

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: NOV 23 2012

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:

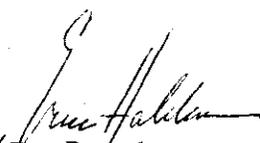


INSTRUCTIONS:

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 as its managing 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, counsel submitted a statement dated June 4, 2010, which contained information pertaining to the petitioner's eligibility, including an overview of the petitioner's business, the business of the beneficiary's foreign employer, and descriptions of the beneficiary's foreign and proposed employment. The petitioner also provided supporting evidence in the form of financial and corporate documents pertaining to the petitioner and the foreign entity.

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) dated July 29, 2010 informing the petitioner of various evidentiary deficiencies. The director instructed the petitioner to provide, in part, supplemental documents describing the beneficiary's proposed position with the U.S. entity in much greater detail, listing the beneficiary's specific daily tasks and the percentage of time the beneficiary would devote to each listed item. The petitioner was also instructed to provide a copy of its organizational chart reflecting its staffing at the time the Form I-140 was filed.

The petitioner's response included another statement from counsel, who stated that the beneficiary's duties "were detailed in the original submission." Counsel described the petitioner's business purpose and added that the beneficiary would not be responsible for providing engineering design or construction management services, but rather that he would direct a professional staff comprised of architects, civil and structural engineers, and project engineers who would carry out the petitioner's daily operational tasks. Counsel further stated that the project engineers will manage the projects and oversee construction. It is noted that the petitioner did not comply with the director's request for a list of the beneficiary's specific day-to-day tasks and their respective time allocations. 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 petitioner did, however, provide a copy of its organizational chart and a 2010 first quarterly wage report, which identified four paid employees—a financial controller, a construction manager, a general coordinator, and a structural engineer. Although the chart also included positions for an architectural designer and an unpaid civil engineering intern, there were no specific individuals identified as holding these positions and none of the evidence submitted was sufficient to establish that either position was filled.

After reviewing the record, the director concluded that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying capacity and therefore issued a decision dated May 19, 2011 denying the petition.

On appeal, counsel disputes the director's conclusion, contending that the evidence does not establish that the preponderance of the beneficiary's duties would be of a non-qualifying nature. Counsel focuses on the beneficiary's experience in having successfully established a similar company in Turkey. Counsel also

asserts that the petitioner's daily operational tasks would be carried out by subordinate personnel, not by the beneficiary. He further states that the beneficiary's subordinate staff would consist of professional personnel.

The AAO finds that counsel's assertions are unpersuasive and are therefore insufficient to overcome the director's decision. The discussion below will provide an analysis of the relevant documentation and will explain the underlying reasoning for the AAO's decision.

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 primary issue in this proceeding calls for an analysis of the beneficiary's employment capacity in his proposed position with the U.S. entity. Specifically, the AAO will examine the record to determine whether the petitioner submitted sufficient evidence to establish that the beneficiary 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 and often necessary to consider other relevant factors, such as an entity's organizational hierarchy and its overall staffing. Proper consideration of these factors often provides clarifying information as to who performs the daily operational tasks within a given entity and how that entity is able to relieve the beneficiary from having to focus the primary portion of his time on the performance of non-qualifying operational tasks.

Applying the above analysis to the beneficiary's position, the AAO finds that the petitioner has failed to establish that the beneficiary's proposed employment with the U.S. entity would be comprised primarily of tasks within a qualifying managerial or executive capacity.

Turning first to the beneficiary's job description, as previously noted, the petitioner failed to provide the requested information in response to the RFE and instead asked the director to refer back to information which the petitioner had previously provided and which the director had already established to be insufficient for the purpose of conveying a meaningful understanding of the actual tasks the beneficiary would perform on a daily basis. Furthermore, repeated references to the job duties the beneficiary currently performs for the foreign entity is insufficient, as such assertions lack probative value in terms of establishing the nature of the beneficiary's proposed employment with the U.S. petitioner, whose organizational hierarchy is considerably less complex than that of the foreign entity.

Additionally, in reviewing the initial job description provided, the AAO notes that a number of the job duties that would be part of the beneficiary's U.S. job assignment are more akin to operational tasks, which are necessary to provide services and thus could not be deemed as being within a qualifying managerial or executive capacity. For instance, counsel indicated in his June 4, 2010 support statement that the beneficiary would be responsible for finding appropriate projects, conducting due diligence to ensure that the projects will be profitable, developing business relationships with suppliers and contractors, addressing unforeseen problems during the course of project development, and maintaining client relationships throughout the duration of ongoing projects. While it is true 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).

In light of the above, the AAO finds that the director's request for a percentage breakdown and the beneficiary's list of job duties was a reasonable means of addressing a key issue in this matter. While the AAO has referred to the proposed job description counsel provided in his original support letter, the requested time allocations for the listed tasks were not included in that description, nor were they included among any of the documents the petitioner submitted in response to the RFE. Without this critical information establishing how much time the beneficiary would allocate to the performance of non-qualifying tasks, the AAO cannot conclude with any degree of certainty that the beneficiary would allocate his time primarily to the performance of tasks within a qualifying managerial or executive capacity.

Finally, the AAO finds that it cannot determine whether the organizational composition at the time of filing was sufficient to support the beneficiary within a qualifying managerial or executive capacity. While the record indicates that the individuals the petitioner employed directly prior to the filing of the petition were professional, thus indicating that any time the beneficiary would spend overseeing their work would be considered as time spent performing tasks within a qualifying capacity, the evidence of record does not establish that the petitioning entity had attained a level of organizational complexity such that the beneficiary would be relieved from having to allocate his time primarily to the performance of non-qualifying tasks. Counsel's repeated references to the relatively complex organizational composition of the foreign entity and the beneficiary's placement therein is insufficient to establish that the beneficiary's job duties and his role within the petitioner's considerably less complex organizational hierarchy would be similar to the duties the beneficiary performed and the role he assumed during his employment abroad.

In summary, the AAO finds that the petitioner has failed to provide sufficient evidence and information in order to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. Therefore, on the basis of this conclusion, the instant petition cannot be approved.

Additionally, while not previously addressed in the director's decision, the record contains inconsistent documentation with regard to the petitioner's ownership, thus indicating that the petitioner has not established that a qualifying relationship exists between it and the beneficiary's employer abroad.

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 that the two entities are 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.

The regulations 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 (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.

In the present matter, the petitioner has indicated that it has an affiliate relationship with the foreign entity by virtue of both entities being majority owned and controlled by the beneficiary. However, in reviewing schedule K-1 of the petitioner's 2008 and 2009 IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, [REDACTED] whom the petitioner's organizational chart identified as the general coordinator,

was named as 100% owner of the petitioner's stock. 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). As the petitioner's stock certificate is entirely at odds with the information provided by the petitioner in its corporate tax returns, the AAO cannot conclude that the petitioner provided sufficient evidence to establish the existence of a qualifying relationship.

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 for ineligibility that was discussed in the paragraph above, the instant 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.