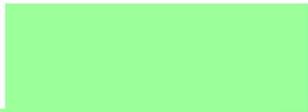


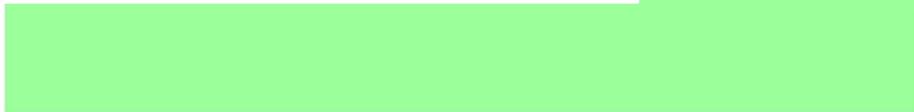
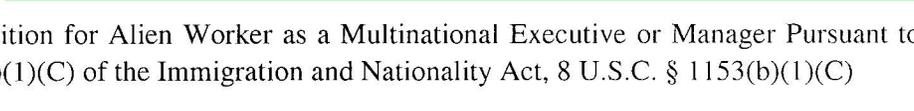


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **SEP 27 2013** OFFICE: NEBRASKA 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a California corporation engaged in immigration and investment services. The petitioner states that it is a subsidiary of [REDACTED] in China. The petitioner seeks to employ the beneficiary as its managing director. 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.

The director denied the petition, finding that the petitioner had not timely and adequately responded to a request for evidence (RFE). Specifically, the director noted that the petitioner had failed to submit the following directly requested evidence: (1) evidence that the petitioner has a qualifying relationship with the foreign employer; and (2) evidence that the beneficiary had at least one year of full-time employment with the foreign employer in the three years preceding the filing of the petition. The director further observed that the petitioner failed to provide detailed descriptions of the beneficiary's position with the foreign employer and proposed position with the petitioner or organizational charts depicting the personnel structure of the foreign and U.S. companies.

On appeal, counsel states that the petitioner submitted a timely response to the RFE. Further, counsel asserts that the petitioner provided sufficient evidence to establish that it has a qualifying relationship with the foreign employer and to establish that the beneficiary had one year of full-time qualifying managerial or executive employment abroad. Finally, counsel contends that the petitioner submitted detailed job descriptions and organizational charts. Counsel indicated on the Form I-290B, Notice of Appeal or Motion, that he would submit a brief or additional evidence to the AAO within 30 days of filing the appeal. A review of the record indicates that neither counsel nor the petitioner submitted a brief or evidence within the required timeframe. Accordingly, the record will be considered complete.

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 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.

II. The Issues on Appeal

A. Timeliness of the petitioner's RFE response

As noted above, the director denied the petition, in part, based on a conclusion that the petitioner did not respond in a timely fashion to his RFE. The director's RFE, issued on September 6, 2012, stated that the petitioner must respond by November 29, 2012 and that evidence received at the service center after the due date would not be considered. The director noted that the service center did not receive the petitioner's response to the RFE until December 3, 2012, and therefore, the petitioner's response was untimely.

On appeal, counsel states that the petitioner's response was in fact timely submitted. Counsel's assertion is correct. While the director instructed the petitioner to submit its response on or before November 29, 2012, the regulation at 8 C.F.R. § 103.8(b) provides that whenever an affected party "is required to do some act within a prescribed period after the service of a notice upon him, and the notice is served by mail, 3 days shall be added to the prescribed period." Therefore, taking into account this prescribed three-day period, the petitioner's response to the RFE was timely submitted. The director's finding that the response was untimely will be withdrawn. Nevertheless, the director did briefly reference the evidence submitted and found that even if had been timely submitted, it did not fully respond to the RFE.

In this regard, counsel asserts that, contrary to the conclusion of the director, the petitioner did in fact submit evidence of the petitioner's qualifying relationship with the foreign entity, evidence of the beneficiary's one year of full-time employment abroad, and the required detailed position descriptions and organizational charts.

The AAO maintains authority to review each appeal on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Accordingly, the AAO will address the merits of the petitioner's claims with respect to the remaining grounds for denial.

