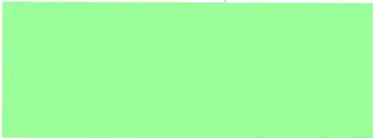


(b)(6)

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

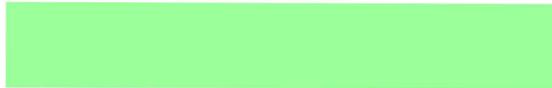


DATE: JAN 14 2013

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 AAO inappropriately applied the law in reaching its 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 motion 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 any motion to 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

www.uscis.gov

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 president and chief executive officer (CEO). 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.

On August 10, 2011 the director denied the petition concluding that the petitioner failed to establish that it would employ the beneficiary in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel disputes the director's decision as an "erroneous conclusion of law." Counsel asserts that the director improperly focused on whether the beneficiary would be primarily employed in a managerial capacity. Counsel asserts that the beneficiary will be serving in an executive capacity and is not required to supervise professional employees. In support of the beneficiary's employment as an executive, counsel notes that as a matter of law "one person can be an executive of a company without having a single employee." Counsel for the petitioner attaches a legal brief in support of the appeal.

I. 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 or managers who have previously worked for a firm, corporation or other legal entity, or an affiliate

or subsidiary of that entity, and 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.

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.

II. U.S. Employment in a Managerial or Executive Capacity

The sole issue addressed by the director is whether the petitioner established that it will employ the beneficiary in a qualifying managerial or executive capacity.

The petitioner filed the immigrant visa petition (Form I-140) on April 5, 2010. The petitioner asserted that the beneficiary would be serving in a managerial or executive capacity as president and CEO of the U.S. company, which is self-described on the petition as an industrial parts import and export company with four employees and gross annual income of \$1.4 million. In support of the petition, counsel submitted a letter dated February 26, 2010 in which he described the beneficiary's proposed duties as follows:

[The beneficiary] will be responsible for establishing new goals and policies, oversee the day-to-day operations, make managerial and strategic [sic] decisions, etc. He will devote 100% of his time, including weekends, to work in all the foregoing duties.

Counsel also briefly described the roles of the three employees currently working for the petitioner. Specifically, counsel stated that the petitioner employs a secretary, a warehouse manager, and a general operation manager, all claimed to be full-time employees. Counsel noted that the beneficiary intends to hire at least five employees in the near future "after he finishes negotiating new deals:"

On December 1, 2010, the director issued a request for additional evidence (RFE) instructing the petitioner to supplement the record with an organizational chart for the U.S. company. The director noted that the chart should include position titles, position descriptions, names of employees filling the positions, the duration of each employee's employment with the company and their annual salaries.

In response, the petitioner submitted an organizational chart identifying a total of four named employees including the beneficiary. The petitioner identified the beneficiary's proposed subordinates as Operation Manager, Office Assistant and Warehouse Manager. The petitioner also provided the following expanded description of the beneficiary's proposed duties:

STRATEGIC PLANNING. Weekly time allocated 10 hrs.

1. Recommends yearly budget for Board approval and prudently manages organization's resources within those budgets guidelines according to current laws and regulations.

2. Review and report regularly to the Board on the overall progress and results against operating and financial objectives and initiate courses of action for improvement.
3. Authorize commitment of corporate resources in the ordinary course of business in order to pursue the approved strategic plans and objectives of the Corporation provided, however, that major commitments, exposures and risk will be reported to the Board on a regular and timely basis.
4. Ensure that processes and systems are in place that enables the CEO to keep the Board fully informed on all material undertakings and activities of the Corporation and any material external factors emanating from industry, financial markets, governments and regulators.

SALES AND MARKETING. Weekly time allocated 10 hrs.

1. Formulate and execute sales plans and budgets that are consistent with and supporting of the company's annual business plan designed to increase sales and profits.
2. Build strong professional business relationship with clients to enable sales and marketing goals to be achieved.
3. Strive to understand client's business and communication challenges and recommend innovative solutions.
4. Ensure that revenue goals are met or exceeded.
5. Oversees design, marketing, promotion, delivery and quality of programs, products and services.
6. Manage and oversee the required disclosure and other communications between the Corporation, shareholders, stakeholders and the public.
7. Act as the principal spokesperson for the Corporation.
8. Ensure effective communications and appropriate relationships are maintained with shareholders and the other stakeholders.

