the beneficiary's proposed employment reiterated the same information, including the same percentage breakdown, as the information that the petitioner originally submitted in support of the petition. In the statement that pertained to the beneficiary's employment abroad, the petitioner stated that the beneficiary handled most of the commercial policies, made financial and marketing decisions, created marketing campaigns and strategies, and ensured adherence to clients' schedules and budgets. The petitioner indicated that the beneficiary's duties were at the managerial level and provided the following percentage breakdown to show how the beneficiary allocated his time:

- Supervising subordinates and reviewing with creative team broadcasting campaigns, to ensure the best creative work and best-targeted scripts[.] 40%
- Maintaining permanent contact with potential clients and manufactures [sic], developing [a] constant relationship[.] 30%
- Providing campaign analysis and cost control, to meet campaign objectives within [t]he given budget[.] 20%
- Reviewing contracts, analyzing reports and budgets[.] 10%

The petitioner did not provide the foreign entity's organizational chart as requested, claiming that the 30 days allowed for the submission of an RFE response was insufficient.

On June 9, 2009, the director issued a notice of his intent to deny (NOID), pointing out that the petitioner did not supplement the record with any new evidence after submitting a response to the RFE, even though there was a nine-month lag time between the submission of the RFE response and the issuance of the NOID. The director once again asked the petitioner to provide the foreign entity's organizational chart, instructing the petitioner to clearly establish who supervised whom and to include employee names, job titles, and job descriptions. The director also asked the petitioner to provide a similar organizational chart pertaining to its own organizational hierarchy and to include employee names, position titles, and job descriptions.

The petitioner's response included an organizational chart dated October 24, 2008 in which the beneficiary was identified as a sales manager, a position that was depicted as the direct subordinate of the company's general manager. The chart depicts an assistant manager at the same level within the petitioner's hierarchy, overseeing an accountant. The lowest tier of the hierarchy shows three administrative assistants. As both the beneficiary and the assistant manager are depicted at the same hierarchical level, it is unclear who specifically oversees the administrative assistants.

Although the petitioner also provided a supporting statement in response to the NOID, the information that pertained to the beneficiary's proposed position with the U.S. entity mirrors that which had been provided earlier in support of the petition and subsequently in response to the RFE. The petitioner also provided an altered percentage breakdown showing slightly different time allocations than the ones submitted earlier. Specifically, the petitioner indicated that instead of 35%, as indicated previously, the beneficiary would allocate 40% of his time to directing the ongoing development of new projects and another 40% to establishing contacts and business relationships with customers and distributors, reviewing contracts, and negotiating favorable deals. The petitioner did not alter the 20% time allocation regarding managing and directing marketing efforts. While the petitioner previously indicated that 10% of the beneficiary's time would be allocated to reporting to the "main office," no time was allocated to this job responsibility in the job description that was offered in the response to the NOID.

Additionally, the petitioner provided an organizational chart of the foreign entity showing one employee at the top of the hierarchy, five employees (including the beneficiary) at the next level of the hierarchy, and one employee at the lowest tier. It is noted that, while the petitioner provided all of the employee names, none of the position titles were translated into English. Furthermore, the chart did not provide any of the employees' job descriptions or educational credentials as specifically requested in the NOID. Rather, in a statement dated March 16, 2009, the petitioner restated the previously provided percentage breakdown pertaining to the beneficiary's foreign employment. The petitioner emphasized the beneficiary's skills and the experience gained through his employment with the foreign entity and provided the following additional information:

On a day-to-day basis, [the beneficiary] was in charge of the establishment of operational objectives and work plans, as well as the delegation of assignments to subordinate managers. He was in charge to [sic] develop contacts with existing and potential clients, and defines [sic] and execute [sic] sales plans and promotions. In addition, he conducted sales presentation[s] such as negotiation of sales contracts including terms, pricing and volume; technical proficiency and consults with prospective clients regarding the use of company products; [i]nvestigation of potential product improvements; [m]anaging client profit and loss, expenses and performance to quota; [i]nvesting and evaluating new business opportunities pertaining to alternative channels and customers; [m]arketing intelligence to sales management and participation in the development of sales forecasts and strategies.

