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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

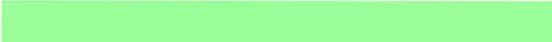


U.S. Citizenship
and Immigration
Services

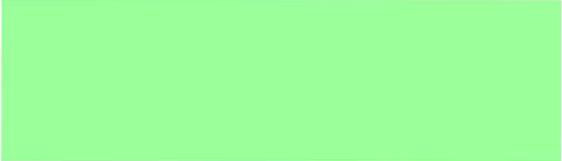


AUG 27 2014

DATE: OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

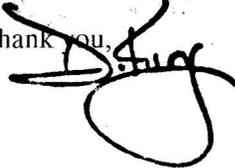
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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

The petitioner filed the instant Form I-140, Immigrant Petition for Alien Worker, 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 petitioner, a Kentucky corporation engaged in "management, operations and development," claims to be an affiliate of [REDACTED] the beneficiary's former employer in India. The petitioner seeks to employ the beneficiary as its Vice President.

The director denied the petition, concluding that the petitioner had failed to establish that the beneficiary would be employed in the United States in a qualifying 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 submits a brief disputing the director's adverse findings.

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.

Additionally, the regulations at 8 C.F.R. § 204.5(j)(3)(i) state that the petitioner must provide the following evidence in support of the petition in order to establish eligibility:

- (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
- (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
- (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
- (D) The prospective United States employer has been doing business for at least one year.

II. ISSUES ON APPEAL

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

The first issue to be addressed is whether the petitioner established that it will employ the beneficiary 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--

- (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.

Finally, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

1. Facts

The petitioner has offered the beneficiary the position of Vice President. In a letter dated January 15, 2013, the petitioner explained that the beneficiary's assignment in the U.S. is to "analyze and develop overall corporate financial goals and objectives for our company, which is engaged in management, operations, development and consulting." The petitioner explained that it has purchased and is managing one location, and "we remain actively seeking other locations, business opportunities, and the like." The documentation in the record indicated that the petitioner purchased a gas station and convenience store in February 2011 and then sold it to [REDACTED] in March 2011. The petitioner also submitted a management agreement between [REDACTED] and the petitioner whereby the petitioner will pursue all aspects of the business operation and manage the business of the gas station and convenience store on behalf of [REDACTED]. The beneficiary described the beneficiary's typical work week as follows:

- Analyze and develop overall corporate financial goals and objectives.
- Company representative on all tax and legal matters, procure and invest corporate fund: 5 hours per week.

- Analyze the market for gasoline and commodities costs, manage inventory, availability and demand, set sales and profit goals: 5 hours per week.
- Review cost analysis, market survey, and other reports: 5 hours per week.
- Authorize expenditures for costs: 5 hours per week.
- Negotiate, execute contracts and purchases: 2 hours per week.
- Oversee subordinate staff: 5 hours per week.
- Plan and direct marketing, promotional and public relations activities, represent business to the public: 5 hours per week.
- Research and develop new business opportunities: 5 hours per week.
- Enforce safety, health and security rules: 2 hours per week.

The petitioner stated on the Form I-140 that it currently had 4 employees and that the total number "may vary." The petitioner submitted an organizational chart listing a president, a vice president, a secretary/manager, an assistant manager, an assistant restaurant manager, a cashier/cook and a clerk/cashier. The petitioner provided a brief job description of each position.

In a request for additional evidence (RFE), the director requested a detailed description of the offered position. The director also instructed the petitioner to submit a detailed organizational chart.

In response to the RFE, the petitioner described the beneficiary's duties as follows:

- Direct and guide policy development and execution on behalf of [REDACTED] in coordination with the President of the U.S. entity.
- Provide for the recruitment and training of personnel.
- Provide for all human resources needs, including payroll, OSHA issue[s], employee relations.
- Ensure business integrity through creation and supervision of proper conduct and application of business methods. Maintain secure records. General oversight of financial conduct to ensure accuracy of A/R, A/P, inventory, projections, analytical information, communications, data control.

- Make recommendations as to investments and cash strategies, and make contribution for financial reports, including the annual budget and any and all audits.
- Manage advertising and public relation opportunities in public venues, as well as on-site, by developing vendor relationships and relationships within the immediate community, both customer and at-large.

