



U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **JUL 27 2015**

FILE #: [REDACTED]

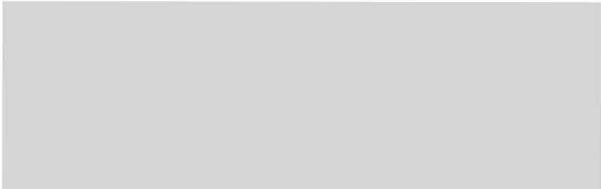
PETITION RECEIPT #: [REDACTED]

IN RE: Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page ([www.uscis.gov/i-290b](http://www.uscis.gov/i-290b)) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office



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

The petitioner is an Arizona corporation that is engaged in retail sales and the operation of grocery stores. It seeks to employ the beneficiary in the United States as its information systems manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition, concluding that the evidence of record did not establish that: (1) the petitioner had a qualifying relationship with the beneficiary's former employer as of the date the petition was filed; and (2) the beneficiary was employed abroad in a qualifying managerial or executive capacity.

On appeal, the petitioner submits a brief contesting the director's adverse findings which is supported by additional documentary evidence.

**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 the alien seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

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

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a

statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

## II. Factual Background and Procedural History

The record shows that the petition was filed on October 25, 2013. The petition was accompanied by a supporting statement, dated October 7, 2013, in which the petitioner provided relevant information pertaining to the petitioner's eligibility, including an overview of the petitioner's business and the beneficiary's former and proposed positions with the foreign and U.S. entities, respectively. The petitioner also provided supporting exhibits 1-27, pertaining to the beneficiary's employers abroad and in the United States. The evidence included, in part, corporate, financial, and business documents pertaining to the petitioner and the beneficiary's former employer abroad.

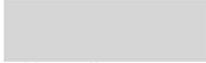
Following a review of the petitioner's supporting documents, the director determined that the record lacked sufficient evidence to establish that a qualifying relationship existed between the beneficiary's former employment abroad and the U.S. entity or that the beneficiary was employed abroad in a qualifying managerial or executive capacity. Accordingly, on June 10, 2014, the director issued a request for evidence (RFE), instructing the petitioner to provide evidence addressing the evidentiary deficiencies discussed herein. The director observed that there were inconsistencies pertaining to the petitioner's ownership interest in the foreign entity where the beneficiary was previously employed and asked that the petitioner provide evidence to resolve those inconsistencies and establish that a qualifying relationship continues to exist. The director also provided a list of deficiencies pertaining to the beneficiary's employment abroad, instructing the petitioner to provide additional evidence and information reflecting the beneficiary's claimed employment in a managerial capacity at the time of her employment abroad.

The petitioner's response included a statement, dated August 26, 2014, which was accompanied by supporting exhibits 1-31, addressing the facts pertaining to the petitioner's qualifying relationship with the beneficiary's former employer abroad as well as the facts and circumstances of the beneficiary's former and proposed positions with the foreign and U.S. entities, respectively.

After reviewing the petitioner's submissions, the director concluded that the evidence of record did not establish that the petitioner had a qualifying relationship with the beneficiary's foreign employer at the time the petition was filed or that the beneficiary was employed abroad in a qualifying managerial or executive capacity. The director therefore issued a decision, dated November 5, 2014, denying the petition.

On appeal, the petitioner submits a brief, disputing the director's findings, supported by exhibits 1-8 in an effort to establish that the petitioner and the beneficiary meet eligibility requirements.

Upon conducting a comprehensive review of the petitioner's statements and submissions, we conclude that the petitioner did not provide sufficient evidence to overcome the director's adverse conclusions. Therefore, for reasons stated below, we will affirm the denial of the petition.



### III. Issues on Appeal

As indicated above, the issues to be addressed in this proceeding are whether the petitioner, at the time of filing, had a qualifying relationship with the beneficiary's former employer abroad and whether the beneficiary was employed abroad in a qualifying managerial or executive capacity.

