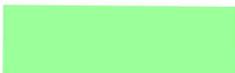


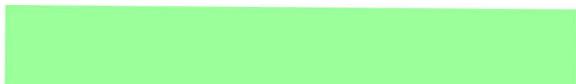
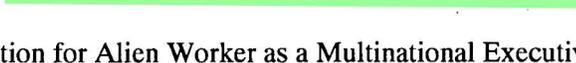


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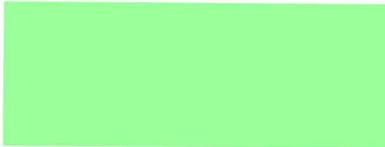
DATE: **MAR 08 2013** OFFICE: TEXAS SERVICE CENTER

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 Florida limited liability company, claiming to engage in the import/export of food and cleaning products, that seeks to employ the beneficiary in the United States as its president. Accordingly, the petitioner endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

I. Procedural History

In support of the Form I-140 the petitioner submitted a statement dated June 2, 2010, which contained relevant information pertaining to the petitioner's eligibility. The petitioner also provided a copy of the beneficiary's pay stub for January 2010 establishing its ability to pay the proffered wage.

The director reviewed the petitioner's initial submissions and determined that the petition did not warrant approval. The director therefore issued a request for evidence (RFE) dated December 13, 2010 informing the petitioner of various evidentiary deficiencies. Among the various issues addressed in the RFE was that of the beneficiary's employment capacity in his proposed position with the petitioning entity. Specifically, the director instructed the petitioner to state what the beneficiary's job duties would be and to provide a percentage breakdown indicating the amount of time the beneficiary would allocate to each of his assigned duties. The petitioner was also asked to: 1) submit evidence of staffing, 2) indicate the number of employees it has in its overall personnel structure, and 3) describe each employee's job duties and educational level.

The petitioner's response included a statement dated January 12, 2011 from counsel, who provided a list of the beneficiary's proposed duties and responsibilities and their respective time allocations. Counsel provided the same information with regard to the petitioner's staff, stating that the petitioner currently has four employees due to the seasonal nature of its business, which experiences periodic declines in orders thus leading to a reduction in the petitioner's work force. Counsel stated that the beneficiary coordinates and oversees U.S. operations, is responsible for all decision-making, and occupies the senior-most position within the U.S. entity.

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 pointed to the petitioner's fluctuating staffing size and questioned the petitioner's ability to employ the beneficiary in a primarily managerial or executive capacity when its staffing size is reduced. Additionally, relying on the common law definition of the term "employee," the director determined that the beneficiary's ownership and control of the petitioning entity preclude the petitioner and the beneficiary from having an employer-employee relationship. In light of these adverse findings, the director issued a decision dated February 9, 2012 denying the petition.

On appeal, counsel provides a brief in which he disputes the director's adverse findings. With regard to the beneficiary's proposed employment, counsel asserts that the petitioner employed an average of 6-8 full-time employees throughout 2009 and 2010. Counsel provides a list of the petitioner's employees and their respective salaries and wages. He also restates the job descriptions that were provided previously in the RFE

response and further notes that it is the beneficiary's responsibility to improve the petitioner's level of sales and revenue.

After reviewing the record in its entirety, the AAO finds that the petitioner's assertions with respect to the beneficiary's proposed employment are unpersuasive and fail to overcome the finding that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity.

II. 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 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;

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- (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.

III. Analysis

A. Managerial or Executive Capacity

Turning to the issue of the beneficiary's proposed employment with the U.S. entity, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Additionally, the AAO finds that it is appropriate and often necessary to consider other relevant factors, such as the level of complexity of an entity's organizational hierarchy and its overall staffing, which allow the AAO to gauge the extent to which the company was or would be able to relieve the beneficiary from having to focus the primary portion of his time on the performance of non-qualifying operational tasks.

In reviewing the relevance of the number of employees a petitioner has, 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

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175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *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 the present matter, the job description provided by counsel in response to the RFE and then reiterated on appeal is overly broad and fails to specify the actual daily tasks the beneficiary would perform. For instance, counsel states that 25% of the beneficiary's time would be allocated to controlling financial relationships and corporate matters. However, there is no follow-up explanation as to the specific daily tasks that are indicative of "controlling financial relationships." Merely conveying a notion of the beneficiary's elevated position within the petitioner's limited organizational hierarchy is not sufficient if the underlying tasks that are associated with "controlling financial relationships" are actually of an operational or administrative nature. Regardless, a determination cannot be made without any detail as to the tasks that fit under the general heading provided. Case law establishes that the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

The petitioner also stated that 20% of the beneficiary's time would be allocated to developing and implementing corporate policies, business and marketing strategies, and plans to maximize profitability; 10% would be allocated to managing staff and assigning their job duties; and 15% would be spent overseeing the warehouse/logistics administrator. However, the petitioner similarly failed to state what actual daily tasks the beneficiary would carry out in order to satisfy these general responsibilities. 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. *Id.* at 1103. While counsel's general statements are sufficient to convey the senior role the beneficiary assumes within the company and his overall level of authority over other staff members, the AAO is unable to gain a meaningful understanding of the specific job duties the beneficiary would perform, thus leaving open the possibility that the beneficiary would perform the daily operational and administrative tasks, regardless of his leadership position within the petitioner's organizational hierarchy.

