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U.S. Citizenship
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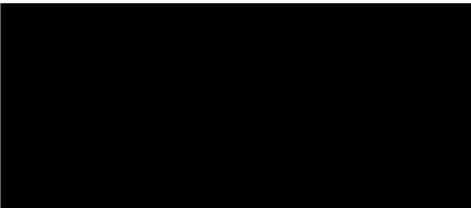


FILE: WAC 02 205 50007 Office: CALIFORNIA SERVICE CENTER Date: **AUG 19 2004**

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

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prevent identity unwarranted
invasion of personal privacy**

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DISCUSSION: The Director, California Service Center denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a limited liability company organized in the State of California in November 2000. It is an information technology service company specializing in consulting and software development. It seeks to employ the beneficiary as its "executive 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 determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner submits a brief in response to the director's decision.

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 that 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. *See* 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a managerial or executive capacity for the United States entity.

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 a January 14, 2002 letter appended to the June 7, 2002 petition, the petitioner described the position of "executive manager" as including responsibilities "for all aspects of the business operations including business development, project management and implementation of business plans." The petitioner also stated that the beneficiary would be responsible for hiring, training, and overseeing company employees and exercising discretion over the day-to-day operations of the company. The petitioner stated further that:

The Executive Manager is an "essential function" within the company's business. The Executive Manager manages all business operations and oversees all training to [sic] employees. These functions are essential functions whose management and execution are indispensable to achieving our organization's goals. [The beneficiary] is responsible for managing these functions, including hiring and firing of personnel and recommending appropriate actions. [The beneficiary] functions at a senior level within the organization and exercises managerial control over the day-to-day activities of the function managed.

On August 28, 2002 the director requested: (1) a copy of the petitioner's organizational chart including the current names of all executives, managers, supervisors, and number of employees within each department; (2) a brief description of job duties, educational level, date of employment and annual salary for each employee under the beneficiary's supervision; (3) a more detailed description of the beneficiary's duties including the approximate percentage of time the beneficiary spent in each of the duties; and, (4) copies of the petitioner's California Form DE-6, Quarterly Wage Reports for all employees for the last four quarters including the second quarter of 2002.

In response to the request for evidence, the petitioner stated that the beneficiary had been employed as its managing director and had the following responsibilities:

- Acquisition and Sales, communication with customers, relationship management.
- Hiring employees and contractors.
- Managing product and service delivery.
- Overseeing accounting tasks.
- Assuring compliance with legal requirement (e.g. timely tax payments, workers compensation payments).

The petitioner added that due to the small size of the company, the beneficiary "also gets involved in the actual delivery of services to the customers of [the petitioner]." The petitioner indicated that it had plans to hire additional information technology consultants for expansion in 2003, thus shifting the beneficiary's responsibilities of service delivery to responsibilities of employment management.

The petitioner provided its organizational chart showing the beneficiary as managing director. The chart also depicted individuals in positions of business analyst, accountant, receptionist, and research. The chart labeled the individuals in the positions of accountant and receptionist as contractors and the researcher as a student.

The petitioner did not provide copies of its California Forms DE-6 or other evidence substantiating the employment of any of the individuals in positions subordinate to the beneficiary.

The director determined that the description provided clearly stated that the beneficiary would be assisting with the petitioner's day-to-day non-supervisory duties and that the performance of these menial tasks precluded the beneficiary from consideration as an executive. The director observed that the beneficiary's plans to hire additional personnel to relieve the beneficiary from performing service delivery tasks did not establish that the beneficiary's duties would be primarily managerial or executive when the petition was filed. The director noted that the record did not contain the requested documentation substantiating the employment of personnel other than the beneficiary. The director stated that even if the petitioner's unsubstantiated organizational chart was considered, the chart depicted only two full-time employees. The director questioned the petitioner's need for a manager or executive with only two full-time employees. Finally, the director determined that the petitioner had not established that the beneficiary would be a functional manager, observing that the petitioner had not shown that the beneficiary would manage or direct the management of a department, subdivision, function, or component of the organization, but rather would perform routine operational activities. The director concluded that the record did not establish that the beneficiary would be employed in a managerial or executive capacity.

