

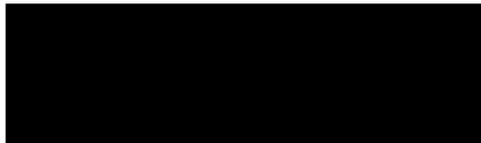
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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave. N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

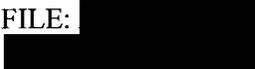
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B4

DATE: MAR 15 2012

OFFICE: NEBRASKA SERVICE CENTER

FILE: 

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:



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 Delaware corporation that seeks to employ the beneficiary as its director of business 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.

### I. Procedural History

The petition was filed on April 9, 2009 along with supporting documents, including a statement dated March 31, 2009, which offered relevant information pertaining to the petitioner's corporate relationship with the beneficiary's foreign employer as well as job descriptions regarding the beneficiary's foreign and proposed employment. The supporting evidence also included corporate and financial documents pertaining to both entities as well as each entity's organizational chart depicting the respective staffing hierarchies and the beneficiary's placement therein.

After reviewing the petitioner's submissions, the director determined that the petition did not warrant approval and therefore issued a request for additional evidence (RFE) dated September 4, 2009 instructing the petitioner to provide organizational charts depicting the staffing hierarchies of the beneficiary's foreign and U.S. employers. The director also asked the petitioner to provide more detailed descriptions of the beneficiary's foreign and proposed positions, listing the beneficiary's specific daily job duties and the percentage of time the beneficiary allocated and would allocate to each task.

The petitioner responded to the RFE by providing an October 12, 2009 statement from counsel, which included the requested job descriptions, and the requested organizational charts.

The director reviewed the submitted evidence and determined that the beneficiary's proposed job description indicated that the beneficiary would allocate the primary portion of his time to performing non-qualifying tasks. Based on this finding, the director concluded that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity and therefore issued a decision dated February 25, 2010 denying the petition.

On March 25, 2010, the petitioner filed a Form I-290B appealing the director's decision. Counsel subsequently submitted an appellate brief and supporting evidence in an effort to overcome the basis for the adverse decision. Counsel asserts that the director's decision was erroneous, contending that the beneficiary spends the majority of his time planning, directing, and coordinating operational activities at the highest managerial level. Counsel objects to the director's likening the beneficiary's proposed position to that of a sales associate and asserts that the position is more similar to that of a sales manager.

The AAO has reviewed the record in its entirety and finds that counsel's arguments are not persuasive in overcoming the basis for denial. All relevant documentation that pertains directly to the key issue in this matter will be fully addressed in the discussion below.

### II. The Law

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.

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.

### III. Legal Analysis

The primary issue to be addressed in this proceeding is 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 supporting evidence establishes that the petitioner would employ the beneficiary in the United States in a qualifying managerial or executive capacity.

In examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The goal is to elicit a detailed description of the beneficiary's daily job duties, 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). While the AAO acknowledges that the statutory definitions do not require the beneficiary to allocate 100% of his or her time to managerial- or executive-level tasks, in order to meet the statutory requirements, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position and thus would not consume the primary portion of the beneficiary's time. 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 provided in response to the RFE is replete with operational tasks that are directly related to the sale of the petitioner's services. Specifically, counsel stated that the beneficiary has been and would continue to be responsible for the following: conducting market research and assessing the customers' needs, traveling to meet with customers, seeking out business partners, negotiating contracts, identifying prospective customers and developing sales leads, approaching potential customers and serving as their main point of contact, maintaining relationships with existing clients, preparing sales and budget reports, representing the

company at trade shows to attract prospective customers, and communicating with customers and providing them with information about the services the petitioner offers.

Although counsel pointed out that the beneficiary is autonomous in his position and has discretionary decision-making authority, both of which are necessary components of either managerial or executive capacity, the job duties catalogued above can only be characterized as those necessary to provide services that are offered to the petitioner's clientele. Counsel's additional statements on appeal, which paraphrase the previously provided job description, establish that the beneficiary is an essential employee who plays a key role within the organization. The fact that the beneficiary performs essential services, however, does not preclude a finding that the primary portion of the beneficiary's time would be spent performing non-qualifying, operational tasks.

Counsel's attempt to distinguish the beneficiary's "complex" position from the position of a sales representative or a sales associate, whose job duties he characterizes as more basic sales, is not persuasive in light of the operational nature of the job duties the beneficiary would in fact perform. Even if the AAO finds that the beneficiary's tasks are more complex than those that would normally be assigned to a sales representative or sales associate, the level of complexity of the beneficiary's tasks does not establish that those tasks are of a managerial or executive nature. Regardless of the level of complexity or the professional nature of the beneficiary's tasks in his proposed position, it appears that the primary portion of the beneficiary's time would be allocated to tasks that the director properly deemed as non-qualifying.

The AAO finds that the petitioner has failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. For this reason, the instant petition cannot be approved.

Additionally, while not previously addressed in the director's decision, the AAO finds that the record lacks evidence to establish that: (1) the beneficiary was employed abroad in a qualifying managerial or executive capacity; and (2) that the petitioner and the beneficiary's foreign employer have a qualifying relationship.

With regard to the beneficiary's employment abroad, the record shows that counsel failed to comply with the director's request for a more detailed description of the beneficiary's specific job duties. Although a job description was provided in the petitioner's initial support statement dated March 31, 2009, the description lacked sufficient information pertaining to the beneficiary's specific job duties. 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). As the record in the present matter lacks crucial information specifying the beneficiary's job duties during his employment with the foreign entity, the AAO cannot conclude that the beneficiary was employed abroad in a qualifying managerial or executive capacity pursuant to 8 C.F.R. § 204.5(j)(3)(i)(B).

Lastly, with regard to the issue of a qualifying relationship, 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 (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 petitioner stated in its original support statement that the beneficiary's foreign employer— [REDACTED] —is owned by [REDACTED] [REDACTED] which in turn is partly owned by [REDACTED] who the petitioner claimed to be its sole owner. However, the record does not contain sufficient evidence of either entity's ownership.

While the petitioner provided the minutes of a meeting that took place on August 7, 2002 wherein reference was made to a proposal and acceptance of the proposal for the purchase of the petitioner's shares, neither the proposal nor a stock certificate showing the transfer of shares to the beneficiary was provided in support of the reference to the sale of shares. With regard to ownership of the beneficiary's foreign employer, while the petitioner provided evidence to show that [REDACTED] is part owner of the holding company, no evidence was provided to establish that the holding company has an ownership interest in the foreign employer. 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)).

The petitioner has not provided sufficient evidence to corroborate the assertions made with regard to the claimed affiliate relationship between the petitioner and the beneficiary's foreign employer and therefore does not meet the regulatory requirement cited at 8 C.F.R. § 204.5(j)(3)(i)(C).

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 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.