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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**



B4

DATE: **JUN 08 2012**

OFFICE: TEXAS SERVICE CENTER



IN RE:



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:



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 with the field office or service center that originally decided your case by filing a 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,

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 Texas entity that seeks to employ the beneficiary as its president/director. 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 the following: 1) two bank statements; 2) an assumed name certificate filed by two partners in a general partnership (of which the beneficiary was named as one partner) seeking to use [REDACTED] as the assumed name; 3) a dealer's surety bond document dated January 29, 2004 issued to [REDACTED]; 4) a retail license issued to [REDACTED] on March 18, 2004; and 5) a statement, dated April 21, 2003, from [REDACTED] authorizing the sublease of the property located at [REDACTED], the address that was identified on the Form I-140 as the location where the beneficiary's proposed employment would take place.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a request for additional evidence (RFE) dated February 22, 2005 informing the petitioner of various evidentiary deficiencies. The director instructed the petitioner to provide corporate, tax, and business documents, as well as information pertaining to the beneficiary's foreign and proposed employment. The director also asked the petitioner to include all four 2004 quarterly wage reports in its response to the RFE.

In response, the petitioner provided a statement dated May 19, 2005 listing the documents that were requested in the RFE and an unsigned statement dated May 15, 2005 on the foreign entity's letterhead with the beneficiary's name printed at the signature line. The statement listed the petitioner's employees, claiming seven total, and provided the petitioner's organizational chart, showing a sales and marketing manager, a procurement manager, and an office manager as the beneficiary's direct subordinates. The petitioner also provided an assumed name filing certificate dated March 7, 2005 showing that the petitioner would be doing business as [REDACTED]. Although the beneficiary, in the statement that was written on the foreign entity's letterhead, stated that a description of the proposed employment were provided within, the only information the beneficiary provided regarding the proposed employment was to state that he has been assigned the position of president of the petitioning entity, which will require him to assume the responsibilities of conception, planning, financing, and execution of all business activities. The petitioner did not provide a list of the beneficiary's job duties, the time each duty would consume, or the job descriptions of the beneficiary's subordinates. The petitioner also failed to provide the requested quarterly tax returns for 2004.

The petitioner did, however, provide a copy of its organizational chart listing a total of seven employees, three of whom—an office manager, a procurement manager, and a marketing and sales manager—were depicted as the beneficiary's three direct subordinates. It is noted that in the May 15, 2005 statement the beneficiary referred to a [REDACTED] claiming that seven employees, including the beneficiary himself, report to this individual. However, the petitioner's organizational chart did not include a [REDACTED] as part of the petitioner's organizational hierarchy. Rather, [REDACTED] is depicted in the foreign entity's organizational chart as chairman of that entity.

The petitioner's response also included two assumed name documents. One document was the petitioner's own certificate, showing that commencing on March 7, 2005, the petitioner was authorized to use the name "[REDACTED]." The other document applied to the general partnership in which the beneficiary was named as one of the partners. The latter document indicated that commencing on January 15, 2003 the general partnership was authorized to do business as (DBA) "[REDACTED]" and that the business was located at [REDACTED], Dallas, Texas. The petitioner provided the general partnership's Texas sales tax return, signed on March 17, 2005, showing that the partnership continued to exist and do business under its DBA name, even after the petitioner was authorized to operate under an almost identical name. The AAO points out again that the DBA document that pertains to the partnership shows the same business address as the one shown on the Form I-140 as the address where the beneficiary would assume his proposed position with the petitioning entity. It therefore appears that the general partnership and the petitioning entity, which have not been established as being one and the same, operated at the same property address.

After reviewing the record, the director concluded that the petitioner failed to establish eligibility and issued a decision dated August 17, 2009 denying the petition. The director determined that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity or that the petitioner itself has been doing business in the United States and submitted inconsistent and unreliable evidence to support its claims. The director stated that U.S. Citizenship and Immigration Services (USCIS) contacted one of the individuals who was named on the petitioner's organizational chart as an employee and that the individual denied having ever been employed by the petitioner. The director also concluded that the petitioner failed to establish that it is currently doing business in the United States.

On appeal, counsel submits a brief addressing the director's concerns. Counsel disputes the grounds for denial and offers additional supporting evidence to resolve certain inconsistencies.

The AAO finds that neither counsel's assertions nor the additional documents provided are persuasive in overcoming the director's decision. It is noted that the petitioner's submissions have been reviewed and will be addressed 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.

First, the AAO will address the issue of the beneficiary's employment capacity in his 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.

As a preliminary matter, the AAO notes that the record contains numerous documents pertaining to a general partnership ( [REDACTED] ) in which the beneficiary was named as one of two partners. These documents are not probative, as they do not pertain to the petitioning entity or the beneficiary's proposed position therein. Therefore, unless those documents that pertain to the partnership directly affect the matter of the beneficiary's proposed employment or the petitioner's eligibility, they will be deemed irrelevant and thus will not be addressed.

The AAO will, however, review the description of the proposed employment as a primary basis for determining whether the beneficiary would be employed in an executive or managerial capacity. See 8 C.F.R. § 204.5(j)(5). Published case law clearly supports the pivotal role of a detailed 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); see also 8 C.F.R. § 204.5(j)(5). The AAO will then consider the list of proposed job duties in light of 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 of the business.

The petitioner failed to provide relevant and critical evidence that directly pertains to the beneficiary's proposed employment, despite the director's express request in the RFE. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The supplemental information that counsel offers on appeal is not sufficient in light of the petitioner's failure to comply with the director's prior RFE request. 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). Moreover, as the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated, the AAO will not consider the newly offered statements for any purpose. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533. The appeal will be adjudicated based on the record of proceeding before the director.