B. Qualifying Relationship

As noted above, the director denied the petition, in part, due to the petitioner's failure to provide evidence that the petitioner had a qualifying relationship with the 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 pertinent regulation at 8 C.F.R. § 205.5(j)(2) defines a "affiliate" as follows:

- (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;

The pertinent regulation at 8 C.F.R. § 205.5(j)(2) defines a "subsidiary" as follows:

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.

At the time of filing, the petitioner submitted the following evidence:

- Articles of incorporation dated February 23, 2009 reflecting that the petitioner was authorized to issue 10,000 shares;
- An amendment to the articles of incorporation dated February 12, 2012, which reflects that the petitioner increased its number of authorized shares to from 10,000 to 1,000,000;
- Copies of its initial and amended by-laws;
- Minutes of an organizational meeting dated February 15, 2012 reflecting the following owners:

- (1) [REDACTED] and, [REDACTED] This document references the corporation's authorization to issue up to 1,000,000 shares and its intention to issue [REDACTED] new shares to the beneficiary;
- An action of the petitioner's directors confirming the above-stated share ownership and the issuance of [REDACTED] new shares to the beneficiary;
 - Notice of Transaction dated February 20, 2012 stated that the beneficiary, as a representative of the foreign employer, paid [REDACTED] to the petitioner, on behalf of the foreign employer, in exchange for [REDACTED] shares;
 - The petitioner's stock transfer ledger and stock ledger which identify a total of 90,000 shares of stock issued, including [REDACTED] shares issued to the beneficiary on February 15, 2012 and the remaining [REDACTED] shares distributed to [REDACTED];
 - Minutes of the petitioner's organizational meeting dated March 26, 2012 indicated that the director's approved the transfer of the beneficiary's [REDACTED] shares to the foreign entity; and
 - Copies of the petitioner's IRS Form 1120S, U.S. Income Tax Return for an S Corporation for 2009 and 2010, which indicate at Schedule K that the petitioner was jointly and equally owned by [REDACTED]

In the RFE, the director requested that the petitioner submit additional documentation to establish that the petitioner had a qualifying relationship with the foreign employer. The director noted that this evidence could include annual reports, statements from the organization's president or corporate secretary, articles of incorporation, financial statements, stock ledgers, and/or other evidence of ownership of all outstanding stock for both entities.

In response, the petitioner re-submitted the same documentation relevant to its ownership. Also, the petitioner provided an IRS Form 1120S U.S. Income Tax Return for an S Corporation for 2011 indicating on Schedule K that the petitioner was wholly owned by [REDACTED]. With respect to foreign employer's ownership, the petitioner provided a copy of the foreign entity's published Annual Report which includes a complete list of shareholders and identifies the beneficiary as the owner of [REDACTED] of the company's shares as of September 2011.

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.

The petitioner has submitted conflicting evidence of its ownership. For instance, the petitioner's IRS Forms 1120S for both 2009 and 2010 state that the petitioner was jointly owned by [REDACTED] during those tax years. Also, the petitioner's provided IRS Form 1120S for 2011 states that the petitioner is wholly owned by the aforementioned [REDACTED]. However, the petitioner's meeting minutes and stock ledger reflect that the petitioner was never jointly owned by [REDACTED] or wholly owned by Mr. [REDACTED]. For instance, the stock ledger indicates that the petitioner issued [REDACTED] and [REDACTED] on July 12, 2011. None of the petitioner's supporting documentation substantiates the information reported in the company's tax returns. In addition, the petitioner's stock ledger does not reflect the issuance of stock in 2009 when the petitioner was incorporated.

Further, the submitted meeting minutes from March 26, 2012 indicate that the beneficiary assigned his [REDACTED] shares to the foreign employer. However, the petitioner's stock ledger does not reflect this transference nor does the petitioner submit a stock certificate indicating the foreign employer's acquisition of the [REDACTED] 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. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The evidence of the petitioner's ownership is inconsistent and incomplete and thus fails to establish that the petitioner is a subsidiary of the foreign employer as claimed. As such, it cannot be determined whether the petitioner has a qualifying relationship with the foreign employer. For this reason, the appeal will be dismissed.

