

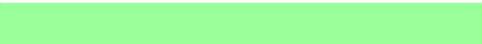


U.S. Citizenship  
and Immigration  
Services

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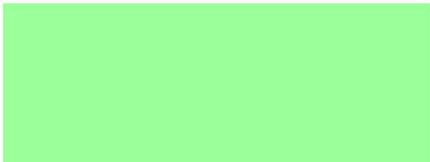


DATE: **OCT 23 2014** OFFICE: TEXAS SERVICE CENTER FILE: 

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)

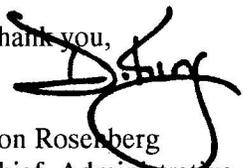
ON BEHALF OF PETITIONER:



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 Texas Service Center denied the employment-based immigrant visa petition. The petitioner filed an appeal to the Administrative Appeals Office ("AAO") on April 19, 2010. On June 27, 2013, we withdrew the director's decision and remanded the matter to the director for further action and entry of a new decision. The director recommended denial of the petition and certified the decision to us for review. *See* 8 C.F.R. § 103.4(a)(1). The director's decision will be affirmed and the petition will be denied.

The petitioner filed this 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 Texas corporation, is engaged in the distribution of consumer goods, and claims to be a subsidiary of [REDACTED], the beneficiary's former employer in India. The petitioner seeks to employ the beneficiary in the position of President/CEO.

The director initially denied the petition, concluding that the beneficiary, as the sole owner of the foreign entity that purportedly owns 100% of the petitioning company, cannot be considered an employee of the petitioner.

The petitioner subsequently filed an appeal. We disagreed with the director's reasoning and withdrew the director's decision. We remanded the matter to the director after determining that there was insufficient evidence in the record to establish the following: (1) that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity; and, (2) that the petitioner has a qualifying relationship with the beneficiary's foreign employer.

After requesting additional evidence and reviewing the petitioner's response, the director denied the petition and certified his decision to us on May 29, 2014. The director determined that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity, and that the petitioner failed to establish a qualifying relationship with the beneficiary's foreign employer. The petitioner did not submit a supplemental brief or evidence for review on certification.

## 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.

Pursuant to 8 C.F.R. § 204.5(j)(3)(i)(D), the petitioner must establish that it has been doing business for at least one year. In turn, 8 C.F.R. § 204.5(j)(2) provides that "[d]oing business means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

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. THE ISSUES ON CERTIFICATION

### 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.

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 President/CEO. In support of the petition, the petitioner provided a job description for the proffered position that states the following:

The President/CEO is responsible for the overall operational efficiency and success of the organization. Detailed below are the areas of responsibility. President/CEO will delegate her authority to subordinate managers who will actually perform the following tasks and will report to the CEO/President of the corporation.

#### **Financial Responsibilities: 40% time commitment.**

- o Responsible for maintaining the enterprise on sound financial footing.
- o Primary contact with the bank to make timely deposits, responsible for timely payment to Texas Lottery Commission for their products sold.
- o Primarily responsible for payments to vendors including vendors for merchandise as well as money orders sold.
- o Primarily responsible for arranging
  - working capital necessary to purchase inventory,
  - pay employee salaries and
  - pay the running expenses of the operation.

#### **Operational Responsibilities: 40% time commitment.**

##### Inventory Management:

- o Responsible for vendor relations and inventory management.
- o Responsible for maintaining optimum level of inventory.
- o Responsible for ordering inventory in time, ensuring proper pricing and display.
- o Responsible for maintaining proper account payable and sustaining vendor relations.

Personnel Management:

- Responsible for hiring and firing of the employees.
- Responsible for making shift schedules on a daily, weekly and monthly basis.
- Ensuring the complete personnel files are maintained for all employees.
- Ensuring that proper screening of all employees is done to ensure that only people who have the legal authority to work in the US are hired.

Premises Management

- Responsible for lease negotiations, ensuring compliance with lease terms by the landlord.
- Responsible for security arrangements[.]
- In case of any mishaps, responsible for dealing with the local law enforcement.

**Regulatory Responsibility: 20% time commitment.**

- Responsible for ensuring that all relevant city, county, state and federal licenses have been obtained and are current.
- Ensuring that proper procedures for sale of alcohol and tobacco products are followed.

In response to the director's request for evidence ("RFE") dated December 10, 2013, the petitioner provided an organizational chart that indicated the beneficiary as President/CEO who in turn supervises an office manager, a vendor relations manager and a marketing and sales manager. The office manager supervises a receptionist/telephone operator; the vendor relations manager supervises an assistant, vendor relations; and the marketing and sales manager supervises two outdoor salesmen. The petitioner also provided a brief job description for the office manager, vendor relations manager and the marketing manager.

The director denied the petition on May 29, 2014 and certified the decision to the AAO, concluding that the petitioner failed to establish the following: (1) that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity; and, (2) that the petitioner has a qualifying relationship with the beneficiary's foreign employer. On certification, the petitioner did not submit a new brief or additional evidence or documentation.

## 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 her time primarily to the performance of tasks that are within a qualifying managerial or executive capacity.

