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: MAR 0 9 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: SELF-REPRESENTED

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 corporation that seeks to employ the beneficiary in the United States 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 August 25, 2011, confirming the beneficiary's employment abroad with and a statement dated September 22, 2011 from the U.S. entity, describing the beneficiary's foreign and proposed positions. The petitioner also provided a copy of its organizational chart as well as a number of corporate, tax, and business documents in support of the petition.

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 March 13, 2012 informing the petitioner of various evidentiary deficiencies. The RFE included requests for more detailed job descriptions pertaining to the beneficiary's foreign and proposed positions, listing the beneficiary's job duties and their time allocations, and job descriptions of the beneficiary's subordinates in each entity, listing their respective job duties and educational levels. The petitioner was also asked to provide various tax documents showing the wages and salaries paid to its employees during relevant time periods. Additionally, the director asked the petitioner to provide documentation showing that it has a qualifying relationship with the beneficiary's employer abroad.

Although the petitioner responded to the RFE, it failed to provide any additional documentation addressing the issue of its claimed qualifying relationship with the beneficiary's employer abroad. The petitioner did, however, provide organizational charts depicting the beneficiary's positions with the foreign and U.S. employers, respectively. Additionally, the petitioner provided the beneficiary's job description pertaining to the U.S. entity only, omitting any further information about the job duties performed by the beneficiary during her employment abroad. 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 was employed abroad or that she would be employed with the U.S. entity in a qualifying managerial or executive capacity. The director found that the job descriptions the petitioner submitted lacked the necessary degree of detail and thus failed to properly convey the true nature of the beneficiary's tasks with either entity. The director also concluded that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer. In light of these adverse findings, the director issued a decision dated April 24, 2012 denying the petition.

On appeal, the petitioner provides a statement asserting that the beneficiary acquired managerial skills during her years of experience with the foreign entity. The petitioner reiterated the beneficiary's list of job duties and time breakdown, which were included in the initial support letter dated September 22, 2011, claiming that the beneficiary's main focus will be on expanding the logistics market and overseeing the company's staff to ensure that each account is serviced properly and on schedule. The petitioner also provides additional evidence in the form of stock certificates to address the issue of a qualifying relationship.

The AAO finds that the petitioner's assertions and supporting documents are not persuasive in overcoming the director's decision. The issues raised will be fully addressed in a comprehensive discussion to follow.

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):
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> * * *
>
> (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 matter pertain to the beneficiary's employment with the U.S. and foreign entities. The AAO will review the record in an effort to determine whether the petitioner submitted sufficient evidence to establish that the beneficiary was employed abroad and whether she 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--
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> (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 general, when examining the executive or managerial capacity of the beneficiary, the AAO reviews the totality of the record, starting first with the 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 will consider 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 businesses conducted by both entities, the respective sizes of the subordinate staff of the foreign and U.S. entities, and any other facts that may contribute to a comprehensive understanding of the beneficiary's actual roles in the two respective entities.

Turning first to the job description provided in the initial supporting statement with regard to the beneficiary's employment abroad, the petitioner indicated that the beneficiary performed such non-qualifying tasks as maintaining information files and processing paperwork, using computers to program and write software as well as to perform data entry, scheduling programs and events, and presenting reports before a general assembly. Although the RFE expressly instructed the petitioner to supplement this job description with a more detailed list of tasks and time constraints showing how much of the beneficiary's time would be allocated to each of her previously assigned tasks, the petitioner failed to provide this information and thus left open the possibility that the beneficiary's time was not primarily allocated to the performance of tasks within a qualifying managerial or executive capacity.

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/are only incidental to the position 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).

Given the petitioner's failure to assign time constraints to the beneficiary's job duties with her former employer, the AAO cannot affirmatively conclude that she primarily spent her time performing tasks in a qualifying managerial or executive capacity. On the basis of this initial adverse conclusion, this petition cannot be approved.

Turning to the beneficiary's proposed employment with the U.S. entity, the AAO will examine the description of the beneficiary's job duties. Although the petitioner's initially provided a job description containing the desired time constraints, the AAO concurs with the director's finding that the information provided was overly vague and failed to convey a meaningful understanding of the tasks to be performed within the context of the petitioner's import-export operation. While the petitioner indicated that 20% of the beneficiary's time would be allocated to analyzing, developing, and executing new alliances to increase the company's business opportunities and profitability, the petitioner failed to affirmatively establish that the beneficiary would refrain from actively seeking out new clientele, thus leaving open the possibility that the beneficiary's role contains a non-qualifying sales component.