C. Employment in a Managerial or Executive Capacity

In denying the petition, the director determined that the petitioner failed to submit a detailed position description and organizational chart pertaining to the beneficiary's U.S. and foreign employment. Therefore, a remaining issue in this matter is whether the petitioner established that the beneficiary has been employed abroad, and would be employed in the United States, in a qualifying managerial or executive capacity.

Upon review, the record contains sufficient evidence to establish that the foreign entity employed the beneficiary in an executive capacity. While the petitioner did not fully comply with the director's RFE with respect to the foreign employment, a review of the totality of the evidence of record reflects that the beneficiary is the senior executive of a publicly traded company. The foreign entity's annual report contains executive biographies for the beneficiary and other senior managers and executives who report to him.

However, upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner did not adequately respond to the director's RFE with respect to the beneficiary's proposed employment in the United States.

In order to determine whether the beneficiary would be employed in a qualifying executive or managerial capacity, U.S. Citizenship and Immigration Services (USCIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In a support letter submitted along with the petition, the petitioner described the beneficiary's duties as managing director of the petitioner as follows:

- Work with CEO in developing business in furtherance of its objectives stated in the Articles of Incorporation
- Balance, forecast, and amend budget
- Manage high level employees and officers of the Company and take responsibilities for the tasks on hand
- Attend various business trips, public meetings, international conferences, and public events to both national and international to promote the business
- Cast vision and future direction and position of the company in a fast changing environment
- Train staff on policies and procedures and monitors compliance
- Ensure staff follows safety standards and guidelines
- Perform duties of guest services staff as needed
- Enforce strict compliance of the uniform and grooming standards
- Oversee training of staff in customer service standards
- Provide leadership to leads, staff and assists with overall management of department
- Assist with new hire training and handles on-boarding tasks
- Assist with the preparation of staff evaluations
- Assist with staff disciplinary matters
- Work extended hours as needed for special events, holidays and trouble calls
- Assist management with other projects as needed

As noted, the director found the above duty description insufficient to establish that the beneficiary would be employed in a managerial or executive capacity in the United States and requested that the petitioner submit a very detailed duty description for the beneficiary, including estimates of the percentage of time he would spend on each task. However, the petitioner did not submit any additional explanations relevant to the beneficiary's duties in the United States in response to the RFE. Again, 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).

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, 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. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on the stated tasks. This failure of documentation is important because some of the beneficiary's daily tasks, such as performing duties of guest services staff, do not fall directly under traditional managerial or executive duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager or executive. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Additionally, 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 director correctly determined that the duties offered by the petitioner, such as developing business in furtherance of its objectives, balancing, forecasting and amending budget, attending various business trips, casting vision and future direction, and providing leadership, are overly vague and provide little probative value as to the beneficiary's actual day-to-day activities. The duties, and the record generally, include no specific examples or documentation to support the beneficiary's vaguely proposed U.S. duties. Further, the petitioner does not specifically describe any specific management actions that will be carried out, budgets that will be managed, or vision or direction of the company that will be driven by the beneficiary. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature. Overall, 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).

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the company's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. The petitioner indicates that it operates a "concierge & investment services" business with two current employees and gross annual income of \$43,123.

The director requested that the petitioner submit a detailed organizational chart including the names of its employees, their titles and job duty descriptions. However, the petitioner failed to respond to this request and provided an organizational chart indicating that the beneficiary had two subordinates, a "CEO & operation manager" and another subordinate "employee" below the aforementioned CEO. Although the petitioner identified these employees by name, the petitioner did not provide duty descriptions for these

employees as necessary to understand their functions and corroborate that they would primarily relieve the beneficiary from performing day-to-day operational duties. Once again, 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). In sum, the petitioner has not provided sufficient evidence with respect to the beneficiary's subordinates and the petitioner's organizational structure to establish that the beneficiary will act in a managerial or executive capacity.

For the foregoing reasons, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity. For this additional reason, the appeal will be dismissed.

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).

III. Conclusion

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.