Looking to the job description the petitioner provided with the petition, we observe that the petitioner assigned a percentage breakdown to groups of actions rather than to individual tasks. For instance, the beneficiary will have "financial responsibilities;" "operational responsibilities;" and, "regulatory responsibilities." The petitioner did not, however, define the petitioner's goals and policies, or clarify the financial responsibilities and goals of the organization. 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 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. at 1108. The petitioner's descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature.

The job description also includes several non-qualifying duties such as the beneficiary is "primarily responsible for payments to vendors including vendors for merchandise as well as money orders sold;" "responsible for ordering inventory in time, ensuring proper pricing and display;" "responsible for maintaining proper account payable and sustaining vendor relations;" and, "responsible for lease negotiations, ensuring compliance with lease terms by the landlord." It appears that the beneficiary will be in charge of inventory purchases, vendor relations, financial reporting and negotiations 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 document entitled "Job Description for the position of President/Chief Executive Officer [the beneficiary]," the petitioner confusingly stated that the beneficiary "will delegate her authority to subordinate managers who will actually perform the following tasks and will report to the CEO/President of the corporation," and then proceeded to list several job duties that are both qualifying and non-qualifying in nature. It is unclear whether the listed job duties are for the beneficiary or for her purported subordinate managers, considering the title of the document and that the petitioner provided separate job descriptions for its office manager, vendor relations manager and marketing manager. 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).

In addition, the director's RFE requested a more definitive description of the beneficiary's job duties; however, the petitioner provided the same job description it previously submitted. 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).

Furthermore, the petitioner did not provide any documentation to establish that the petitioner in fact employs the individuals listed on the organizational chart. The petitioner submitted Forms W-2 and Forms 941, Employer Quarterly's Wage Reports, but none of them were for the petitioner. All the documents were for a company named [REDACTED]. We note that [REDACTED] is not the petitioning entity in this proceeding. The petitioner completed Part 1 of the I-140 petition to clearly indicate that the intended employer is [REDACTED]." Regardless of any ownership interest in [REDACTED] the United States and Immigration Services ("USCIS") must examine whether the prospective United States employer, i.e., the U.S. subsidiary of the beneficiary's foreign employer qualifies for an immigrant status on behalf of the beneficiary. Only those documents that pertain specifically to the beneficiary's foreign employer and the foreign employer's subsidiary office will be addressed. Thus, we will not consider all the documents for [REDACTED] or other businesses that are listed on the invoices submitted with the petition.

Furthermore, the petitioner has failed to provide any detailed explanation, along with credible and probative supporting documentation, establishing the U.S. entity's overall organizational structure, staffing levels, and the scope of its business activities at the time of filing. Based on the evidence in the record, it appears that the petitioner runs a gas stations/convenience store. However, the record is unclear as to exactly how many gas stations/convenience stores the petitioner actually operates and from what addresses, as much of the evidence the petitioner submitted with the instant petition was outdated, contained different addresses for the same business name, or pertained solely to [REDACTED]. The record is also unclear as to what the beneficiary's actual role will be with regards to each separate location, as well as what the actual staffing levels of each location will be. The petitioner

provided generic job descriptions for an office manager, vendor relations manager and marketing manager, but provided no actual proof of employment such as Forms W-2, Forms 941 or paystubs. The petitioner also provided no other job descriptions or explanations regarding any of its other employees, if any. Considering the petitioner's claim that it operates a gas stations/convenience store, it is unclear who is actually performing the day-to-day functions of the U.S. operations such as stocking shelves, working at the cash register, customer service, ordering inventory, and bookkeeping. Overall, the record is insufficient to establish that the beneficiary will be employed in a primarily managerial or executive capacity.

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 articulated whether each duty is managerial or executive.

#### B. Qualifying Relationship

The next issue to be addressed in this proceeding is whether the petitioner established that it has a qualifying relationship with the foreign entity. 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 a subsidiary of [REDACTED] the beneficiary's foreign employer. This claim is based on the assertion that the foreign company owns 100% of shares of the U.S. petitioner. The petitioner submitted a stock certificate numbered 1001 and it certifies that the foreign company owns 1000 shares of the petitioner's shares. The petitioner also submitted a copy of its Articles of Incorporation.

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 petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In the current case, the petitioner submitted one stock certificate and the petitioner's articles of incorporation. As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone 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 the minutes of relevant annual shareholder meetings 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.

The petitioner has not established that it maintains the requisite qualifying relationship with the foreign entity and thus, the director's decision shall be affirmed.

### C. Employment Abroad in a Managerial or Executive Capacity

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).

Beyond the decision of the director, the record contains insufficient evidence to establish that the overseas company employed the beneficiary in a primarily managerial or executive capacity. The foreign company provided a letter dated July 27, 2019, that states the beneficiary was employed by the foreign company since 1991 and acted as Managing Partner where "she has been entrusted with senior level functions in the organization and charged with the responsibility and granted authority to make day-to-day as well as long term and strategic decisions." The petitioner provided a vague and brief job description and did not provide an organizational chart of the foreign entity or any job descriptions for the other employees. The record lacks substantive job descriptions establishing what job duties the beneficiary performed during her employment abroad. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. For this additional reason, the petition must be denied.

### III. CONCLUSION

The director's decision to deny the petition will be affirmed. 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 the petitioner has not met that burden.

**ORDER:** The director's decision is affirmed. The petition is denied.