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

(b)(6)

DATE: APR 18 2013 OFFICE: TEXAS 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 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, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Virginia entity that seeks to employ the beneficiary in the United States as its CFO and vice president. 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 an undated statement, which contained relevant information pertaining to the petitioner's eligibility, including brief descriptions of the beneficiary's foreign and U.S. employment. The petitioner also provided a copy of its organizational chart and tax and financial documents addressing the petitioner's ownership.

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 February 9, 2012 informing the petitioner of various evidentiary deficiencies. The RFE included a request for a more detailed job description pertaining to the beneficiary's proposed employment with a list of the beneficiary's job duties and their time allocations, Form W-2 wage and tax statements for the petitioner's employees, and the petitioner's organizational chart.

Although the petitioner responded to the RFE, the statement dated April 16, 2012, which contained a description of the beneficiary's proposed U.S. employment, lacked any additional information elaborating on the previously provided job description and failed to assign time constraints to individual tasks as requested. As the petitioner also failed to provide the requested organizational chart, the AAO will rely on the chart that the petitioner provided initially in support of the Form I-140. The record further shows that aside from the copy of the 2011 IRS Form W-2 that was issued to the beneficiary, the petitioner failed to provide the same tax forms pertaining to the remainder of its employees for 2011. It is noted that 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).

After considering the petitioner's response, the director determined that the petitioner failed to establish that the beneficiary would be employed with the U.S. entity in a qualifying managerial or executive capacity. The director noted that the petitioner failed to provide much of the evidence requested in the RFE and denied the petition in a decision dated May 11, 2012.

On appeal, counsel provides an appellate brief accompanied by supplemental documentation aimed to address the director's adverse findings. Counsel points to the recent additions in the petitioner's staff and attempts to elaborate on the significance of the beneficiary's position with the U.S. entity.

The AAO finds that neither counsel's assertions nor the supplemental documents are sufficient to warrant approval of the petitioner's Form I-140. Counsel's brief and any evidence that is pertinent to the matter at hand 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.

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 wishes to address the evidence submitted in support of the appeal where counsel seeks to have recognition of the petitioner's growth as an organization in terms of its staffing and overall business progress. While the AAO duly acknowledges the increase in the petitioner's personnel, the fact remains that a petitioner must establish eligibility at the time of filing and cannot rely a new set of facts to establish eligibility at a future date. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In other words, the petitioner must establish that its staffing composition, as it existed at the time of filing, was sufficient to relieve the beneficiary from having to allocate his time primarily non-qualifying operational tasks.

Additionally, with regard to counsel's attempt to supplement the record with the previously requested evidence, including employee wage documents and an organizational chart with brief job descriptions of the participating employees, the RFE expressly shows that 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. As previously noted, the petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

The AAO will now turn to the main basis for denial—the finding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. In general, when examining the executive or managerial capacity of the beneficiary, the AAO reviews the totality of the record, starting first with the petitioner's description of the beneficiary's job duties. *See* 8 C.F.R. § 204.5(j)(5). A detailed job description is crucial, as the duties themselves will reveal the true nature of the beneficiary's foreign and proposed 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 often considers this information in light of other relevant factors, including (but not limited to) job descriptions of the beneficiary's subordinate employees, the nature of the business conducted by the entity in question, the size of that entity's subordinate staff, and any other facts contributing to a comprehensive understanding of the beneficiary's actual roles within a given entity's organizational hierarchy.

In the present matter, the director found that the petitioner failed to provide an adequate description of the beneficiary's proposed job duties. The director determined that the job descriptions provided were overly vague and offered little insight as to the actual tasks the beneficiary would perform daily as a means of supervising, directing, and controlling the business and its employees. The director also pointed out that the

petitioner neglected to inform U.S. Citizenship and Immigration Services (USCIS) of the roles of the beneficiary's subordinates in relieving the beneficiary from having to allocate his time primarily to the performance of non-qualifying operational tasks. 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 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). Hence, the AAO cannot overlook the petitioner's failure to provide a list of the beneficiary's proposed tasks and their respective time constraints, as such evidence could potentially explain how the beneficiary would distribute his time among the qualifying and non-qualifying tasks assigned to his proposed position.

In summary, the petitioner failed to provide USCIS with the evidence that is necessary in order to make a well-informed determination as to whether the beneficiary would be employed in a qualifying managerial or executive capacity and whether the petitioner's organizational hierarchy at the time of filing was adequately complex to support the beneficiary in such a capacity. Accordingly, in light of the deficiencies catalogued above, the AAO finds that the petition does not warrant approval.

Additionally, while not previously addressed in the director's decision, the AAO finds that the record is unclear as to whether or not 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 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 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 (Assoc. 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 stated that the beneficiary's foreign and proposed U.S. employers are "affiliated companies under the broad umbrella of and that the two entities are therefore commonly owned. However, looking to the record the evidence indicates that the beneficiary's foreign employer— —is one of three owners who jointly own the petitioning entity in equal shares, each entity owning 32.730% of the petitioner's stock as shown in Schedule G, Part I of the petitioner's 2010 corporate tax return. While the petitioner also provided a U.S. Securities and Exchange Commission Form 20-F listing ownership interests in its various subsidiaries and in other entities, including the petitioner, the record lacks evidence to show that the petitioner and are similarly owned and controlled, as the petitioner claims. 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)).

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 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.