While counsel is correct in pointing out that the petitioner's eligibility cannot hinge on the size of the petitioning organization, 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)). While the petitioner's organizational chart and supporting statements may indicate that the beneficiary would assume the top-most position within the petitioning entity's organization, this information,

without further supporting documentary evidence, is insufficient to establish that the proposed employment would consist primarily of managerial- or executive-level tasks. The fact that an individual manages a small business does not necessarily establish that the employment fits the definition of managerial or executive capacity within the meaning of section 101(a)(44) of the Act.

The petitioner has provided no supporting evidence to corroborate the organizational hierarchy that was illustrated in the organizational chart. As noted previously, the petitioner failed to provide the requested quarterly tax returns for 2004, which would have clarified the staffing the petitioner had in place at the time of filing the petition. 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)).

One of the documents that the petitioner submitted on appeal to explain and reconcile a previously noted inconsistency dealing with the alleged employment of [REDACTED] is not credible. Specifically, in an affidavit dated September 13, 2009, [REDACTED] indicated that he worked for the petitioner on a commission basis for a period of nine months in 2004 but that he did not earn any commission. In reviewing the organizational chart that the petitioner provided in response to the RFE, it is noted that one of the employees—an outdoor salesman—was expressly identified as a commission-based employee. The AAO notes that the petitioner did not similarly identify [REDACTED] the alleged procurement manager, as being a commission-based employee. In fact, [REDACTED] was depicted as a manager with one subordinate employee, thus leading to the logical conclusion that [REDACTED] position was not one of sales, but rather, that the position was supervisory to some extent. The claim that [REDACTED] performed tasks that would justify a commission-only form of compensation is simply not supported by the organizational chart, particularly when the chart identified three other sales-related employees, only one of whom was purportedly compensated on a commission-basis. If [REDACTED] was to be compensated on a commission basis, it is unclear why the petitioner failed to clarify this information on the organizational chart as was done with one of the outdoor sales associates.

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). If USCIS does not believe that a fact stated in the petition is true, it may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The petitioner has failed to provide requested evidence and information that pertains to the beneficiary's qualifying employment with the U.S. entity, what specific tasks the beneficiary would perform on a daily basis, and whether the petitioner was adequately staffed to employ the beneficiary in a position where he would focus the primary portion of his time on the performance of qualifying tasks within a managerial or executive capacity. The petitioner has also provided evidence on appeal that further undermines the validity of the claims being made with regard to the organizational structure that was in place at the time the Form I-140 was filed. The petitioner has provided documents that indicate that the beneficiary may have been involved in two seemingly distinct enterprises—one a general partnership and the other the limited liability company that has filed the instant petition—both of which appear to operate at the same location—2105 Royal Lane—without a credible explanation to clarify the information that has been presented. In light of the

deficiencies and anomalies that have addressed in this discussion, the AAO finds that the petitioner's claims regarding the beneficiary's proposed employment are not credible and are unsupported by the evidence of record. The AAO concludes that the petitioner has failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. On the basis of this initial conclusion, the instant petition cannot be approved.

The next issue to be addressed in this proceeding is whether the petitioner submitted sufficient evidence to establish that it is doing business in the United States. The regulation at 8 C.F.R. § 204.5(j)(2) defines doing business as the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

The petitioner has failed to provide evidence to establish that it, rather than the general partnership in which the beneficiary is a partner, is doing business. Instead, the petitioner has provided numerous documents, including lease agreements, dealer's surety bond paperwork, inventory statements, sales tax returns, and title applications all of which pertain to [REDACTED], the partnership, keeping in mind that the petitioner was authorized to do business as [REDACTED]. While some of the partnership's documents refer to the partnership as [REDACTED] this was clearly done in error and without authorization to use this name, as the documents in question predate the petitioner's assumed name certificate, which clearly shows that an entity by the name of "[REDACTED]" could not have existed prior to March 7, 2005, when the petitioner filed the assumed name certificate.

Furthermore, while the AAO acknowledges the petitioner's submission of federal tax returns for 2005, 2006, 2007, and 2008, all four returns show that the petitioner was doing business as International Marketing Services and the Schedule K of all four returns shows that the petitioner was in the business of providing marketing services. This is entirely inconsistent with counsel's statements on appeal, the Form I-140 itself, and with other documents on record. As previously noted the burden is on 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. at 591-92.

In light of the considerable deficiencies noted above, the AAO concludes that the petitioner has failed to provide evidence showing that it has been and continues to do business in the United States. On the basis of this second ground for denial, the petition cannot be approved.

Lastly, the AAO finds that the record contains other deficiencies that were not previously addressed in the director's decision.

First, the AAO finds that the petitioner has not submitted sufficient evidence and information pertaining to the beneficiary's employment abroad. As such, the petitioner has failed to show that it meets the requirement at 8 C.F.R. § 204.5(j)(3)(i)(B), which states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to his entry to the United States as a nonimmigrant to work for the same employer.

Second, 8 C.F.R. § 204.5(j)(3)(i)(C) states that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer. Although the petitioner claims to be the subsidiary of the parent entity where the beneficiary claims to have been employed, the only evidence the petitioner

provided to corroborate this claim is a single undated stock certificate, which purports to show that the foreign entity was issued 1,000 out of a possible 50,000 shares of the petitioner's stock at some unspecified time. The petitioner has not provided other evidence, such as a stock ledger, to show that no one but the foreign entity was issued any of the petitioner's stock. As such, the AAO cannot conclude that the petitioner is a subsidiary of the beneficiary's foreign employer as claimed.

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 grounds 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.