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

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PUBLIC COPY

U.S. Citizenship and Immigration Services

[redacted]

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DATE: OCT 3 1 2011 OFFICE: NEBRASKA SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
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, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a California corporation that seeks to employ the beneficiary in the position of 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 two grounds of ineligibility. The director concluded that the petitioner failed to establish (1) that a qualifying relationship exists between the petitioner and the beneficiary's foreign employer and (2) that the beneficiary was employed abroad in a managerial or executive capacity.

On appeal, the petitioner disputes the director's decision and provides a brief in an attempt to overcome the adverse 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 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 a statement that was submitted in support of the Form I-140, the petitioner was described as the "U.S. subsidiary of the Brazilian affiliate" where the beneficiary was previously employed. In the same statement the foreign entity was referred to as the parent company and the petitioner as an affiliate of the foreign entity. The petitioner submitted its articles of incorporation and its 2007 corporate tax return in support of the petition. The latter identified [redacted] as owner of 60% of the petitioner's stock, thus indicating that [redacted] is the petitioner's majority owner. However, none of the submitted documentation established the ownership of the beneficiary's foreign employer.

Accordingly, on August 14, 2009 the director issued a request for evidence (RFE) instructing the petitioner to provide evidence of the petitioner's current ownership as well as evidence establishing the ownership of the foreign entity where the beneficiary was previously employed.

In response, the petitioner provided a statement dated October 10, 2009 in which the prior claims were reiterated. The petitioner referred to itself as the foreign entity's subsidiary and instructed the director to review the foreign entity's brochures and website for further information. It is noted that the brochure of the foreign entity's business was not accompanied by a certified English language translation. *See* 8 C.F.R. § 103.2(b)(3).

On December 8, 2009 the director issued a decision denying the petitioner's Form I-140 basing his decision, in part, on the determination that the petitioner failed to submit evidence to establish that it has a qualifying relationship with the beneficiary's foreign employer. The director reviewed the documentation that had been submitted prior to the denial and determined that the petitioner failed to respond to the RFE with the

requested evidence pertaining to the ownership of the beneficiary's foreign employer. The director noted that 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)).

On appeal, the petitioner provided no documentation establishing the foreign entity's ownership. With regard to the U.S. entity, the petitioner resubmitted its articles of incorporation and an amended annual report which was filed on May 31, 2006. It is noted, however, that neither document establishes who owned the petitioning entity at the time the petition was filed. Regardless, even if the AAO were to assume that the petitioner's 2007 corporate tax return was accurate in identifying the petitioner's majority owner, establishing only the petitioner's ownership is not sufficient.

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 the United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595. In the present matter, the record is devoid of any evidence establishing who owns and controls the foreign entity. Therefore, the petitioner has failed to establish that it shares common ownership and control with the beneficiary's foreign employer and on the basis of this initial determination the instant petition cannot be approved.

The next issue that will be addressed in this proceeding is the beneficiary's employment abroad. Specifically, the AAO will examine the record in order to determine whether the beneficiary was employed abroad 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 the initial support statement, the petitioner stated that the beneficiary was employed abroad in a managerial capacity. The petitioner indicated that the beneficiary was a function manager whose key responsibility was to prepare and conduct cargo projects, and to prepare business plans, campaigns, and service development plans. The beneficiary also established operational objectives and work plans, delegated assignments to lower level employees, developed contacts with new clients and maintained relationships with existing clients, defined and executed sales plans and promotions, and conducted sales negotiations.

In the August 14, 2009 RFE, the director instructed the petitioner to provided a list of the beneficiary's day-to-day tasks and to indicate what percentage of time the beneficiary allocated to each listed task.

In the October 10, 2009 response statement, the petitioner claimed that information previously submitted adequately established the beneficiary's position abroad as being primarily within a managerial capacity. The petitioner noted further that the beneficiary's position abroad involved supervising function managers in international shipments, inventory preparation, accuracy, language, responsibility, transportation regulations, specialty services, equipment, inspections, weighing procedures, safety, and quality control. The beneficiary was also responsible for being the foreign entity's spokesperson in media events and for developing the sales and business development plan, providing leadership to manage and motivate the sales team including setting monthly and quarterly sales goals, creating a system to measure sales growth, and managing the preparation of proposals and service contracts and negotiating prices and services.