The petitioner also submitted a Form W-2 from 2012 for all of its employees. The petitioner submitted seven Forms W-2 showing that five out of the seven employees received wages under \$6,500. The beneficiary received \$36,000 and another individual received \$30,000. The petitioner also submitted a new organizational chart that listed the president, vice president, secretary/manager, assistant manager and clerk/cashier. The petitioner also submitted a copy of its IRS Form 941, Employer's Quarterly Federal Tax Return, for the first two quarters of 2013, which indicates that it had only four employees at the time of filing the Form I-140.

The director denied the petition on October 30, 2013, concluding that the petitioner failed to establish that it will employ the beneficiary in a qualifying managerial or executive capacity. In denying the petition, the director determined that the petitioner provided an overly broad job description that failed to convey an understanding of what the beneficiary primarily does on a day-to-day basis. The director concluded that the beneficiary would not supervise a staff comprised of subordinate managerial, supervisory or professional employees, or that he would otherwise be relieved from primarily performing non-managerial and non-executive functions associated with the operation of the petitioner's business.

On appeal, counsel contends that the director placed undue emphasis on the petitioner's staffing levels, and undue influence has been placed on the small size of the business. Counsel also contends that the beneficiary will work in an executive capacity.

2. Analysis

When examining the executive or managerial capacity of the beneficiary, we review the totality of the record, starting first with the petitioner's description of the beneficiary's proposed 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 job descriptions of the beneficiary's subordinate employees, the nature of the business that is conducted, the petitioner's subordinate staff, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role within the petitioning entity. While an entity with a limited support staff will not be precluded from the immigration benefit sought herein, it is subject to the same burden of proof that applies to a larger entity with a moderate or large subordinate staff. In other words, regardless of an entity's size or support staff, the petitioning entity must be able to provide sufficient evidence showing that it has the capability of maintaining its daily operations such that the beneficiary would be relieved from having to primarily perform the operational tasks.

In the present matter, upon review of the totality of the record, the evidence does not support a finding that the beneficiary would allocate his time primarily to the performance of tasks that are within a qualifying managerial or executive capacity.

On review, the petitioner provided a vague description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner stated the beneficiary will: "analyze and develop overall corporate financial goals and objectives;" "oversee subordinate staff;" and, "enforce safety, health and security rules." This description provides little insight into what the beneficiary will primarily do on a day-to-day basis as vice president, and the petitioner did not explain how the beneficiary will oversee the subordinate staff and define the corporate financial goals and objectives. The petitioner also did not clearly explain which employees and departments will assist the beneficiary in performing his job duties. Furthermore, 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 sufficient details of the beneficiary's daily activities. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

The beneficiary's job description also includes several non-qualifying duties such as responsibility for "all tax and legal matters, procure[ment] and invest[ment of] corporate fund[s];" "analyze the market for gasoline and commodities costs, manage inventory, availability and demand, set sales and profit goals;" "review cost analysis, market survey, and other reports;" "negotiate, execute contracts and purchases;" "plan and direct marketing, promotional and public relations activities, represent business to the public;" and, "research and develop new business opportunities." The petitioner did not indicate who will be in charge of market research and financial operations nor of the development of the marketing program and expansion strategies. In addition, representing management in negotiations is an operational duty that cannot be classified as a managerial or executive task. It appears that the beneficiary will be marketing the business rather than directing such activities through subordinate employees. 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. at 604.

In the instant matter, the job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will perform. While the petitioner has provided a breakdown of the percentage of time the beneficiary will spend on various duties, the petitioner has not fully articulated the nature of these duties.

In addition, the petitioner provided two different organizational charts and did not explain the reason for the differences. The first organizational chart submitted with the initial petition listed a president, a vice president, a secretary/manager, an assistant manager, an assistant manager in restaurant, a cashier/cook, and a clerk/cashier. In response to the request for evidence, the petitioner submitted a second organizational chart that indicated a president, a vice president, a secretary/manager, an assistant manager and a clerk/cashier. The petitioner does not explain why it

