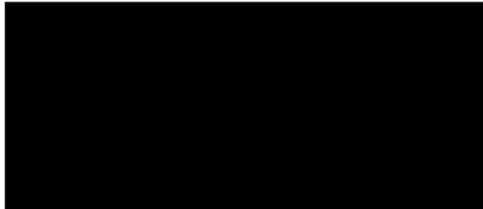


U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

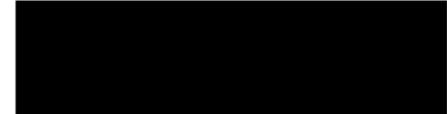


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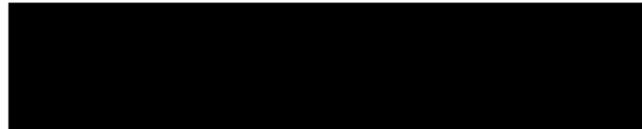
OFFICE: NEBRASKA SERVICE CENTER



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 in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** 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,

Ron Rosenberg
Acting 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 United States as its CEO and vice president of development. 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 record shows that in support of the Form I-140 the petitioner submitted a statement dated July 6, 2010. The statement was signed by [REDACTED] petitioning entity. [REDACTED] statement addressed various issues concerning the petitioner's eligibility, including the beneficiary's employment abroad as well as his proposed employment with the petitioning entity. [REDACTED] indicated that the beneficiary's foreign position included marketing and customer service elements as well as personnel management and administrative duties. With regard to the beneficiary's proposed employment, [REDACTED] stated that the beneficiary would concentrate on the company's growth, finances, personnel, and business procurement, the latter of which would require negotiating distribution agreements with suppliers and identifying new products. [REDACTED] referred to business procurement as the beneficiary's "most important duty" and further stated that the beneficiary functions at a senior management level within the petitioner's organization and manages a subordinate staff of supervisory personnel. The petitioner provided both entities' organizational charts and also submitted documentation in the form of corporate and tax documents.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a request for evidence (RFE) instructing the petitioner to provide more detailed job descriptions pertaining to the beneficiary's foreign and proposed positions, respectively. The director also asked for evidence of the petitioner's qualifying relationship with the beneficiary's foreign employer as well as tax documents, including IRS Form 1099s and Form W-2s issued by the petitioning entity.

The petitioner complied with the director's request supplementing the record with additional documentation. However, after reviewing the evidence submitted in response to the RFE, the director determined that the petitioner failed to establish that the beneficiary was employed abroad or that he would be employed by the U.S. entity in a qualifying managerial or executive capacity. Additionally, relying on the common law definition of "employee," the director determined that the beneficiary's ownership of 50% of the petitioner's issued stock precludes the beneficiary from forming the requisite employer-employee relationship with the petitioning entity. Accordingly, the director issued a decision dated August 20, 2011 denying the petition based on the three grounds of ineligibility discussed in this paragraph.

[REDACTED] on behalf of the petitioner, now appeals the denial addressing all three grounds in an appellate brief dated September 16, 2011. [REDACTED] provides evidence to resolve an inconsistency regarding the petitioner's ownership, showing that she, not the beneficiary, owns and controls the majority of the petitioner's stock. In light of this evidence, the AAO finds that the petitioner has successfully overcome one of the three grounds for denial.

With regard to the two remaining denial grounds—the beneficiary's employment capacity in his foreign employment and his proposed position with the U.S. entity—[REDACTED] provided supplemental information discussing the beneficiary's job duties and responsibilities.

Notwithstanding the petitioner's ability to overcome one of the three grounds of ineligibility, the AAO finds that [REDACTED] assertions are not persuasive in establishing that the petitioner is eligible for the immigration benefit sought. An analysis of the relevant documents is provided in the discussion below.

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.

In an effort to address the two primary issues in this proceeding—the beneficiary's employment capacity in his respective positions with the foreign and U.S. entities—the AAO will examine the record to determine whether it contains sufficient evidence to establish that 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 examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the beneficiary's proposed job duties. *See* 8 C.F.R. § 204.5(j)(5). Published case law supports the pivotal role of a clearly defined job description, deeming the actual duties themselves as the factors that determine the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The AAO also finds that it is appropriate to consider other relevant factors, including the organizational hierarchy and overall staffing of the company or companies in question, both of which would help establish who within a given entity performed or would perform the daily non-qualifying tasks.

Turning first to the beneficiary's employment with the foreign entity, the record shows two conflicting organizational charts—one submitted initially in support of the petition (and a replica of the chart that was provided in response to the RFE) and the more recent chart, which [REDACTED] submitted on appeal. The AAO notes that while the original chart shows the beneficiary occupying two managerial positions—the position of marketing manager and IT manager—where one position is subordinate to the other, no other positions are shown to be subordinate to the beneficiary. The more recent chart submitted on appeal shows that in his capacity as marketing manager, the beneficiary's position was supervisory to the IT manager position (which the beneficiary himself occupied) and the position of sales manager. This chart also indicates that the beneficiary's IT manager position was supervisory to technology providers and contractors. The latter information was not conveyed in the original organizational chart, which showed the position of sales manager at the same level within the foreign entity's organizational hierarchy as that of the beneficiary's

marketing manager position. As noted in the director's decision, the petitioner has the burden of resolving 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).