#### A. Qualifying Relationship

First we will address the evidence pertaining to the petitioner's claimed qualifying relationship with the beneficiary's former 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 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, although the director acknowledged the petitioner's claim that it and the beneficiary's former employer are affiliates, he concluded that the two entities do not satisfy either subsection (A) or (B) of the definition of affiliate because they are neither owned by the same parent or individual, as required by subsection (A), nor are they owned by the same group of individuals where each individual owns approximately the same share or proportion of each entity, as required by subsection (B). The director found that while the petitioner is currently owned by two trusts and one

individual, the foreign entity has four individual shareholders. The director further noted that the evidence of record demonstrated that [REDACTED] owned the majority of the foreign entity's "social capital," which is comprised of stock series A, B, B-1, and B-2. While the director acknowledged that [REDACTED] is a trustee in a living trust, which owns the majority of the petitioner's stock, he duly pointed to the terms of a Certificate of Trust, dated June 4, 2012, which requires that decisions be made unanimously when a trust consists of two trustees. Given that Mr. [REDACTED] is one of two trustees in whose name the living trust is titled – ([REDACTED] being the other trustee – he did not have sole ownership and control of the majority of the petitioner's stock. As indicated by the evidence presented, the majority of the petitioner's stock belongs to a living trust that is comprised of two trustees, neither of whom can be deemed as having control of the stock, despite each individual's veto power. The director also acknowledged the petitioner's submission of a document, dated August 28, 2014, in an attempt to establish that Ms. [REDACTED] relinquished her control over the trust to the beneficiary. However, the director pointed out that this document was deficient in two ways. First, the director noted that the document was not notarized. Second, and more importantly, the director observed that the document did not exist at the time the petition was filed.

On appeal, the petitioner asserts that the petitioner's relationship with the foreign entity changed from one of parent-subsidary to one in which the two are affiliates, thus claiming that it has maintained a qualifying relationship with the beneficiary's foreign employer at all times that were relevant for the purpose of meeting eligibility criteria in the filing of the instant Form I-140 and the former nonimmigrant petitions on behalf of the same beneficiary. The petitioner asserts that the change in ownership of its majority stock from Mr. [REDACTED] to the [REDACTED] and ([REDACTED] Living Trust was not material to the petitioner's ownership and control, contending that Mr. [REDACTED] "owns and controls 50% of the voting powers by the terms of the Living Trust, and therefore controls the trust through the power of a negative veto power."<sup>1</sup> The petitioner does not, however, acknowledge or address the fact that by the very same operation of the trust, Ms. [REDACTED], the other trustee, similarly controls the trust by virtue of her negative veto power and that there is no evidence that either of the living trust members – the beneficiary or his wife – is shown to have an individual majority of the shares they own through the trust.

Further, with regard to the claim that Mr. [REDACTED]'s wife has relinquished her control of the trust by virtue of having executed a voting proxy agreement in which she gave the beneficiary de facto control over the living trust, the director properly determined that the referenced proxy agreement was deficient in light of the fact that the document did not come into existence until after the instant petition was filed. A petitioner must establish eligibility 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'r 1971). Here, the fact that the proxy agreement was executed on August 28, 2014 indicates that the beneficiary did not gain de facto control of the petitioner until ten months after the petition was filed. As properly stated in the director's decision, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to U.S. Citizenship and Immigration Services (USCIS) requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

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<sup>1</sup> Page 5, appeal brief.

[REDACTED]

Accordingly, we must evaluate the petitioner's eligibility based on the circumstances that existed as of the date the petition was filed. Here, the record shows that while Mr. [REDACTED] directly owned the majority of the foreign entity's stock, the same cannot be true of his ownership of the petitioning entity, which he shared jointly with his wife by virtue of the living trust, whose terms were in effect at the time of filing.

