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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

[redacted]

B4

DATE: SEP 0 4 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 Pennsylvania corporation that seeks to employ the beneficiary as its 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 December 10, 2008, which contained information pertaining to the petitioner's eligibility, including general overviews of the beneficiary's foreign and proposed employment. The petitioner also provided supporting evidence in the form of bank, tax, and 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 notice of intent to deny (NOID) dated May 12, 2009 informing the petitioner of various evidentiary deficiencies. The director determined that the record lacked evidence showing that (1) the petitioner has a qualifying relationship with the beneficiary's foreign employer; (2) the beneficiary would be employed in the United States in a qualifying capacity; (3) the beneficiary was employed abroad in a qualifying capacity; and (4) the petitioner has the ability to pay the beneficiary's proffered wage.

The petitioner provided a brief statement dated June 8, 2009 itemizing the documents that were being submitted in response to the concerns listed in the NOID. The petitioner's submissions included an affidavit addressing ownership of the foreign entity, job descriptions pertaining to the beneficiary's foreign and U.S. employment, and various wage and tax documents addressing the petitioner's ability to pay.

After reviewing the record, the director concluded that the petitioner failed to overcome the adverse findings listed in Nos. 2-4 above. Additionally, the director relied on the common law definition of the term "employee" in concluding that the petitioner and the beneficiary do not have an employer-employee relationship. The director continued, *questioning the petitioner's credibility in light of the petitioner's failure* to explain or provide evidence clarifying why the petitioner, which was incorporated in the Commonwealth of Pennsylvania, listed a State of Maryland residential address at Part I of the Form I-140 to represent the location where its business is conducted. The director therefore issued a decision dated February 17, 2011 denying the petition.

On appeal, counsel submits a brief disputing the denial and contending that the beneficiary's proposed position with the U.S. entity falls under the statutory definition of managerial capacity. The petitioner provides separate statements discussing the beneficiary's employment with the foreign and U.S. entities. The petitioner also submits wage and tax documents addressing its ability to pay the beneficiary's proffered wage.

The AAO has reviewed the record in its entirety and finds that the adverse findings regarding the petitioner's ability to pay and its employer-employee relationship with the beneficiary were not warranted. The AAO will therefore withdraw these findings.

Notwithstanding the withdrawal of two of the director's grounds for denial, the AAO nevertheless finds that the evidence submitted on appeal is not persuasive in overcoming the remainder of the director's adverse

findings. 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 two issues to be addressed in this proceeding call for an analysis of the beneficiary's employment capacity in her former position with the foreign entity and her proposed position with the U.S. petitioner. Specifically, the AAO will examine the record to determine whether the petitioner submitted sufficient evidence to establish that the beneficiary was employed abroad and 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 job duties. *See* 8 C.F.R. § 204.5(j)(5). 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* 8 C.F.R. § 204.5(j)(5).

The AAO also finds that it is appropriate to consider other factors, including the organizational hierarchy and overall staffing of the entity(s) in question. These factors are highly relevant as they allow the AAO to understand who performed or would perform the daily operational tasks such that the beneficiary was and would be relieved from having to make those tasks the primary portion of the former and proposed employment. While the AAO acknowledges 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 performed and would perform were and would be only incidental to the position(s) in question. 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 applying the above analysis to the beneficiary's position with the foreign entity, the AAO finds that the job description provided on appeal indicates that the beneficiary performed a significant number of non-

qualifying job duties. Specifically, in its April 6, 2011 statement, which listed the beneficiary's job duties with the foreign entity, the petitioner stated that the beneficiary performed the following non-qualifying tasks: evaluating clients' technical needs, preparing reports and studies to address those needs, developing the foreign entity's business, conducting research and development of new products to suit customers' needs, designing and developing customized software, preparing bids and proposals for software projects, providing training to various personnel, and maintaining knowledge of industry trends and developments. While the petitioner pointed out that the beneficiary exercised discretionary authority with regard to personnel issues, developed organizational policies and strategic plans, and directed operations concerning software products, the AAO cannot overlook the significant quantity of non-qualifying tasks the beneficiary performed as part of her position with the foreign entity.

In the beneficiary's proposed position with the U.S. entity, the AAO similarly finds that a considerable portion of the job duties assigned to the beneficiary's proposed position do not fall within the criteria for managerial or executive capacity. Specifically, counsel's supporting statement on appeal contains the following list of non-qualifying job duties that would be part of the beneficiary's proposed employment with the U.S. entity: creating budgets, evaluating and identifying customers' IT needs, preparing recommendation reports and studies, and conducting research to develop cost effective methods to meet company goals. Although the job description also indicates that the beneficiary would coordinate pricing, promotion, and marketing of the company's services, it is unclear who, if not the beneficiary, would actually carry out the marketing and sales-related functions.

Further, despite counsel's paraphrasing of the statutory criteria for managerial and executive capacity, there is no way of knowing what actual tasks would be involved in developing and overseeing strategies for identifying suitable technology, developing organizational policies, overseeing and directing operations, and developing and implementing strategic plans for overseeing company operations. These statements are overly vague and fail to adequately convey what underlying tasks would be involved. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature: otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103.

Additionally, while the petitioner maintains the claim that the beneficiary would oversee professional employees who would actually carry out the consulting and IT services to meet client needs, the record lacks supporting evidence to establish precisely whom the petitioner employed at the time the Form I-140 was filed, as all of the tax returns the petitioner has provided thus far reflect payment of only the beneficiary's salary, not the salaries and wages of consultants and other IT workers. 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)).

In summary, the AAO finds that the petitioner failed to provide sufficient evidence to establish that the beneficiary was employed abroad or that she would be employed in the United States in a qualifying managerial or executive capacity. Based on these two grounds of ineligibility, the instant petition cannot be approved.

Additionally, the record shows that the petitioner failed to address the issues of credibility that stemmed from the petitioner's use of a residential address at Part 1 of the petition, where the petitioner was supposed to

provide an address representing its place of business. In light of the fact that the petitioner is an entity incorporated in the Commonwealth of Pennsylvania and has provided no documentation to establish that it has the authority to carry on business activity in the State of Maryland, the AAO finds the petitioner's use of a residential address in Maryland as its business address to be questionable and requiring further information. As previously stated in the director's decision, 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 has failed to resolve or even to acknowledge the anomaly described herein, the AAO finds that the petitioner's diminished credibility casts doubt on other aspects of the petitioner's proof and further causes the AAO to question the validity of the petitioner's claims. *See id.* at 591.

Lastly, the AAO finds that the petitioner has failed to submit sufficient evidence to establish that it has a qualifying relationship with the beneficiary's foreign employer as required by 8 C.F.R. § 204.5(j)(3)(i)(C). 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.

While the petitioner provided a stock certificate to establish its ownership and control, the only evidence provided to establish ownership of the foreign entity was a sworn affidavit authored by the foreign entity's claimed majority owner. The petitioner submitted no corroborating evidence of ownership to support a self-serving statement made by the entity's alleged owner.

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.