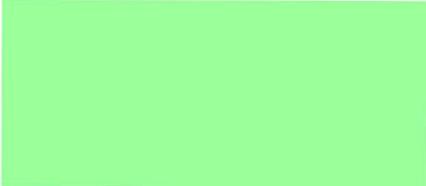


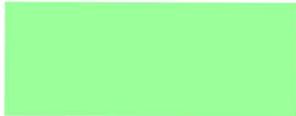
U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave. N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



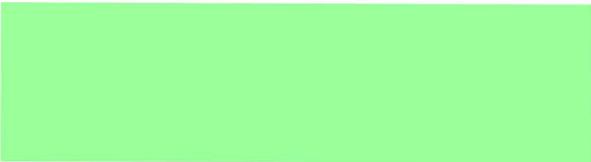
DATE: **MAY 16 2013** OFFICE: TEXAS SERVICE CENTER



IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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 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 “December, 2011” which contained information pertaining to the beneficiary’s employment abroad and with the petitioning entity as well as information describing the nature of the petitioner’s qualifying relationship with the beneficiary’s foreign employer. The petitioner also provided supporting evidence in the form of tax, business, and corporate documents.

The director reviewed the petitioner’s submissions and determined that the petition did not warrant approval. Although the petitioner provided an hourly breakdown describing the beneficiary’s proposed position, the list of items was primarily comprised of broad job responsibilities rather than daily tasks. The director therefore issued a request for evidence (RFE) dated March 31, 2012 informing the petitioner of various evidentiary deficiencies. The beneficiary’s proposed employment with the petitioning entity was among the list of issues the RFE addressed. The petitioner was instructed to provide a more detailed description of the beneficiary’s proposed employment complete with a list of the specific job duties the beneficiary would perform and the percentage of time he would allocate to each of the named tasks. The petitioner was also asked to list the beneficiary’s direct subordinates, their job titles, and respective levels of education and to provide an organizational chart depicting the petitioner’s staffing structure supported by IRS Form W-2s and/or Form 1099s for each of the petitioner’s employees and/or contracted workers.

The petitioner responded to the RFE by supplementing the record with an additional job description and percentage breakdown describing the beneficiary’s proposed employment, an organizational chart accompanied by an employee list specifying employee dates of employment where applicable, and IRS wage and salary documents showing who got paid and the amount of the compensation. The petitioner failed to provide any of the employees’ educational credentials or the educational requirements for the positions that are depicted as the beneficiary’s direct subordinates. 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 therefore issued a decision dated July 2, 2012 denying the petition. The director specifically found that the petitioner failed to establish that its organizational composition was adequately complex to support the beneficiary in a position that could be characterized as being in a qualifying managerial or executive capacity. The director further noted that the record lacks sufficient evidence to establish that the beneficiary would oversee the work of supervisory, professional, or managerial employees.

On appeal, counsel provides an appellate brief in which he asserts that the director “overlooked the fact that the beneficiary” directs and controls the petitioning entity’s major functions and works through others to achieve the corporation’s end goals. Counsel challenges the director’s reference to the size of the petitioning entity, asserting

that the director cannot “solely” rely on the size of the petitioning entity in determining the petitioner’s eligibility for the immigration benefit sought.

The AAO finds that counsel’s assertions fail to overcome the ground for denial. A full discussion explaining the AAO’s analysis of the petitioner’s supporting evidence is provided 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.

In general, when examining the executive or managerial capacity of the beneficiary, the AAO reviews the totality of the record, starting 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 will then 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 business conducted, the size of the subordinate staff, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role within the organization.

While the AAO agrees with counsel's assertion that the size of the petitioning entity should not serve as a sole basis for denial, the record does not indicate that the petitioner's size was the director's sole consideration in making a determination regarding the petitioner's eligibility. The director restated the beneficiary's job description as provided in response to the RFE and commented on the lack of evidence that the beneficiary oversees the work of a professional staff.

The AAO agrees with the director's observations and further finds that there are numerous inconsistencies that lead to confusion regarding whom the petitioner actually employed at the time of filing the petition and whether the staffing composition at that time was sufficient to relieve the beneficiary from having to allocate his time primarily to the performance of non-qualifying operational tasks. For instance, the petitioner readily stated in its employee list that [REDACTED] whom the organizational chart identified as an operations assistant, and [REDACTED] whom the chart identified as a customer service representative, were no longer employed by the petitioner at the time of filing the petition. This leaves the AAO to question who performed the tasks assigned to those positions. Moreover, this change in staffing further precludes the AAO from finding that the operations manager was actually a managerial or supervisory employee. Given that the petitioner failed to provide evidence

of the educational credentials for any of the beneficiary's three direct subordinates—a sales executive, a sales subordinate, and an operations manager—the AAO cannot conclude that at the time the petition was filed the beneficiary was going to oversee the work of professional employees. The mere fact that the beneficiary's subordinates carry managerial or professional position titles does not establish that they are, in fact, professional or managerial employees.