On appeal, the petitioner cites the case of *Sun Moon Star Advanced Power, Inc. v. Chappel*, 773 F. Supp. 1373 (N.D. Cal 1990), contending that the court's finding applies to the facts in the present matter. In the *Sun Moon Star* decision, the Immigration and Naturalization Service (now USCIS) refused to recognize the indirect ownership of the petitioner by three brothers owning shares of the company as individuals through a holding company. The decision stated that the two claimed affiliates were not owned by the same group of individuals. The court found that the Immigration and Naturalization Service decision was inconsistent with previous interpretations of the term "affiliate" and contrary to congressional intent because the decision did not recognize indirect ownership. Prior to the adjudication of the Sun Moon Star petition, the Immigration and Naturalization Service amended the regulations so that the definition of "subsidiary" recognized indirect ownership. See 52 Fed. Reg. 5738, 5741-2 (February 26, 1987). Accordingly, the basis for the court's decision has been incorporated into the regulations. However, despite the amended regulation and the decision in *Sun Moon Star*, neither legacy Immigration and Naturalization Service nor USCIS has ever accepted a random combination of individual shareholders as a single entity, so that the group may claim majority ownership, unless the group members have been shown to be legally bound together as a unit within the company by voting agreements or proxies.

Here, the petitioner claims that the foreign and petitioning entities are affiliates based on Mr. [REDACTED]'s direct ownership of the majority of the foreign entity's stock and his parallel indirect ownership of the petitioner's stock. The petitioner's assertion is not valid, however, as it disregards the key fact that the living trust, through which Mr. [REDACTED] derives his indirect ownership of the petitioner, is titled to Mr. [REDACTED] and his wife jointly, not to Mr. [REDACTED] individually, and there was no agreement on the part of Ms. [REDACTED] relinquishing control over her ownership interest in the petitioner at the time the petition was filed. As such, while we do not dispute that Mr. [REDACTED] had an indirect ownership interest in the petitioning entity at the time the petition was filed, there is no evidence that he had control over the petitioner as a result of such ownership or by some other operation of law. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Despite evidence showing that Mr. [REDACTED] has a controlling interest in the foreign entity, there is no evidence to show that any one shareholder has a majority interest in the petitioning corporation. See *Matter of Tessel, Inc.*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 1981).

In light of the above analysis, we conclude that the petitioner and the beneficiary's foreign employer did not share common ownership and control at the time of filing and therefore a qualifying relationship did not exist as required by statutory and regulatory provisions. See section 203(b)(1)(C) of the Act; see also 8 C.F.R. § 204.5(j)(3)(i)(C). Based on this initial finding of ineligibility, this petition cannot be approved.

## B. Qualifying Employment Abroad

Next, we will address the beneficiary's former position abroad for the purpose of determining whether the petitioner submitted sufficient evidence to establish that the beneficiary was employed in a qualifying managerial or executive capacity.

In general, when examining the executive or managerial capacity of a given position, we review the totality of the record, starting first with the description of the beneficiary's job duties with the entity in question. 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). We then consider the beneficiary's job description in the context of the organizational structure of the division or department where the beneficiary was employed in her former position with the foreign entity, the job duties and job requirements of the positions under the beneficiary's immediate control, and any other relevant factors that may contribute to a comprehensive understanding of the beneficiary's daily tasks and her role within the foreign organization.

