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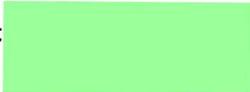


U.S. Citizenship
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Services

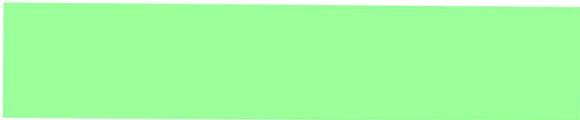


DATE: **MAY 23 2014**

OFFICE: TEXAS SERVICE CENTER

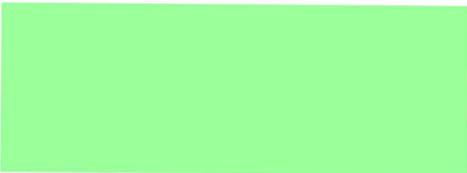
FILE: 

IN RE: Petitioner:
Beneficiary:



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

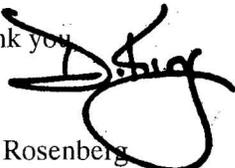
ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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 preference visa petition was denied by the Director, Texas Service Center. The matter subsequently came before the Administrative Appeals Office (AAO) on appeal. The appeal was dismissed and the matter is now before the AAO on a motion to reopen and reconsider. The petitioner's motion will be granted and the matter will be reopened for consideration of the newly submitted documents. However, the AAO will affirm the underlying decision dismissing the appeal.

The petitioner is a Florida limited liability company that is engaged in the business of providing telecommunications services. The petitioner seeks to employ the beneficiary permanently as its chief financial officer. 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.

I. Factual and Procedural Background

The record shows that the petitioner filed a Form I-140 on May 22, 2012. The record indicates that the petitioner provided supporting documents, including a statement, dated March 13, 2012, signed by [REDACTED] in his capacity as the petitioner's chief operations manager. Mr. [REDACTED] stated that the petitioner has an affiliate relationship with the beneficiary's foreign employer based on his and the beneficiary's ownership of each entity's shares in "the same proportion." Specifically, Mr. [REDACTED] stated that he and the beneficiary each owns 42.17% of the foreign and 50% of the petitioning entity. The petitioner provided evidence documenting these claimed ownership breakdowns.

Additionally, with regard to the beneficiary's proposed employment in the United States, Mr. [REDACTED] stated that the beneficiary will work 40 hours per week during which he will dedicate his time entirely to "managing and supervising the financial operations" of the petitioning entity. In a separate submission, also dated March 13, 2012 and signed by Mr. [REDACTED] in his professional capacity, the following percentage breakdown was provided describing the beneficiary's proposed employment:

- Design and [f]ormulate corporate and financial policy, rules and regulations and make sure that every department adheres to them. Assure that appropriate efforts are made to effective [sic] manage the organizations [sic] financials and advise the Managing Members, Chief Operations Officer and other staff on financial matters and assist in long-range planning; 10%
- Direct and coordinate the company's financial affairs, on a daily basis, in accordance with the business plan and budget as well as meeting the organization's short-term objectives, using published financial principles and policies, and complying with government regulations; 10%
- Direct and oversee the development and ongoing maintenance of policies, processes and procedures that are required to properly manage information, and ensure adequate and accurate accounting controls and services are in place; 10%
- Oversee the [a]ccounting, [f]inancial [p]lanning, [t]ax, [b]udget, [p]ayroll, and [c]ontracting functions; 10%
- Exercise complete authority over the hiring and firing of all personnel; 10%
- Direct, supervise and evaluate the performance of accounting, sales and other financial staff, recommending and implementing personnel actions, such as promotions and dismissals; 10%
- Directs and supports the company's sales and pricing strategies, payment policies and strategies, and strategic planning efforts, and oversee the company's accounts payable and manage accounts client receivable; 5%

- Appraise the program's financial position and issue monthly reports on the program's financial stability, liquidity, and operational performance, and synthesize complex satellite [i]nternet transactional matters across international markets and prepare reports; 10%
- Conduct ad-hoc financial analysis for [the petitioner]'s satellite products and services, as provided through co-location facilities to customers worldwide; 5%
- Conduct cost and margin analysis on proposed agreements with technology companies such as satellite transponder providers, equipment suppliers, and collocation facilities and Hubs; 10%
- Establish lines of credit: direct receipt, disbursement, and expenditures of money and capital assets, and develop and maintain relationships with banking, insurances, and non-organizational accounting personnel to facilitate financial activities; 5%
- Evaluate business-partnering opportunities with the Managing Members, and research and review opportunities for strategic acquisitions/partnerships with organizations that broaden the program's portfolio of products and services. 5%