The AAO further observes that while the petitioner issued an IRS Form W-2 and Form 1099 for [REDACTED] in 2011, this individual was not identified on the petitioner's organizational chart. Rather, the petitioner simply identified [REDACTED] as an executive assistant in the separate employee list that was submitted with the organizational chart, which identified [REDACTED] (for whom a Form W-2 and Form 1099 was also submitted) as the petitioner's only executive assistant in 2011.

Furthermore, the fact that the organizational chart identified only one executive assistant poses yet another problem given that [REDACTED] whom the chart identified as an operations assistant, and [REDACTED] whom the chart identified as an operations manager and superior of [REDACTED] were both identified as executive assistants in the petitioner's separate employee list. Despite the fact that [REDACTED] was shown not have been employed by the petitioner at the time of filing the petition, the inconsistencies regarding these ever-changing position titles gives rise to doubt as to who was performing the petitioner's daily operational tasks when the petition was filed and how exactly the petitioner planned to support the beneficiary's employment in a primarily managerial or executive capacity. It is incumbent upon the petitioner to resolve any inconsistencies in the record by providing 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).

After having reviewed the job description the petitioner offered in response to the RFE, the AAO finds that the information provided lacks substance and fails to convey a meaningful understanding of the actual daily tasks the beneficiary would perform. For instance, the petitioner indicated that 20% of the beneficiary's time would be allocated to managing the "main connection between" the foreign entity and the U.S. petitioner. The petitioner did not clarify, however, how the beneficiary plans to coordinate activities between the two entities to "to determine the best equipments [sic] required by customers." In fact, the petitioner's reference to "equipments" [sic] is confusing when taking into consideration the petitioner's claim that it is a wholesaler of used clothing.

The AAO also finds that the petitioner's references to the beneficiary's role in correcting and implementing policies to be equally vague, as the petitioner provided no clarifying statements discussing the specific policies the beneficiary corrects and implements or how the beneficiary assesses policies in order to determine when a policy requires correction. Further, while the petitioner indicated that the beneficiary would allocate 10% of his time to meeting with subordinate executives, there is no evidence to establish that the sales executive and the executive assistant, who are the only two employees with executive position titles, are supervisory, professional, or managerial employees. As indicated above, the petitioner failed to provide evidence of the educational credentials for any of the beneficiary's three direct subordinates.

Lastly, the AAO finds that a considerable portion of the beneficiary's time would be allocated to non-qualifying tasks, including communicating with suppliers in order to establish agreements regarding price and shipping times for approximately 10% of the beneficiary's time; attending meetings with vendors for another 10% of the time; conducting market analysis for approximately 5% of the time; and generally supervising the work of non-supervisory, non-professional, and non-managerial employees for more than 10% of the time. 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).

The record indicates that the beneficiary's position would require a mix of both qualifying and non-qualifying tasks. However, given the numerous general statements, which failed to identify tasks with specificity, and the fact that some of the beneficiary's tasks can be readily identified as operational or non-qualifying tasks, the petitioner has failed to establish just how much of the beneficiary's time would be spent performing qualifying tasks versus those that are found to be non-qualifying. In summary, the petitioner has failed to provide detailed and persuasive evidence that the beneficiary would allocate his time primarily to tasks within a qualifying managerial or executive capacity. Therefore, the AAO finds that the petitioner has failed to establish that it meets the relevant statutory criteria. On the basis of this finding the petition cannot be approved.

Additionally, while not previously addressed by the director, the AAO finds that the petitioner has provided inconsistent evidence of its ownership. Specifically, in reviewing the petitioner's 2011 corporate tax return, the AAO notes that while Schedule G indicates that the beneficiary's foreign employer owns 66% of the petitioner's stock and the beneficiary owns the remaining 34%, Schedule K of the same tax return identifies the beneficiary as the sole owner holding 100% of the petitioner's stock. As noted previously, the petitioner maintains the burden of resolving any inconsistencies in the record by providing independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. Here, the petitioner has neither acknowledged the inconsistency nor provided evidence to resolve it. 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 (BIA 1988); 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 light of the inconsistent claims made by the petitioner with regard to its ownership, the petitioner has not shown that a qualifying relationship exists between it and the foreign entity that previously employed the beneficiary abroad.

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.