HUMAN RESOURCES. Weekly time allocated 10 hrs.

1. Effectively manages the human resources of the organization according to authorized personnel policies and procedures that fully conform to current laws and regulations.

2. Maintain a positive work climate that is conducive to attracting, retaining and motivating top-quality employees at all levels.

In addition, the petitioner provided the job descriptions for the other three employees listed as follows:

OPERATION MANAGER

1. Build strong professional business relationships with clients to enable sales and marketing goals to be achieved. Weekly time allocated 20 hrs.
2. Strive to understand client's business and communicating challenges and recommend innovate [*sic*] solutions. Weekly time allocated 15 hrs.
3. Develop new accounts in the territory. Weekly time allocated 20 hrs.
4. Monitor billing and collection status of accounts. Weekly time allocated 2 hrs.

OFFICE ASSISTANT

1. Perform a wide variety of executive secretarial and administrative duties as required by daily operations in office. Weekly time allocated 2 hrs.
2. Answer telephones and intercoms, take messages, respond to inquiries. Weekly time allocated 4 hrs.
3. Provide comprehensive secretarial and clerical support to sales staff and management. Weekly time allocated 1 hr.

WAREHOUSE MANAGER

1. Take inventory control.
2. Record of purchases and sales at appropriate times.
3. Coordinate the delivery of merchandise to customers.

The petitioner also provided copies of its IRS Forms 941, Employer's Quarterly Federal Tax Return; and Florida Form UCT-6, Employer's Quarterly Report, for the first three quarters of 2010, which confirmed payments to all three employees during this period.

The director denied the petition on August 10, 2011. The director determined that the petitioner did not establish that the beneficiary would be employed in a primarily managerial or executive position. In her decision, the director determined that the beneficiary would not be overseeing supervisory or professional employees and further found that the petitioner's evidence of wages paid in 2010 did not support its claim that all of the company's employees work on a full-time basis.

On appeal, counsel asserts that the director's decision was erroneous as a matter of law because she considered only whether the beneficiary's employment would be in a managerial capacity. Counsel asserts that the beneficiary would be functioning in an executive capacity. In support of this position, counsel further asserts that the beneficiary was not offered a managerial position.

Upon review, counsel's assertions are not persuasive. The petitioner did not establish that the beneficiary will be employed in a primarily managerial or an executive capacity.

When 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). In this matter, the beneficiary's duty descriptions do not adequately explain what the beneficiary will do on a day-to-day basis as the president of the petitioning company. The petitioner initially provided a very general duty description. In response to the RFE, the petitioner included additional information but still did not adequately explain the particular tasks and specific duties expected of the beneficiary. The beneficiary's duty description was divided into three categories, each category accounting for ten hours per week. However, the petitioner has consistently stated that the beneficiary will work on a full-time basis, including weekends, and failed to account for what duties the beneficiary would perform beyond the 30 hours included in the position breakdown. This unexplained discrepancy raises questions as to whether the petitioner has in fact provided a complete description of the beneficiary's proposed duties.

Further, despite the allocation of hours to each broad category, the petitioner did not assign hourly allocations to specific tasks within each category. In fact, no specific tasks were included in the categories. For example, the category entitled "Sales and Marketing" contained duties that appeared to be non-qualifying such as relationship building with clients but it is unclear what tasks will be performed or how much time will be spent on them. Similarly, the Human Resources category requiring the beneficiary to effectively manage the human resources of the organization may potentially include a combination of qualifying and non-qualifying duties but it is impossible to determine given the vague and broad nature of the description. Finally, the Strategic Planning category included broad and general descriptions of what may be executive responsibilities. However, nothing in the description provides any insight into what specific tasks the beneficiary would perform with respect to his planning responsibilities. The description is especially curious since the petitioner asserts that the beneficiary owns all of the stock and is the sole director of the corporation. Presumably any duties relating to discussions, reports, and reviews to the board of directors would be abbreviated. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations

require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will 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). Given the inadequacy of the position descriptions provided, the record does not support a finding that the beneficiary would be employed in a primarily managerial or executive capacity.