In addition to the above inconsistency, the AAO also finds that the job descriptions provided with regard to the petitioner's employment abroad were insufficient to establish that the beneficiary allocated his time primarily to the performance of tasks in a qualifying managerial or executive capacity. [REDACTED] indicated that 10% of the beneficiary's time was allocated to promoting sales of the company's products by optimizing market share, improving efficiency, and providing outstanding customer service. Aside from actually carrying out the foreign entity's marketing-related tasks, which would fall within the category of operational or non-qualifying tasks, it is unclear how the beneficiary assisted with increasing the company's market share. [REDACTED] also failed to disclose the specific tasks the beneficiary carried out in ensuring efficiency and optimal customer service and she was equally vague in stating that a total of 10% of the beneficiary's time was allocated to supervision, marketing, profitability and sales, reporting, purchasing, resale pricing, inventory, service, maintenance, and promoting team work. In other words, [REDACTED] failed to specify the beneficiary's specific role with regard to these numerous elements and she did not state what actual daily tasks the beneficiary performed. Although [REDACTED] made numerous references to the beneficiary's personnel management responsibilities, neither the beneficiary's position title nor his placement within the foreign entity's organizational hierarchy support the assertions conveyed in making these references. The AAO further finds that additional clarification is needed in order to determine that the beneficiary's role in coordinating and assisting department managers with marketing plans translated to tasks within a qualifying managerial or executive capacity.

Turning now to the beneficiary's proposed position with the U.S. entity, the AAO notes [REDACTED] claim that the beneficiary's key responsibility is business procurement, which requires the beneficiary to seek out new business and negotiate contracts with suppliers. Although the petitioner provided a percentage breakdown in response to the RFE, it is unclear how much time the beneficiary plans to spend directly providing sales- and marketing-related tasks, which are required for the purpose of obtaining new clients. Additionally, the percentage breakdown that was provided in response to the RFE indicates that the beneficiary would spend 28% of his time assisting managers and/or property managers by providing sales strategy and campaign coordination and providing instruction to front desk managers and reservation managers. As there are no reservation managers, property managers, or front desk managers included in the petitioner's organizational chart, the AAO can only assume that these various types of managers are the end users of the petitioner's technology products and the beneficiary would be directly assisting these end users. Without further clarification, the AAO cannot conclude that these tasks are within a qualifying managerial or executive capacity.

The petitioner also indicated that the beneficiary would allocate 10% of his time to providing guidance and leadership for managing customers and coordinating marketing and sales efforts. As the petitioner's organizational chart does not identify any employee who actually carries out marketing tasks, the AAO can only assume that the beneficiary performs marketing tasks to help sell the petitioner's products. The petitioner's organizational chart identifies the beneficiary as "Sales CA" and names six individuals (who are seemingly assigned to sell the petitioner's products in various locations in California) alongside the beneficiary. The job description does not clarify what relationship the beneficiary has with these six individuals, how the beneficiary's "Sales CA" position compares to the individuals assigned to the same

positions in Florida, Texas, Illinois, and Pennsylvania, or the nature of the beneficiary's specific role in relation to the sales function.

As sales- and marketing-related tasks would be deemed non-qualifying, it is critical for the petitioner to provide clarification for the above uncertainties and to establish what portion of the beneficiary's time would be allocated to tasks that are qualifying versus those that are not. While the AAO acknowledges that no beneficiary is required to allocate 100% of his or 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 the 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). The job description does not contain sufficient information to allow the AAO to affirmatively conclude that the primary portion of the beneficiary's time would be allocated to tasks within a qualifying managerial or executive capacity.

While the AAO has examined the petitioner's organizational chart, the record does not contain sufficient supporting evidence to establish that the individuals named in the chart, particularly the numerous sales people (whom the petitioner presumably hires on a contractual or commission basis) are actually performing sales services as claimed. The AAO notes that the petitioner provided only four IRS Form 1099s for 2010 and of those four, one Form 1099 was issued to a tax servicing company, and the individuals to whom the three remaining Form 1099s were issued were not named anywhere in the petitioner's organizational chart. In light of the submitted documentation, the AAO is unable to determine just whom the petitioner actually employed at the time of filing the petition. Given the lack of clarity in the beneficiary's job description and the further lack of information with regard to the petitioner's staffing at the time of filing the petition, the AAO is unable to conclude that the petitioner was able to relieve the beneficiary from having to allocate his time primarily to the performance of non-qualifying tasks.

In summary, the record does not contain sufficient evidence demonstrating that the beneficiary was employed abroad in a qualifying managerial or executive capacity or that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. Accordingly, the petition cannot be approved.

Additionally, while not previously addressed in the director's decision, the AAO finds that the petitioner failed to provide sufficient evidence to demonstrate that a qualifying relationship exists between the petitioner and the beneficiary's foreign employer.

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 (Assoc. Comm. 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.

The petitioner has provided sufficient evidence to demonstrate that [REDACTED], the beneficiary's spouse, is the majority owner of the petitioning entity. However, the evidence submitted to show ownership of the foreign entity is not sufficient. Specifically, while the petitioner provided a foreign document and its English translation showing that the beneficiary was named general manager of the foreign entity, the document is silent as to the ownership of that entity. The AAO cannot assume that management of the foreign entity is synonymous with ownership of that entity. Therefore, the AAO cannot conclude that the petitioner and the beneficiary's foreign employer are commonly owned by [REDACTED]. 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)).

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 ground of ineligibility discussed above, the petition cannot be approved.

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.