On January 29, 2010, the director issued a decision denying the petition, concluding that the petitioner failed to establish that the beneficiary was employed abroad and that he would be employed by the petitioning U.S. entity in a qualifying managerial or executive capacity.

On appeal, while the petitioner challenges the propriety of the director's decision and provides a summary of the procedural history leading up to the denial, the only issue that is addressed with any specificity is the third ground that was cited as a basis for denial, i.e., the petitioner's failure to establish a qualifying relationship

with the beneficiary's foreign employer. The petitioner does not, however, provide any specific reasons explaining why the director erred in concluding that insufficient evidence had been submitted to establish that the beneficiary was employed abroad and that he would be employed by the petitioning U.S. entity in a qualifying managerial or executive capacity.

A review of the record shows that the evidence the petitioner submitted both in support of the original petition and in its responses to the director's RFE and NOID was deficient. As noted earlier, the organizational chart that was submitted with regard to the beneficiary's foreign employer was not accompanied by a certified English language translation, thus making it impossible for the AAO to determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

Moreover, a review of the chart shows only three tiers within the foreign entity's hierarchy. This depiction of the foreign entity is not consistent with the statements that described the beneficiary's foreign employment to include oversight of lower managerial tiers. The chart is also inconsistent with the time allocations that were provided in response to the NOID, where the petitioner indicated that approximately 40% of the beneficiary's time was allocated to the supervision of subordinates. Despite the petitioner's failure to provide an English language translation of the foreign entity's organizational chart, it is clear to see that the chart does not list any employees at all under the beneficiary's position, thus contradicting the claim that the beneficiary spent a significant portion of his time overseeing subordinates. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The AAO further notes that contacting clients and manufacturers is not deemed to be a qualifying managerial or executive task. Thus, when considering the percentage breakdown in totality, it appears that at least 30% of the beneficiary's time was allocated to non-qualifying tasks while another 40% of his time was allocated to tasks that are entirely inconsistent with the organizational composition as depicted in the organizational chart that was submitted in response to the NOID.

The record is similarly deficient in clarifying information regarding the beneficiary's proposed employment with the U.S. entity. First, the AAO notes that while the petitioner's organizational chart, which was submitted in response to the RFE, lists a total of seven employees, Part 5, No. 2 of the petitioner's Form I-140 indicates that the petitioner had a total of two employees at the time of filing. The AAO notes that even if the organizational chart was an accurate depiction of the petitioner's staffing as of October 24, 2008, the Form I-140 was filed in April 2008 and must establish eligibility based on facts that existed 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). As the petitioner indicated that it had only two employees at the time of filing, it must establish that this staffing composition was sufficient to relieve the beneficiary from having to primarily perform non-qualifying tasks.

While a showing of eligibility is not solely based on the petitioner's staffing size, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for USCIS

to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In the present matter, the AAO does not find that an organization that is comprised of only two employees, whose job duties the petitioner did not discuss, has the capability of supporting the beneficiary in a position that would primarily involve the performance of managerial or executive job duties.

Additionally, the AAO finds that the petitioner offered insufficient information about the job duties the beneficiary would perform in the course of the proposed employment. Published case law clearly supports the pivotal role of a clearly defined job description, as 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). Moreover, the regulation at 8 C.F.R. § 204.5(j)(5) expressly instructs the petitioner to provide a list of the beneficiary's proposed job duties. Although the petitioner repeatedly discussed the beneficiary's proposed employment, the job descriptions that the petitioner offered were comprised of overly vague statements that contained little information regarding the beneficiary's actual day-to-day tasks. The petitioner instead focuses on the beneficiary's discretionary authority over personnel and budget issues and provides a list of the beneficiary's skills and positive attributes that would be beneficial to the petitioner. In order to determine that the beneficiary merits immigrant classification as a multinational manager or executive, the petitioner must provide evidence to show that the beneficiary's time would be primarily allocated to tasks within a qualifying capacity. Simply establishing that the beneficiary will have a high degree of authority and will fill a necessary role within the petitioner's organization is not sufficient if the primary portion of the beneficiary's time would not be devoted to tasks within a qualifying capacity.

