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

[redacted]

DATE: DEC 2 6 2012 OFFICE: TEXAS SERVICE CENTER FILE: [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:

[redacted]

INSTRUCTIONS:

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

If you believe the AAO inappropriately applied the law in reaching its 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 motion 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 any motion to 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, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Texas entity that seeks to employ the beneficiary as its president and general 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.

In support of the Form I-140 the petitioner submitted a statement dated April 29, 2004, which contained relevant information pertaining to the petitioner's eligibility, including an overview of the petitioner's business and a brief description of the beneficiary's proposed employment with the U.S. entity. The petitioner also provided the petitioner's certificate of organization and articles of organization, the petitioner's organizational chart listing the position titles that comprise the petitioning organization, quarterly and annual tax documents, a copy of the petitioner's lease, and photographs of the leased premises.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued two requests for evidence (RFE)—one issued on August 12, 2005 and the other on January 13, 2010. In the first RFE, the director instructed the petitioner to provide, in part, a detailed description of the beneficiary's proposed employment, including supplemental job descriptions listing the beneficiary's job duties in her foreign and proposed employment as well as evidence demonstrating the existence of a qualifying relationship between the beneficiary's foreign and proposed employment.

The petitioner's response included a statement from counsel dated November 10, 2005 in which counsel provided a percentage breakdown listing the beneficiary's duties and general job responsibilities in her respective positions with the foreign and U.S. entities. The petitioner also provided both entities' organizational charts and quarterly employer's reports for the petitioning entity identifying five employees during the time period the petition was filed.

In the subsequent RFE, the director once again addressed the above three issues, instructing the petitioner to submit evidence of the foreign entity's purchase of the petitioner's stock and detailed job descriptions listing the beneficiary's individual job duties in her foreign and proposed positions and the amount of time the beneficiary allocated and would allocate to each task. The director also asked the petitioner to provide the names, job duties, and educational levels of the beneficiary's subordinates in her respective positions with both entities.

The petitioner's response included an undated statement from counsel in which counsel referred to the petitioner as a wholly owned subsidiary of the beneficiary's claimed foreign employer. Counsel referred to the petitioner's stock certificate, articles of organization, and the foreign entity's partnership deed as evidence of the petitioner's qualifying relationship with the beneficiary's foreign employer. The petitioner did not provide the requested evidence showing that the foreign entity paid for its claimed ownership of the petitioner's stock.

With regard to the beneficiary's employment abroad, counsel stated that the beneficiary worked as a managing director for Om Trading and provided the same percentage breakdown that was previously incorporated in the statement counsel submitted earlier in response to the first RFE.

In response to the director's request for evidence pertaining to the beneficiary's proposed position, counsel provided background information about the convenience store industry, which was accompanied by generalized job duties and a percentage breakdown which showed time constraints assigned to each of six categories—management decisions, company representation, financial decisions, supervision of day-to-day functions, business negotiations, and organizational development.

After reviewing the record, the director determined that the petitioner failed to establish that the beneficiary was employed abroad and would be employed in her proposed position with the U.S. entity in a qualifying managerial or executive capacity. The director questions the petitioner's reference to as the beneficiary's foreign employer, noting that the petitioner has not provided evidence showing that is in any way related to the petitioner or the foreign entity that is claimed to be the petitioner's owner. The director therefore issued a decision dated March 30, 2010 denying the petition.

On appeal, counsel submits a brief disputing the director's adverse findings and asks the AAO to consider additional business documents pertaining to the foreign entity. Although counsel generally acknowledges the regulatory provision requiring the petitioner to demonstrate the beneficiary's qualifying employment abroad, counsel does not actually address this issue or attempt to overcome the director's adverse conclusion regarding this issue. Counsel also fails to acknowledge or address the questionable reference to as the beneficiary's employer abroad, which contradicts the claim that was the beneficiary's foreign employer and leaves open the possibility that the beneficiary's foreign employer and her proposed employer in the United States do not have a qualifying relationship. 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).

In light of counsel's failure to address the beneficiary's employment abroad on appeal, the AAO finds that the petitioner has failed to overcome the director's adverse conclusion—that the petitioner failed to provide sufficient evidence showing that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

With regard to the beneficiary's proposed employment with the U.S. entity, counsel restates much of the information that he has provided thus far, referring to the beneficiary as leader of "the senior management team" with discretionary authority over hiring and firing personnel, setting budgets "within the firm," establishing goals and policies, and supervising other professional and managerial employees.

After considering the counsel's appellate brief, the AAO finds that counsel's assertions are questionable, unpersuasive, and overall insufficient to establish eligibility. As counsel has not provided any statements on appeal to address the adverse finding concerning the beneficiary's employment abroad, the AAO's discussion below will focus on the beneficiary's proposed employment with the U.S. petitioner.

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.

As noted above, the remaining issue to be addressed in this discussion is the beneficiary's employment capacity in her proposed position with the petitioning U.S. entity. Specifically, the AAO will examine the record to determine whether the petitioner submitted sufficient evidence to establish that it would employ the beneficiary 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). The AAO will then consider this information in light of other relevant factors, such as the petitioner's organizational hierarchy, the beneficiary's position therein, and the petitioner's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks.