100%

After reviewing the record, the director determined that the petition did not warrant approval. Accordingly, on October 15, 2012, the director issued a request for evidence (RFE) instructing the petitioner to provide further documentation to address evidentiary deficiencies concerning the beneficiary's proposed employment with the petitioning entity. Specifically, the director instructed the petitioner to provide, in part, a detailed list of the beneficiary's proposed job duties supplemented with time allocations, indicating the percentage of time the beneficiary would spend carrying out each of his assigned tasks. The petitioner was also asked to provide a copy of its organizational chart depicting its staffing hierarchy and demonstrating the employees and contractors the petitioner employed.

In response, the petitioner supplemented the record with another job description, whose contents will be addressed at length in the analysis portion of this discussion. The petitioner also provided a copy of its organizational chart, a list of its employees as well as their job duties and educational credentials, and payroll documents showing that at the time of filing the Form I-140 the petitioner had seven employees – including a chief financial officer, an internal sales manager, a sales assistant, an administrative manager, a chief operations officer, a systems engineer, and a hub engineer – and employed the services of outside contractors to provide accounting services, bandwidth, and special products and services. The chart shows that the beneficiary would directly oversee the work of the administrative manager, the outsourced tax and accounting service provider, and the international sales manager, who would oversee the work of one sales assistant. Although the chart indicates that the petitioner intends to hire a marketing assistant, who would also be subordinate to the international sales manager, that position is shown as vacant at the time of filing.

On April 30, 2013, the director issued a decision denying the petition on two separate grounds of ineligibility. First, the director determined that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity. Second, the director concluded that the ownership breakdown that applied to the petitioner and to the foreign organization where the beneficiary was formerly employed did not qualify as an affiliate relationship pursuant to the applicable regulatory definition of the term "affiliate."

On appeal, counsel submitted a brief disputing the director's findings, contending that the petitioner's previously submitted evidence is sufficient to determine that the petitioner and the beneficiary are eligible for the immigration benefit sought herein. After reviewing the record in its entirety and weighing all evidence

that is relevant to the issues in contention, we find that record does not warrant approval of the petition. A comprehensive analysis of the issues and the relevant supporting evidence is provided in the discussion below.

II. The Law

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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.

III. Managerial or Executive Capacity

The first issue to be addressed in this matter is whether the petitioner submitted sufficient evidence to establish that the beneficiary 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--

- (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.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (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.

As a threshold issue in the matter at hand, we note that the director provided a deficient legal analysis, which placed undue emphasis on employee salaries as an indicator of whether a particular position could be deemed professional or managerial. The director also incorrectly interpreted the petitioner's organizational chart, concluding that the beneficiary's position of "CFO appears to be subordinate to the Operations Manager." In fact, when reviewing the evidence submitted originally in support of the petition and subsequently in response to the RFE, both of the petitioner's organizational charts indicate that the beneficiary's position of CFO and his partner's position of COO (chief operations officer) are placed at the same tier within the petitioner's organizational hierarchy. Although both the CFO and COO are technically shown as subordinates to the board of directors, given that the individuals who occupy the respective positions of CFO and COO also

comprise the board of directors, it appears that these two individuals, one of whom is the beneficiary, share the top-most positions within the organization and it cannot be said that one individual is subordinate to the other. Furthermore, the chart does not make any reference to an "operations manager" positions as cited in the director's decision.

Notwithstanding the above described deficiency, the record supports the director's ultimate conclusion – that the petitioner failed to provide sufficient evidence to establish that it would employ the beneficiary in a qualifying managerial or executive capacity. As such, the director's decision will be affirmed. We will, however, provide a proper analysis of the evidence to further explain why the director's conclusion was warranted.

In general, when examining the executive or managerial capacity of the beneficiary, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record, starting first with the petitioner's description of the beneficiary's job duties. See 8 C.F.R. § 204.5(j)(5). Published case law has determined that the duties themselves will reveal the true nature of the beneficiary's 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). Also critical to this analysis are factors such as staffing size, job descriptions of the beneficiary's subordinates and other employees who will carry out the petitioner's daily operational tasks, the nature of the business conducted, and any other facts that may contribute to a comprehensive understanding of the beneficiary's actual role within the organization.