Turning to the beneficiary's job description, the record shows that among the items requested in the RFE, the director expressly instructed the petitioner to provide a supplemental job description, which was to include an itemized list of the beneficiary's specific daily tasks with a corresponding percentage indicating precisely how much time the beneficiary allocated to each of her assigned tasks. Such information is critical in allowing USCIS to ascertain the beneficiary's time distribution among the qualifying and non-qualifying tasks that comprised her former position with the foreign entity. While the petitioner in the present matter supplemented the record with a job description that was more detailed than the one provided originally in the petitioner's supporting statement, the time allocations the petitioner provided in the supplemental list of duties were confusing and thus failed to convey a meaningful understanding of how the beneficiary distributed her time among her various tasks. As pointed out in the director's decision, the petitioner accounted for a total 122.5% of the beneficiary's time. In other words, where 100% represents the total time spent on all of the job duties performed during the course of a given work week, the petitioner assigned time constraints that created a factual impossibility by indicating that the whole is represented by 122.5%, rather than 100% of the beneficiary's time. This effectively precludes us from being able to determine how much time the beneficiary allocated to each of her assigned tasks. Given that the beneficiary's position required her to supervise the work of employees whose positions the petitioner has not established as having been of a supervisory, professional, or managerial nature, it is particularly critical for the petitioner to document how much time the beneficiary allocated to qualifying managerial tasks versus the non-qualifying tasks.

Although the beneficiary is not required to supervise personnel, if the petitioner claims that the beneficiary's duties involve supervising employees, then the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* section 101(a)(44)(A)(ii) of the Act. In the present matter, the petitioner repeatedly referenced the beneficiary's responsibilities in overseeing subordinate personnel, and the record indicates that the beneficiary oversees three individuals in the positions of software technical support, hardware technical support, and pricing coordinator. As such, the supervisory, professional, or managerial nature of the positions of the beneficiary's subordinates is highly

relevant and is a factor that must be considered in the course of examining the qualifying nature of the beneficiary's former employment abroad. Given that two of the beneficiary's three subordinates, namely, the individuals occupying the software and hardware technical support positions, did not have subordinates of their own and thus cannot be classified as supervisory or managerial, it is necessary to determine whether such employees assumed professional positions within the foreign organization.

In determining whether the beneficiary managed professional employees, we must evaluate whether the subordinate positions required a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817, 818 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686, 687-8 (D.D. 1966).

Therefore, we must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, while the petitioner provided a number of documents in an effort to establish that the foreign entity's employees had educational credentials that qualified them as professional employees, the company documents that expressly provide the job requirements of the beneficiary's subordinates indicate that their respective positions did not require baccalaureate degrees, thus precluding us from finding that either the hardware support or the software support/programmer position fell within the category of a professional.

While no beneficiary is required to allocate 100% of her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary performed abroad were only incidental to her assigned 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). Here, given the inaccuracy of the percentage breakdown that accompanied the beneficiary's job description in the RFE response, we are unable to determine what proportion of the beneficiary's time was spent performing qualifying managerial tasks and what portion was allocated to tasks that could only be deemed as daily operational tasks. Despite the director's attempt to seek clarification of the deficiency in the submitted job description, the appeal contains no further supporting evidence that accurately delineates the beneficiary's assigned tasks and their corresponding time allocations.

Lastly, the petitioner relies heavily on USCIS's prior approvals of the petitioner's nonimmigrant L-1 petitions, which were filed on behalf of the same beneficiary. The petitioner asserts that such approvals should serve as evidence that the statutory requirements pertaining to the beneficiary's employment

abroad have been met. However, we disagree with the petitioner's reasoning. Despite the petitioner's assertions, we stress that each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof. As such, each petition must stand on its own individual merits. There is no statute or case law precedent that requires USCIS to assume the burden of searching through previously provided evidence that was submitted in support of other petitions to determine the approvability of the petition at hand in the present matter. The prior nonimmigrant approvals do not preclude USCIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Similarly, the approval of a nonimmigrant petition in no way guarantees that USCIS will approve an immigrant petition filed on behalf of the same beneficiary.

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. at 597. It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Finally, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, we would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Accordingly, given the petitioner's inability to establish that the beneficiary was employed abroad in a position where she allocated the primary portion of her time to managerial- or executive-level tasks, we cannot conclude that the beneficiary was employed abroad in a qualifying managerial or executive capacity. On the basis of this second adverse conclusion, this petition cannot be approved.

#### IV. Conclusion

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, 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.