The AAO recognizes that the director limited her decision to a discussion of the beneficiary's lack of oversight of professional or supervisory employees, but concurs with the director's ultimate conclusion that the petitioner failed to establish that the beneficiary would be employed in a managerial or executive capacity. In her decision, the director reviewed the organizational structure of the company. She recognized that three employees other than the beneficiary were employed with the U.S. company. She did not find multiple levels of supervision within the company but she did find inconsistencies in the record. The petitioner asserted that all three employees were full-time staff, working a minimum of 40 hours per week. Despite that claim, the petitioner provided a job description for the assistant/secretary that included duties amounting to only seven hours per week and failed to include any time allocation for duties assigned to the warehouse manager. Furthermore, and as pointed out in detail by the director, the petitioner's state and federal quarterly returns do not support the assertion that all employees were working on a full-time basis.

On appeal, counsel asserts that "the distinction between full-time employees and part-time employees cannot be at issue" because the statutory definitions of managerial and executive capacity make no such distinction, and because "an executive does not need a single employee (full-time or part-time) to be considered an executive." While it is true that there is no specific requirement that a petitioner must employ full-time workers, it is expected that a petitioner will provide USCIS with accurate information supported by corroborating documentary evidence. Therefore, if the petitioner claims that all of its workers are employed on a full-time basis, it is reasonable to expect the petitioner's payroll records to reflect payments commensurate with full-time employment of all workers. 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). Counsel makes no effort to explain the discrepancies noted by the director.

Counsel also does not object to the director's finding that the beneficiary will not be supervising managerial or professional employees, and instead claims that the beneficiary will be employed in an executive capacity.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the

definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* While it is accurate to state that the definition of "executive capacity" does not specifically reference a requirement that the executive supervise subordinate employees, the petitioner must still establish that someone, other than the beneficiary, is available to perform the vast majority of the non-qualifying duties associated with operating the petitioner's business.

In this matter, the petitioner has not established that the beneficiary would have the ability to focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. Counsel asserts in his brief that the general operation manager reports to the beneficiary and supervises the other two employees suggesting that although small, the staff is organized in such a way to relieve the beneficiary of the day-to-day operations. Nevertheless, the record does not support such a conclusion. While the beneficiary's job description includes responsibility for the management of employees, the operation manager's job description does not. In addition, counsel asserts in his brief that the beneficiary has been making all of the financial and operational decisions and he is also the person who "makes all the negotiations with the corporation's clients." The petitioner does not explain how much time the beneficiary will spend on these non-qualifying duties or any other non-qualifying duties. 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988). Accordingly, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, 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. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. *See Systronics*, 153 F. Supp. 2d at 15.

Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president, an

operations manager, a part-time secretary and a warehouse manager. The petitioner indicates that the beneficiary will be directly involved in sales and marketing activities and has not identified who will perform certain non-qualifying functions of the company, such as purchasing and bookkeeping. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility based on its failure to provide a detailed description of the beneficiary's proposed duties.

The AAO acknowledges the petitioner's claim that the beneficiary would hire up to five additional employees in the "near future." However, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

III. Qualifying Relationship

Beyond the director's decision it is noted that the petitioner has not established that it has a qualifying relationship with the beneficiary's overseas 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 (Comm'r 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 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.

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. *See Matter of Siemens Medical Systems, Inc., supra.* Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

In this matter, the petitioner indicates that it is a subsidiary of the foreign entity, but, according to the petitioner's articles of incorporation, the beneficiary owns 100 percent of the petitioner's shares. 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. at 591-92. The petitioner has not submitted copies of the petitioner's stock certificates or other documentary evidence to establish who actually owns the company. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

If the beneficiary is actually the owner of the petitioning company, then the petitioner would need to provide evidence that he also owns at least a majority interest in the foreign entity in order to establish a qualifying affiliate relationship. The petitioner has not submitted adequate evidence of the ownership of the foreign entity. The petitioner submitted articles of incorporation for the foreign corporation and meeting minutes in order to establish that the beneficiary is the sole shareholder of the foreign corporation. However, the documents are written in Spanish and the offered translations have not been signed or certified as true and accurate by the translator. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

Notably, even if the documents were considered, there are unexplained inconsistencies within the documents regarding the number of authorized shares and the number of shares issued. No other documents were provided to establish ownership and control of the foreign company in order to establish its relationship to the U.S. company.

Based on the foregoing, the record does not support the petitioner's claim that it is a subsidiary of the foreign entity, nor has the petitioner established the existence of an affiliate relationship between the two entities. For this additional reason, the petition cannot be approved.

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).

IV. Conclusion

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