Turning to the issue of the beneficiary's job description, the record fails to establish that the beneficiary would allocate his time primarily to tasks within a qualifying managerial or executive capacity. Although the petitioner supplemented the record with a second job description in response to the RFE, the more recent job description, while similar in content and format when compared to the original description, contained an altered percentage breakdown and in some instances added or replaced certain terms without explaining the reason for the changes or even acknowledging that the changes had been made. For instance, where the original job description stated that the beneficiary would design and formulate corporate and financial policy, the second job description replaced the term "formulate" with "implement" thus indicating that the beneficiary would design and implement corporate and financial policy. The petitioner did not explain the reason for this change or clarify how or whether implementing versus formulating policy would affect the beneficiary's tasks. The petitioner also altered the time allocation for the following job duties: (1) originally, the beneficiary allocated 10% of the beneficiary's time to exercising authority over hiring and firing personnel, but later altered this percentage to 8% in the second job description; (2) originally, the petitioner allocated 5% of the beneficiary's time to directing and supporting the company's sales and pricing strategies, payment policies and strategies, but changed that time allocation to 8% in the more recent job description; (3) the original description allocated 10% of the beneficiary's time to appraising the petitioner's financial position, reporting monthly on its financial stability, liquidity, and operational performance, combining complex satellite internet transactional matters across international markets, and preparing reports, while the newer job description allocates only 5% of his time to a set of similar job duties; (4) with regard to the beneficiary's responsibility in directing and supporting strategies and policies concerning sales, pricing, payments, and overseeing accounts payable and receivable, the petitioner originally allocated 5% of the beneficiary's time, but changed this time allocation to 8% in the updated job description; (5) while conducting ad-hoc analysis for satellite products and services was originally allocated 5% of the beneficiary's time, the updated job description allocated 4% of his time to the same job duty; (6) while establishing lines of credit and instructing deposit and disbursement of funds as well as authorizing expenditures was originally allocated 5% of the beneficiary's time, the new job description altered this time allocation to 3%; and (7) while the original job

description indicated that the beneficiary would allocate 5% of his time to evaluating business-partnering opportunities and researching and reviewing opportunities for strategic acquisitions and/or partnerships, the newer job description added negotiating, a task that was not included in the original description, along with assessing partnership opportunities and conducting research and reviewing acquisition and/or partnership opportunities allocated 12% of the beneficiary's time to the group of tasks.

In sum, the petitioner altered time allocations and, in certain instances, the actual job duties since the time of the original job description, yet failed to provide an explanation for these considerable changes. While it is reasonable, and even expected, that the petitioner would provide additional evidence in response to an RFE in order to clarify and/or expand on evidence and information that was previously provided, the fact remains that an RFE is not issued for the purpose of allowing the petitioner to significantly alter information that was previously offered. The petitioner in the present matter did not provide clarifying information. Instead, the petitioner created confusion by repeating many of the same job duties, while changing their time allocations without offering an explanation for the changes. Such changes can be interpreted as little more than inconsistencies with no way of determining which set of facts, if any, actually applied to the beneficiary's proposed position when the Form I-140 was originally filed. 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).

Furthermore, despite any development or progress that the petitioner may have undergone between the time the petition was first filed and the time the petitioner issued its response to the RFE, a determination of the petitioner's eligibility must be based on the facts and circumstances that existed 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). Thus, even if, *arguendo*, the altered time allocations were intended to reflect business progress, such information would be deemed irrelevant for the purpose of determining the petitioner's eligibility at the time of filing.

Inconsistencies aside, when reviewing the content of the job descriptions, the information provided lacks sufficient detail as to the beneficiary's actual daily tasks. For instance, while the petitioner provides a general statement to establish the beneficiary's policy-making role with regard to all issues concerning the petitioner's finances, merely stating that the beneficiary would design and formulate financial and corporate policy, as was stated in the original job description, does not specify what actual policies the beneficiary had formulated at the time of filing or what specific daily tasks represent the beneficiary's policy-making role. The petitioner was similarly vague in stating that the beneficiary would "direct and oversee the development and ongoing maintenance of policies, processes and procedures," as no clarifying information was provided to explain the difference between the beneficiary's policy-making role here and his policy-making role with regard to financial policy. Next, while having discretionary authority over personnel matters is a characteristic of someone employed in a managerial or executive capacity, it is unclear whether the beneficiary's role is limited to merely exercising his authority or whether the beneficiary himself recruits the employees and thus performs a human resources task that maybe outside of the domain of a manager or executive. Additionally, the petitioner did not determine that establishing lines of credit is a qualifying managerial or executive task. Moreover, because the petitioner grouped several tasks together when providing the percentage breakdown, it is unclear precisely how much time would be allocated to specific items within a group of tasks. This information is particularly relevant when a group is comprised of both qualifying and non-qualifying tasks. While 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). In grouping together qualifying and non-qualifying tasks without assigning time allocations to individual job duties, it becomes unclear precisely how much time is being allocated to qualifying tasks versus those that are non-qualifying.