Additionally, as noted by the director, the petitioner initially claimed that it employed 11 persons at the time of filing but later admitted in response to an RFE that it employed only four persons. The petitioner claimed that its staffing varies due to the dynamic nature of the petitioner's business, which experiences seasonal downturns. Based on this claim, the AAO must question how such downturns and the consequent reductions in the petitioner's staff would affect the job duties the beneficiary would be required to perform. Based on the information provided in response to the RFE, the petitioner's staffing needs change depending on the rise and fall of the petitioner's seasonal business. It is therefore reasonable to question how the petitioner's varying staffing needs would alter the beneficiary's job duties. It is expected that based on the petitioner's changing needs, the beneficiary's daily tasks would also undergo certain changes.

It is essential for the petitioner to establish what tasks the beneficiary would perform during the petitioner's peak business season versus the non-peak season and to provide sufficient evidence to show that regardless of the season, the beneficiary would continue to allocate his time primarily to the performance of tasks in a

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qualifying managerial or executive capacity. The petitioner must prove that the beneficiary primarily performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. Sections 101(a)(44)(A) and (B) of the Act ("an assignment within an organization in which the employee *primarily*" (emphasis added)); *see also* *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

In the present matter, the petitioner has not acknowledged or discussed its changing needs or the effect that such changes may have on the beneficiary's proposed position. Alternatively, if it is the case that the beneficiary's job duties would remain unaltered, further information is required to determine how the beneficiary would be able to continue his employment in a managerial or executive capacity in light of a significant change in the petitioner's staff size from one season to the next. In either case, the vague job description that counsel provided in response to the RFE (and again on appeal) is not sufficient to establish that the beneficiary's proposed position would primarily entail the performance of tasks in a managerial or executive capacity.

In light of the significant deficiencies described above, the AAO finds that the petitioner failed to establish that the beneficiary's employment in the United States would be in a primarily managerial or executive capacity. Sections 101(a)(44)(A) and (B) of the Act. The petition must therefore be denied.

The AAO further determines that due to the above finding of statutory ineligibility, there is no need to address the employer-employee issue, which the director cited as a second basis for the denial.

B. Qualifying Relationship

Beyond the decision of the director, the petitioner has not established that a qualifying relationship exists between the petitioning entity and a foreign entity. *See generally* section 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 petitioner has not demonstrated that a qualifying relationship still exists with a foreign entity and has not persuasively demonstrated that the foreign entity will continue doing business during the alien's stay in the United States. At the time of filing, the petitioner claimed that the U.S. company was 51% owned by the foreign parent company. In response to the RFE, the petitioner admitted that the beneficiary had purchased that 51% interest from the foreign employer, so that he now owned a majority of the shares. The purported parent company in Venezuela no longer owns any part of its claimed U.S. subsidiary.¹

In response to the RFE, the petitioner submitted a single membership certificate (number three), representing the beneficiary's ownership of 51% of the petitioning company. The petitioner previously submitted the first two membership certificates, but certificate number one, issued to the foreign parent company, remains outstanding and has not been cancelled. The petitioner did not submit a stock ledger or registry.

¹ While the beneficiary's nonimmigrant L-1A petitions are not before the AAO, the petitioner submitted approval notices representing the beneficiary's L-1A status since 2009. Based on the claims made in this immigrant visa petition, it appears that the petitioner may have misrepresented the relationship between the U.S. petitioner and the claimed Venezuelan parent company in the nonimmigrant visa petitions. If so, the approval of those petitions would have involved gross error. *See* 8 C.F.R. § 214.2(l)(9)(iii).

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The AAO further notes that the petitioner's IRS Forms 1065 (U.S. Return of Partnership Income) and Schedules K-1 (Partner's Share of Income, Deductions, and Credits) consistently reflect the beneficiary as the owner of a 51% share. In other words, despite membership certificate number one, originally issued to the foreign parent company on June 20, 2007 representing 510 units, the tax documents at no time reflect the purported Venezuelan parent company as an owner.

The petitioner asserts in the alternative that the two companies continue to maintain a qualifying relationship, despite the transfer of ownership to the beneficiary. In the letter accompanying the response to the RFE, counsel for the petitioner asserts that "[t]he foreign company is 50% owned and 100% controlled and directed" by the beneficiary, making the two entities affiliates under the regulatory definition. *See* 8 C.F.R. § 204.5(j)(2) (defining the terms "affiliate" and "subsidiary"). However, the petitioner submitted no documents to establish that the beneficiary in fact owns and controls the Venezuelan company. While the petitioner submitted an incomplete "summary translation" of the Venezuelan company's articles of incorporation, representing the beneficiary as one of two equal owners, the petitioner submitted no other evidence to document that claimed ownership (such as share certificates) or to show that the beneficiary in fact *controls* the foreign entity (such as proxy agreements).

The regulations recognize a 50-50 ownership scenario as a qualifying affiliation under limited circumstances, specifically when the subsidiary is a "joint venture" with two owners maintaining equal control and veto power over the entity. *Id.* (defining the term "subsidiary"). The petitioner submitted no such evidence in this case. If the petitioner would claim that the beneficiary owns half of the entity but maintains *de facto* or *de jure* control over the Venezuelan company, the record is equally devoid of evidence.

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.*, 19 I&N Dec. at 362.

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).

In the present case, the AAO cannot discern the actual ownership and control of the purportedly related companies. The petitioner's claim to eligibility is undermined by the inconsistent claims made in this case. *Id.* Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

For this additional reason, the appeal must be dismissed and the petition denied.

IV. Conclusion

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.