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

[redacted]

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DATE: OCT 1 1 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 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,

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 Florida corporation that seeks to employ the beneficiary as its 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 October 15, 2008, which contained relevant information pertaining to the petitioner's eligibility, including an overview of the beneficiary's proposed employment, an organizational chart, and a list of supporting documents that were being submitted with the petition. The supporting evidence included bank, tax, and other business documents pertaining to the petitioner and the beneficiary's foreign employer.

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 December 8, 2009 instructing the petitioner to provide evidence and/or information pertaining to various eligibility requirements, including the petitioner's qualifying relationship with the beneficiary's foreign employer and the beneficiary's managerial or executive employment capacity in his proposed position with the petitioning entity.

The petitioner provided a response, which included a list of the beneficiary's responsibilities in his proposed position and brief job descriptions pertaining to the petitioner's other employees. Other submissions included the 2009 IRS Form W-2 statements issued to the petitioner's employees, the petitioner's 2008 tax return, the foreign entity's translated tax return for 2008, translated bank statements for September and October 2009, and translated business invoices for various dates in August, September, October, and November 2009.

After reviewing the record, the director concluded that the petitioner failed to meet certain eligibility criteria. First, the director determined that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The director found that the petitioner provided a deficient job description which lacked details about the beneficiary's daily tasks and further noted that the petitioner's limited support personnel would be unable to relieve the beneficiary from having to allocate his time primarily to the performance of non-qualifying tasks. Second, the director concluded that the record contains conflicting documentation pertaining to the petitioner's ownership and that as a result it cannot be concluded that the petitioner has a qualifying relationship with the beneficiary's former employer abroad. The director therefore issued a decision dated February 17, 2010 denying the petition.

On appeal, counsel submits a brief asserting that the petitioner is not ineligible and offering an explanation for the petitioner's submission of inconsistent documents pertaining to its ownership. With regard to the beneficiary's proposed employment, counsel states that the director erroneously focused on the size of the petitioning entity in making the determination regarding the beneficiary's U.S. employment capacity.

The AAO finds that counsel's statements are not persuasive and fail to overcome the director's denial. 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 first 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 it supports the finding 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 managerial or executive capacity of the proposed employment, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Additionally, contrary to counsel's assertions on appeal, the AAO also finds that it is appropriate to consider the petitioner's organizational hierarchy and overall staffing, as these factors allow the AAO to gain an understanding of how the petitioning entity functions, who performs its daily operational tasks, and whether the petitioner has the overall ability to relieve the beneficiary from having to focus the primary portion of his time on the performance of non-qualifying operational tasks.

The RFE specifically instructed the petitioner to formulate its response in a manner that would list the beneficiary's job duties and indicate how much of the beneficiary's time would be allocated to each item listed. The petitioner's response was comprised of four bullet points—each listing broad job responsibilities rather than specific job duties—and lacked the requested time constraints intended to inform USCIS how the beneficiary would allocate his time on a daily basis. For instance, while the petitioner indicated that the beneficiary would be responsible for managing the company's finances and report his findings to the foreign entity, the petitioner provided no explanation that would clarify the specific tasks the beneficiary would perform in his efforts to manage the company's finances. Although the petitioner generally indicated that the beneficiary would analyze the sales department's performance, this general information does not clarify what actual tasks would be entailed in such analysis. Similarly, the claim that the beneficiary would make "general inquiries" regarding current projects does not translate to an explanation of daily tasks. Furthermore, indicating that certain tasks, such as conducting an annual performance review of the design department manager and attending an annual board meeting, would be done on yearly basis does little to further USCIS's understanding of the actual tasks the beneficiary would engage in on a daily basis.

As indicated above, in order to meet regulatory criteria discussed at 8 C.F.R. § 204.5(j)(5), the petitioner must provide a statement in the form of a job offer containing a detailed description of the beneficiary's proposed job duties. It is noted that published case law supports the pivotal role of a clearly defined 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*. Furthermore, 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). While the petitioner provided some supplemental information pertaining to the beneficiary's prospective employment, the response lacked the substantive content necessary to allow for an accurate assessment of the tasks the beneficiary would perform on a daily basis, the nature of those tasks, and the quantity of time allotted to qualifying versus non-qualifying tasks.

Further, while counsel disputes the director's reliance on the petitioner's staffing as a means of determining the beneficiary's managerial or executive capacity, 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 at 42; *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003). Furthermore, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In light of the above, the AAO finds that the director reasonably inquired into the petitioner's staffing hierarchy as a relevant factor in determining the petitioner's ability to employ the beneficiary in a managerial or executive capacity. The number of employees the petitioner had at the time of filing the petition is not the sole factor used to determine whether the beneficiary would be employed in a qualifying capacity. However, the instant record lacks sufficient information and evidence to establish that the staffing composition at the time of filing was adequate to relieve the beneficiary from having to allocate the primary portion of his time to tasks of a non-qualifying nature. While the AAO acknowledges that no beneficiary is required to allocate 100% of his 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 record fails to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. For this reason, the instant petition cannot be approved.

The other issue to be addressed in this proceeding is whether the petitioner has a qualifying relationship with the beneficiary's foreign employer. 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:
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> (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;
>
> * * *
>
> *Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.
>
> *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 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. 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.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

The director properly notified the petitioner that the responses provided in the petitioner's 2008 tax return with regard to its ownership were not consistent with the claim that the petitioner is a wholly owned subsidiary of the beneficiary's foreign employer. 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.

On appeal, the petitioner neither acknowledged the director's adverse finding regarding the inconsistent evidence presented in the director's decision, nor did the petitioner provide evidence to resolve the inconsistency. The AAO finds that the petitioner has failed to overcome the adverse finding that served as the second ground for the director's denial.

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.