Lastly, while the petitioner provided sufficient evidence to establish that it employed the personnel identified in the petitioner's organizational chart, such evidence is not sufficient to clarify the nature of the specific job duties the beneficiary would perform. Despite our review of the various email correspondence from and to the beneficiary, which establish that the beneficiary assumed an integral in assisting with the creation of client proposals and facilitating communications between the petitioner and its various clients, it is unclear that the individual components of that role would involve the performance of primarily managerial or executive tasks. There were a number of emails in which the beneficiary discussed creating the client proposals – a task that has not been established as being within a qualifying capacity, despite the fact that it appears to be a key task in the beneficiary's proposed role within the petitioner's organization.

On appeal, counsel relies on the expert opinion of a university professor to establish the qualifying nature of job duties that comprise the beneficiary's proposed employment. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). In the matter at hand, Professor [REDACTED] Director of Graduate Studies and Senior Lecturer of the School of Business at the [REDACTED] Connecticut, testified about the qualifying nature of the beneficiary's proposed job duties based on his business knowledge. However, there is no evidence that Mr. [REDACTED] credentials include first-hand knowledge and understanding of the statutory definitions of managerial or executive capacity within the context of immigration law or his own personal knowledge of the beneficiary's actual job duties. Rather, it appears that Mr. [REDACTED] relied predominantly on evidence and information that the petitioner provided in order to formulate an opinion about the beneficiary's proposed employment. Mr. [REDACTED]' statements, much like the petitioner's own assertions, must be supported with documentary evidence in order to meet the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Mr. [REDACTED]' professional opinion in the capacity of a third party is not deemed as sufficient supporting evidence that can be used to substantiate the petitioner's claims.

Given the considerable evidentiary weight placed on a detailed description of the beneficiary's proposed job duties and in light of the deficiencies of the job descriptions the petitioner provided in the present matter, we cannot conclude that the petitioner provided sufficient evidence to establish that the beneficiary would allocate his time primarily to the performance of tasks within a qualifying managerial or executive capacity.

IV. Qualifying Relationship

The other issue to be addressed in this decision is whether the petitioner has a qualifying relationship with the beneficiary's claimed employer 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); *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:

- (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 evidence in the record confirms Mr. [REDACTED]'s claims with regard to the ownership of the petitioner and the foreign entity that previously employed the beneficiary in the qualifying position abroad. The record shows that the foreign entity has a total of five owners with Mr. [REDACTED] and the beneficiary each owning 42.17% of the foreign entity's shares. The ownership of the petitioning entity, however, is evenly split between Mr. [REDACTED] and the beneficiary with each owning 50% of the petitioning limited liability company.

To establish eligibility in this case, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982).

In this case, the petitioner provided evidence to establish that together, the beneficiary and Mr. [REDACTED] control the petitioning entity by virtue of each owning 50% of that entity and that the same two individuals have de facto control of the foreign entity by virtue of the amendments to Articles 13, 14, and 17, which indicate that no decision can be made nor any by law changed without a vote of 75% of the company's shareholders. Given that no combination of votes other than the beneficiary and Mr. [REDACTED] together accumulate to at least 75%, the two men must vote in concert to establish a controlling interest. The same is true of the 50/50 ownership interest assumed by the same two men in the petitioning entity. Therefore, the

petitioner has established that a qualifying relationship exists between the petitioner and the beneficiary's foreign employer and the director's adverse finding to the contrary must be withdrawn.

V. Conclusion

Notwithstanding the withdrawal of the second ground cited in the director's decision as a basis for denial, the decision dismissing the appeal will not be disturbed based on the petitioner's failure to overcome the director's first adverse finding with regard to the beneficiary's employment capacity in her proposed position with the petitioning U.S. entity.

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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The motion is granted. The underlying application is denied.