The petitioner also failed to state what actual tasks the beneficiary would carry out in her supervision of two managerial employees, only one of whom was included in the relevant quarterly wage report, which reflects the petitioner's staffing at the time the instant Form I-140 was filed. Not only is the record vague as to the tasks the beneficiary would carry out in supervising her direct subordinates, the record does not support the claim that the petitioner employed two managerial employees for the beneficiary to oversee. 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)).

While the petitioner claimed that the beneficiary would allocate a total of 15% of her time to implementing long- and short-term goals and exercising wide latitude in discretionary decision making, these statements are little more than mere paraphrases of the statutory definition for executive capacity and impart no further understanding of the actual tasks the beneficiary would perform in her role as general manager of an import-export business.

Finally, while the beneficiary's job description indicates that she would allocate 10% of her time to reviewing various reports and budgets, the record does not establish that the employee who has been assigned the duties of generating such reports was actually working for the petitioner at the time the petition was filed. The petitioner's organizational chart includes [redacted] who was originally identified in the position of administrative manager. According to the job descriptions provided on appeal, [redacted] assumes the responsibilities of preparing financial reports, budgets, and profit-loss projections. The record does not establish that this individual was employed by the petitioner during the fourth quarter of 2011, as her name was not included among the list of employees to whom the petitioner paid a wage or salary. The AAO is

therefore unable to determine who within the organization was available to undertake job duties; nor can the AAO rule out the possibility that the beneficiary would have assumed the responsibility of carrying out these non-qualifying tasks in the absence of an employee to whom those tasks would normally be assigned. Despite the petitioner's offer of an updated organizational chart as part of its submissions on appeal, the AAO cannot consider events that took place since the filing of the petition in determining the petitioner's eligibility. The 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. 1971).

In summary, the AAO finds that the petitioner has failed to provide the evidence necessary to affirmatively establish that the petitioner was ready and able to employ the beneficiary in a qualifying managerial or executive capacity. On the basis of this second adverse conclusion, the instant petition may not be approved.

Lastly, the AAO will address the third ground that served as a basis for denial—the director's finding that the petitioner failed to establish the existence of a qualifying relationship between itself and 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 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 record indicates that ownership of the foreign entity is evenly divided among two individuals. The record also shows that the petitioning entity is authorized to issue a total of 20 shares eleven of which were originally issued to the foreign entity, as shown in stock certificate No. 00. Stock certificate No. 01 shows that the

petitioner issued another six shares to [redacted] Both stock certificates were dated April 1, 2009. However, the record indicates that on October 1, 2010 the petitioner sought to change its ownership by transferring the originally issued shares belonging to the foreign entity and [redacted] to [redacted] and the beneficiary, respectively, such that [redacted] would own 51% of the petitioner's shares while the beneficiary would own the remaining 49%. However, the petitioner only provided documents showing the original parties' forfeitures of their respective shares. The petitioner did not provide new stock certificates to show that the forfeited shares were issued to the intended parties—[redacted] and the beneficiary, respectively. Despite the petitioner's attempt to resolve this anomaly by submitting stock certificate Nos. 3 and 4, both certificates were issued on November 10, 2011. As previously noted, eligibility must be established based on facts that existed at the time of filing the petition; 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. at 49. Here, the stock certificates that purport to transfer shares to [redacted] and the beneficiary were not issued until after the petition was filed.

The AAO finds that the newly issued stock certificates are not valid, as they purport to transfer more shares than the petitioner is actually authorized to issue. More specifically, the petitioner's Articles of Incorporation, Article IV, indicates that the petitioner is authorized to issue a total of 20 shares. However, certificate Nos. 3 and 4 attempt to issue a total of 100 shares, which is an amount greater than the number of shares the petitioner is authorized to issue. 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).

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 light of the conflicting and inconsistent evidence with regard to the petitioner's ownership, the AAO cannot conclude that the petitioner and the beneficiary's foreign employer are similarly owned and controlled. On the basis of this third adverse finding, the instant petition cannot be approved.

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.