The petitioner failed to provide an adequate description of the beneficiary's proposed employment within the context of the petitioner's convenience store business, which consists of one retail location outfitted with a staff of five employees at the time of filing the petition. Although counsel has offered job descriptions that focus on the beneficiary's discretionary authority and placement within the petitioning entity, several of his assertions are questionable and seemingly overlook the nature and scope of the petitioner's business operation. For instance, on appeal, counsel refers to the petitioner as a firm and states that the beneficiary "funds projects that support strategy." However, referring to the gas station/convenience store operation as a firm is misleading and implies that the petitioning company has a more complex organization and staffing structure than the one actually in place at the time of filing the petition. Counsel's statements also fail to include what is meant by funding projects or what specific strategies the beneficiary considers.

Although counsel also asserts that the beneficiary is responsible for business expansion, the record contains no evidence that the petitioner has experienced any expansion in terms of its work force or scope of operations since it commenced doing business prior to the filing of the petition. Similarly, counsel provided no information to establish what role the beneficiary plays in marketing the petitioner's business, thus failing to rule out the possibility that the beneficiary would directly perform marketing-related tasks, particularly in light of the fact that none of the petitioner's other employees were actually assigned any marketing tasks.

Next, the AAO finds that counsel's claim that the beneficiary "works with the management heads to ensure proper execution of services" lacks credibility, as there is no evidence that the petitioner actually employs "management heads" within its organization. As previously stated, the AAO cannot simply consider counsel's statements outside the context of the petitioner's actual business operation. The petitioner's business operation consists of a gas station and convenience store. Despite the managerial and supervisory position titles included in the petitioner's organizational chart, the job descriptions that accompanied the chart indicated that the petitioner employed two alternating managers who were overseeing and assisting the work

of a cashier. Suggesting that any of these individuals are management heads or are part of a "management team" is a distortion of the actual facts as presented in the job descriptions and employer's quarterly report, which indicates that the petitioner employed no more than five individuals, including the beneficiary, at the time the petition was filed.

While counsel also indicates that the beneficiary will develop and implement business policies and promote sales, he has not actually explained which duties the beneficiary would perform on a daily basis in order to successfully meet these broad job responsibilities. Similarly, counsel states that the beneficiary will meet with "appropriate officials," negotiate service agreements, make presentations of services to company heads, and direct the completion of the services. The AAO finds that these assertions lack credibility and are generally inapplicable within the scope of a gas station/convenience store where the petitioner's primary objective is to sell gas and goods typically found in a convenience store. It is unclear which "officials" the beneficiary would need to meet, why the beneficiary would need to make presentations about selling gas and convenience store goods, and who would be the intended audience during these alleged presentations. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Finally, counsel's frequent use of male pronouns when referencing the beneficiary further indicates the questionable validity of his statements, as the beneficiary is a female. While this single anomaly would not normally lead the AAO to question the validity of counsel's claims, when this type of discrepancy is considered in light of the questionable assertions put forth by counsel in his brief and in his earlier responses to the director's RFEs, the AAO finds that this error serves as yet another indicator that counsel's statements are unreliable and that the intended purpose of such statements is likely to provide information that is so general that it may be applied to a variety of business types. Where the primary objective of U.S. Citizenship and Immigration Services is to gain a meaningful understanding of the scope of the petitioner's business and the beneficiary's role therein, counsel's broad statements, which do not specifically apply to the petitioning entity, fail to achieve the desired goal.

In summary, the AAO finds that the petitioner has failed to establish that the beneficiary was employed abroad or that she would be employed in the United States in a managerial or executive capacity and on the basis of these two findings this petition must be denied.

Additionally, while not previously addressed in the director's decision, the AAO finds that the petitioner has also failed to establish that it has a qualifying relationship with the beneficiary's employer abroad pursuant to 8 C.F.R. § 204.5(j)(3)(i)(C). 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;

* * *

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.

First, the AAO points out that the petitioner failed to reconcile the inconsistency between the petitioner's original claim—that the beneficiary's employer abroad was [redacted]—and counsel's more recent reference to Om Trading as the beneficiary's foreign employer. If [redacted] was in fact the beneficiary's employer abroad, the burden is on the petitioner to establish that it has either a parent-subsidiary or an affiliate relationship with that entity. However, as counsel failed to address this inconsistency on appeal, the question concerning the identity of the beneficiary's employer abroad remains unresolved.

Second, even if the above inconsistency were resolved, the record shows that the petitioner failed to provide evidence showing that [redacted] paid for its alleged ownership of the petitioner. The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 204.5(j)(3)(ii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As previously noted, the director requested evidence of this nature in one of the earlier RFEs, instructing the petitioner to provide documentation of monies, property, or other consideration furnished to the petitioner in exchange for stock ownership. In light of the petitioner's failure to provide this previously requested evidence, the AAO finds that the petitioner has failed to establish the requisite qualifying relationship with the beneficiary's foreign employer and on the basis of this additional finding the instant petition does not warrant approval.

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). Accordingly, based on the additional ground of ineligibility discussed above, this 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.