no longer employs an assistant manager or a cook for the restaurant as listed in the initial organizational chart. It is not clear who is performing the duties of the restaurant as the new organizational chart does not list any employees working in the restaurant. 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 petitioner also provided documents entitled, "weekly employee work schedule," from January 1, 2013 until August 25, 2013. According to the work schedules, there were several hours during the week where only one individual is working at the gas station and convenience store. In addition, it does not appear that the work schedules submitted cover the entire time the store is open. For example, some weeks indicate that one employee was working on Sunday from 4 pm to 9 pm and other weeks it states that one employee was working on Sunday from 2 pm to 9 pm. It is doubtful that a gas station and convenience store has different hours of operation on a weekly basis. Thus, the employee work schedules submitted do not accurately indicate the hours employees worked each week. In addition, it is not clear how one employee can cover an entire shift alone which would include running the cashier, handling the restaurant, handling customer service, inventory and stocking.

Furthermore, the Forms W-2 for 2012 submitted by the petitioner indicated that five out of the seven employees received wages that cannot possibly be full-time employment. For example, the wages of the employees were \$5976.08, \$1123.36, \$6292.96, \$3871.45, and \$3847.52. It appears that only two employees received a full time salary, the beneficiary and the secretary/manager.

The petitioner runs a gas station and convenience store that is most likely open seven days a week for at least several hours each day. Thus, it is not clear how a gas station and convenience store that is opened for several hours per week can run with two employees and one part-time employee and be in charge of inventory, purchasing, customer service, stocking, budget, financial operations and running the cash register. Thus, the petitioner did not explain who would handle the financial operations such as budgeting and bookkeeping; purchasing of inventory; inventory management; marketing; sales; market research; and other important elements in successfully running a business. Since the petitioner must establish that the beneficiary would *primarily* perform qualifying duties, it must be determined that the beneficiary would not spend a majority of his time performing these 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In summary, the petitioner has failed to provide sufficient evidence to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity and based on these findings, the instant petition cannot be approved.

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 petitioner's assertions are true. See *Systronics*, 153 F. Supp. 2d at 15.

Here, the petitioner contends that it has enough staff to establish a reasonable need for a vice president who primarily performs qualifying duties. However, as discussed, the record does not substantiate that the petitioner actually employs all of the individuals listed on the organizational chart or that it retains a sufficient number of employees to run the gas station/convenience store.

In light of the foregoing discussion, the petitioner has not established that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity and on the basis of this second adverse conclusion, this petition cannot be approved.

B. Qualifying Relationship

Beyond the decision of the director, the petitioner did not provide sufficient evidence to establish a qualifying relationship between the petitioner and the entity where the beneficiary was employed abroad. 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).

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

- (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.

In the present matter, the petitioner claims to be an affiliate of [REDACTED] located in India, where the beneficiary was employed prior to coming to the United States to work for the petitioner. This claim is based on the assertion that [REDACTED] owns 51% of the petitioner. Counsel for the petitioner explained that "initially, in creating the corporation on February 22, 2011, Certificate #1 was erroneously made out to the benefit of [REDACTED] for 1000 shares of [the petitioner]." Counsel also explained that in order to correct the error, [REDACTED] created an addendum, signed by both parties and formalized in the Minutes, transferring 510 shares of stock to the [foreign company]."

The petitioner submitted Certificate Number 1 issuing 1000 shares of the petitioner to [REDACTED] dated February 22, 2011. The petitioner submitted a one paragraph document certifying that [REDACTED] acquired 51% partnership in the petitioner, signed by [REDACTED] and the beneficiary. The petitioner also submitted a document entitled, "Minutes of the Director's Meeting," stating that [REDACTED] transferred 510 shares of the petitioner to [REDACTED].

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, a stock certificate alone and an addendum 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 a new stock certificate of the new issued shares 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.

Given that ownership of the petitioning entity is germane to establishing the existence of an affiliate relationship between the petitioner and the beneficiary's employer abroad, the petitioner's failure to provide sufficient and reliable evidence to identify its owner(s) precludes the AAO from concluding that the petitioning U.S. employer and the beneficiary's employer abroad are commonly owned and controlled. See *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'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). Thus, the petitioner has not established that it maintains the requisite qualifying relationship with the beneficiary's foreign employer.

III. CONCLUSION

An application or petition that fails to comply with the technical requirements of the law may be denied by us 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 conducts appellate review on a *de novo* basis).

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of our enumerated grounds. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative 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.