Although the AAO acknowledges the petitioner's attempt to show how the beneficiary would allocate his time by providing two percentage breakdowns, the petitioner was not consistent in its time allocations and repeatedly provided broad responsibilities rather than specific daily tasks in describing the proposed employment. For instance, the petitioner failed to identify any of the actual job duties the beneficiary would perform in directing the development of new projects or managing and directing marketing efforts. Moreover, in a separate job description, the petitioner indicated that the beneficiary would directly perform various non-qualifying job duties including negotiating sales and supply contracts and consulting existing and prospective clients regarding the petitioner's products. The petitioner did not indicate precisely how much of the beneficiary's time would be allocated to these and possibly other non-qualifying tasks. 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 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 summary, the AAO finds that the evidence of record is deficient and does not establish that the beneficiary was employed abroad or that he would be employed in the United States in a qualifying managerial or executive capacity. Based on these two separate findings, the instant petition cannot be approved.

The other issue 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's initial supporting documents indicate that the petitioner is owned [REDACTED]. Thus, in order to fit the above definition of affiliate, the foreign entity would have to be owned in equal share by the same two individuals or, in the alternate, the petitioner would have to establish that there is a parent/subsidiary relationship where the petitioner owns and controls the foreign entity. It is noted, however, that the petitioner did not provide any evidence to establish who owns and controls the foreign entity. The petitioner similarly failed to provide this relevant documentation either in response to the RFE or in response to the NOID, both of which requested evidence of a qualifying relationship. Rather, the petitioner merely indicated in its March 16, 2009 statement that it was "[e]stablished as a U[.]S[.] subsidiary" of the beneficiary's Brazilian employer. The basis for this claim, however, went unexplained.

Accordingly, the director determined that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer and denied the petition on this basis as well. On appeal, the petitioner claims that it and the beneficiary's foreign employer are affiliates by virtue of being owned by the same individual or group of individuals.

The AAO finds, however, that the evidence submitted does not support the petitioner's claim. Although not previously submitted, the petitioner has provided the foreign entity's amendment of articles of incorporation, which lists a total of three owners— [REDACTED] each owning

6,000 shares, and [REDACTED] owing 3,000 shares. Although [REDACTED] is an owner who is common to both the foreign and U.S. entities, the ownership of these entities is entirely different and does not establish the existence of an affiliate relationship.

To establish eligibility in this case, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982).

The U.S. entity is owned by two individuals while the foreign entity is owned by three individuals. Absent documentary evidence such as voting proxies or agreements to vote in concert so as to establish a controlling interest, the petitioner has not established that the same legal entity or individuals control both entities. Thus, the companies are not affiliates as both companies are not owned and controlled by the same individuals. *Based on the evidence submitted, it is concluded that the petitioner has not established that a qualifying relationship exists between the U.S. and foreign organizations.*

Additionally, in *Matter of Tessel, Inc.* it was determined that "[w]here there is a high percentage of ownership and common management between two companies, either directly or indirectly or through a third entity, those companies are 'affiliated' within the meaning of that term as used in section 101(a)(15)(L) of the Act." 17 I&N Dec. 631, 633 (Acting Assoc. Comm. 1981). Here, no one shareholder holds a majority interest in either corporation. The record, therefore, fails to demonstrate that there is a high percentage of common ownership and common management between the two companies.

The AAO finds that the petitioner has failed to establish that it has a qualifying relationship with the beneficiary's employer abroad and on the basis of this additional finding, the instant 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.