Although the petitioner also provided the foreign entity's organizational chart, which clearly depicts the beneficiary in a position that is three tiers below that of the company's president, all position titles were identified in Portuguese without an accompanying English language translation. As such, neither the beneficiary's position title nor the position titles of the two subordinates below her can be determined.

In the denial, the director noted that the petitioner failed to provide the requested percentage breakdown listing the beneficiary's specific day-to-day job duties. The director further pointed out that the petitioner failed to provide job descriptions for the two employees whom the organizational chart depicted as the beneficiary's subordinates. The director determined that the petitioner's failure to submit requested evidence precluded a full examination of information that is material to the petitioner's eligibility. 8 C.F.R. § 103.2(b)(14).

On appeal, the petitioner reiterates and paraphrases the previously submitted job description and supplements the record with job descriptions of the two individuals who were depicted as the beneficiary's subordinates in her position with the foreign entity. With regard to newly submitted job descriptions, however, the record shows that the petitioner was put on notice of a deficiency in the evidence and was given an opportunity to respond to that deficiency. As such, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the RFE. *Id.* Under the circumstances, the AAO need not and does not consider the subordinates' job descriptions that have been offered on appeal.

With regard to the beneficiary's own job description, the AAO concurs with the director in finding that the general information provided fails to establish that the primary portion of the beneficiary's time was spent performing tasks within a qualifying managerial capacity as claimed. The petitioner's vague references to the beneficiary's involvement with operational functions such as inventory preparation, contract negotiation, communication with existing clients, and developing relationships with new clients are all indicative of non-qualifying operational functions. Without additional information that would disclose the beneficiary's specific role with regard to these seemingly non-qualifying job responsibilities it cannot be determined that the specific tasks the beneficiary performed were of a qualifying nature. While the AAO acknowledges that no beneficiary is required to allocate 100% of her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to 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. at 604.

The petitioner was even more vague about the beneficiary's role and specific job duties with regard to accuracy, language, transportation regulations, weighing procedures, safety, and quality control. It is noted that the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). As the petitioner failed to provide key information that was expressly requested in the RFE, the AAO has no evidence that could serve as a basis for affirmatively concluding that the beneficiary allocated the primary portion of her time to the performance of managerial- or executive-level tasks. Therefore, on the basis of this additional finding, the instant petition cannot be approved.

Furthermore, while not previously addressed in the director's decision, the AAO finds that the petitioner failed to provide sufficient evidence to establish that the beneficiary's position with the United States entity would be within a managerial or executive capacity. The information provided is overly generalized and fails to identify specific qualifying tasks. Moreover, some of the claims made in the statement provided on appeal do not appear to support the beneficiary's position as depicted in the petitioner's organizational chart. For

instance, the petitioner's statement on appeal indicates that the beneficiary will ensure the coordination of the departments and workers. However, the beneficiary's position in the organizational chart does not show that she is in charge of any departments. Rather, the chart indicates that the beneficiary is one of four branch managers and shows that she directly supervises two sales representatives and one mover. There is no indication as to the amount of time the beneficiary spends or will spend overseeing these individuals or her level of involvement in their oversight. As there is no indication that these direct subordinates are themselves supervisory or professional employees, the petitioner's failure to provide the relevant information about the beneficiary's specific managerial tasks precludes the AAO from being able to determine how much of the beneficiary's time would be allocated to qualifying versus non-qualifying tasks. As noted earlier, specific information about the beneficiary's job duties is crucial for the purpose of determining the beneficiary's job capacity. *Id.* Moreover, 8 C.F.R. § 204.5(j)(5) expressly requires the petitioner to provide a description of the specific job duties the beneficiary will perform in the proposed position. Failure to provide this necessary information precludes the AAO from reaching a favorable conclusion.

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). Based on the additional ground 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.