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

(b)(6)

DATE: APR 0 2 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner claims to be a California corporation that seeks to employ the beneficiary in the United States as its "CEO/CFO & Marketing Director." Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

In support of the Form I-140 the petitioner submitted a statement dated November 1, 2011, which contained relevant information pertaining to the beneficiary's employment abroad and with the petitioning entity. The petitioner also provided documentary evidence in the form of corporate documents, foreign bank documents, and an organizational chart depicting the petitioner's organization.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a request for evidence (RFE) dated February 13, 2012 informing the petitioner of various evidentiary deficiencies. The director instructed the petitioner to provide a more detailed description of the beneficiary's proposed employment, listing the beneficiary's job duties and their time allocations, the petitioner's organizational chart, and the job duties of the beneficiary's subordinates. The director cautioned the petitioner to assign time allocations to individual job duties and to refrain from grouping several tasks together.

The petitioner's response included a supplemental job description with a percentage breakdown for the beneficiary and separate job descriptions pertaining to the two employees who assume positions as the beneficiary's direct subordinates. The petitioner also provided a copy of its 2011 organizational chart and IRS Form W-2 and Form 1099 statements for 2011.

After considering the petitioner's response, 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. The director determined that the petitioner submitted a deficient job description lacking in adequate information about the beneficiary's actual daily tasks. The director also determined that the beneficiary would oversee the work of outside sales personnel, whom the director deemed as non-professional employees. The director incorporated his findings in a denial dated June 13, 2012.

On appeal, counsel provides a brief disputing the director's adverse findings. Counsel asserts that the director placed undue emphasis on the size of the petitioner's staff while neglecting to consider the petitioner's reasonable needs as well as its overall purpose and stage of development. Counsel asserts that the beneficiary's position title does not incorporate the term *manager*, but rather that of *director*, claiming that the two terms are distinct. Counsel asserts that the director functions within an executive capacity where he allocates his time primarily to qualifying executive tasks.

After having reviewed the record and considered counsel's statements on appeal, the AAO finds that counsel's assertions are not persuasive in overcoming the basis for denial. The discussion below will address points that are deemed relevant to the petitioner's burden of proof in this matter.

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

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

* * *

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

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

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

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.

In general, when examining the executive or managerial capacity of the beneficiary, the AAO 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). 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 (but not limited to) job descriptions of the beneficiary's subordinate employees, the nature of the business conducted by the entities in question, the size of the subordinate staff of the entity in question, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role within the petitioning entity.

Turning first to the petitioner's job description, the AAO concurs with the director's finding that the percentage breakdown offered in response to the RFE was overly broad and thus failed to convey a meaningful understanding of the actual tasks the beneficiary would perform daily. For instance, the petitioner indicated that the beneficiary is responsible for setting sales and profit goals as well as developing strategies to attain efficiency and maximize profits. However, it is unclear how these vague responsibilities translate to actual daily tasks. In other words, what how does the beneficiary determine what the sales and profit goals should be? What types of tasks does he perform on a regular daily basis to ultimately arrive at the financial figures that would comprise the company's sales and profit goals? And how specifically, i.e., what actions does the beneficiary execute to ensure that the company operates efficiently and achieves optimal profit margins?

The AAO is similarly perplexed as to the petitioner's reference about the beneficiary's responsibility to direct the company's managerial staff in researching and developing designs for new products. It is unclear what specific acts are consistent with this type of direction. Moreover, when considering this statement in light of the petitioner's management staff, the AAO observes that neither of the individuals whom the beneficiary directly manages has been tasked with actually carrying out any research or product development tasks. Neither the subordinates' respective job duties nor their position titles indicate that research and product development are part of either individual's daily responsibilities. This leaves open the likelihood that the beneficiary himself conducts both the market research and product development tasks, which the AAO finds to be more akin to tasks required to produce a product or provide a service, i.e., non-qualifying tasks.

The AAO also finds that the beneficiary's active role in hiring and training employees, resolving conflicts among employees, reporting to his superiors at the overseas entity, and overseeing the work of the petitioner's outside sales representatives are also non-qualifying tasks. While the AAO acknowledges that 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). Merely establishing that the beneficiary performs tasks at a professional level is not sufficient to conclude that those tasks rise to the level of managerial or executive capacity.

Additionally, while the petitioner indicates that the beneficiary would supervise the performance of an accountant, the record does not show, nor does the petitioner claim to have an accountant as part of its organization. Therefore, it is unclear what supervisory tasks the beneficiary can perform over an individual who is simply hired to provide an administrative service and who is not part of the petitioner's staff. Although the AAO assumes that the beneficiary enables the accountant to carry out his/her function by providing necessary information about the petitioner's finances, the AAO is unclear as to how the beneficiary would actually supervise an individual who has been retained to provide a service on a need basis.

In summary, the AAO finds that the petitioner has failed to provide a job description that would indicate that the primary portion of the beneficiary's time would be allocated to tasks within a qualifying managerial or executive capacity. While counsel asserts that the director placed undue emphasis on the size of the petitioning entity, the AAO finds that considerable weight was placed on the petitioner's failure to provide an adequate description of the beneficiary's proposed employment.

Furthermore, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003). Although the AAO does not find that the size of the petitioning entity served in any way as an obstacle to establishing eligibility, this factor can and should be considered for the purpose of determining who within the organization would be available to perform the necessary non-qualifying such that the beneficiary is relieved from having to allocate the primary portion of his time to tasks that are not within a qualifying managerial or executive capacity. Neither the petitioner's reasonable needs nor its stage of development can be used to justify a favorable finding when the petitioner is unable to establish that the beneficiary would spend his time primarily performing tasks within a qualifying capacity.

Lastly, the AAO rejects counsel's assertion that the director's denial of the petition is synonymous with a violation of the petitioner's rights to due process. The petitioner has not demonstrated any error by the director in conducting its review of the petition. Nor has the petitioner demonstrated any resultant prejudice such as would constitute a due process violation. *See Vides-Vides v. INS*, 783 F.2d 1463, 1469-70 (9th Cir. 1986); *Nicholas v. INS*, 590 F.2d 802, 809-10 (9th Cir. 1979); *Martin-Mendoza v. INS*, 499 F.2d 918, 922 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975).

As previously indicated, the petitioner has failed to establish that the petitioner has reached a stage in its development such that it could relieve the beneficiary from having to primarily carry out non-qualifying tasks. Notwithstanding the beneficiary's top placement within the petitioner's hierarchy, the petitioner has not established that the job duties to be performed in the proposed position would be primarily within a managerial or executive capacity and on the basis of this finding the instant petition cannot be approved.

Finally, beyond the director's decision, the AAO finds that the record lacks sufficient evidence to establish that the petitioner and the beneficiary's former employer abroad have a qualifying relationship as required by regulation. *See* 8 C.F.R. § 204.5(j)(3)(i)(C).

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; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Assoc. Comm. 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 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, 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.*, 19 I&N Dec. 362. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

In the present matter, while the record contains a stock certificate showing the foreign entity's claimed ownership of the petitioner, the bank document, which was apparently provided to establish the foreign entity's payment of funds in exchange for stock ownership, does not show the foreign entity as the originating party of the fund transfer. Rather, [redacted] is identified as the remitter in the fund transfer transaction. It is therefore unclear whether the petitioner has the claimed parent-subsidiary relationship with the foreign entity where the beneficiary was formerly employed.

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). Therefore, based on the additional ground of ineligibility discussed above, this petition cannot be approved.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.