On appeal, counsel for the petitioner asserts the director misapplied section 101(a)(44)(A) when stating a manager of a function may not directly perform the function. Counsel also claims that the director did not take into account the reasonable needs of the organization in light of its overall purpose and stage of development when the director questioned the petitioner's need for an executive when only two individuals were employed full-time. Counsel takes issue with the director's characterization of the beneficiary's duties as involving menial tasks. Counsel contends that duties involving acquisition and sales, relationship management, hiring employees and contractors, managing product and service delivery, overseeing accounting tasks, and assuring compliance with legal requirements are clearly functional. Counsel submits documentation showing that insurance forms, payroll service invoices, and other invoices have been sent to the beneficiary's attention and asserts this documentation shows the beneficiary manages a function. Counsel cites unpublished decisions, a federal district court decision, and Citizenship and Immigration Services (CIS) operating instructions relating to adjudication of nonimmigrant intracompany transferee petitions in support of his brief.

Counsel's assertions are not persuasive. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In addition, when examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In this matter, counsel for the petitioner refers to the beneficiary both as an executive directing the management of a function of the petitioner and as a manager managing the petitioner's functions. Although the regulations do not preclude an individual from performing in both an executive and managerial capacity, the petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory

definition for executive and the statutory definition for manager if it is representing a beneficiary is both an executive and a manager.

Counsel's underlying premise throughout his brief is that a beneficiary may perform the day-to-day operational tasks associated with the organizations various functions. Counsel's premise, however, fails to take into account CIS's long-held position that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The petitioner's description of the beneficiary's duties indicates that the beneficiary "also gets involved in the actual delivery of services to the customers of [the petitioner]." Although this task should not be described as "menial" it is a task that includes providing services to the petitioner's customers.

Moreover, the petitioner, despite the director's request for further evidence, fails to allocate the percentage of time the beneficiary spends providing delivery of services to customers. This failure of documentation is critical as actually providing services to the customer is not considered a managerial duty. For this reason, the AAO cannot conclude that the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Counsel's contention that duties involving acquisition and sales, relationship management, hiring employees and contractors, managing product and service delivery, overseeing accounting tasks, and assuring compliance with legal requirements are clearly functional does not address the requirement that a beneficiary direct or manage a function. Likewise, documentation showing that the beneficiary is the petitioner's principal employee does not establish that the beneficiary manages or directs a function. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, as observed above, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function.

Further, to allow the broad application of the term "essential function" to include any or all functions within a business would render the term meaningless. First, the term "essential" is defined as "inherent" or "indispensable." *Webster's II New College Dictionary* 384 (2001). Accordingly, the petitioner must establish that the function is inherent and indispensable to the business rather than a low-level collateral task that is superfluous to the company's essential operations. Second, the petitioner cannot argue that all functions are essential without specifically identifying the essential nature of each function and demonstrating that the individual responsible for each function is managing the function through the work of others rather than performing the function.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In this matter, the petitioner did not submit documentary evidence that it employed any subordinate staff members or contractors who would perform the actual day-to-day, non-managerial operations of the company. The petitioner failed to present documentary evidence that it employed any of the individuals listed on its organizational chart, despite the director's request for this information. Moreover, the petitioner did not provide job descriptions for any of the individuals subordinate to the beneficiary's position. The 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). Counsel's attempt to rectify the petitioner's failure on appeal will not be considered. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, *supra*.

Furthermore, to establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Counsel's references to the start up of a new business are inapplicable. The petitioner in an employment-based I-140 petition must demonstrate that it is a viable company capable of supporting a managerial or executive assignment when the petition is filed and not at some later date. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, *supra*. Moreover, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44).

Counsel's citation to unpublished matters carries little probative value. Counsel has not furnished evidence to establish that the facts of the instant petition are analogous to those in the unpublished cases. Moreover, unpublished decisions are not binding on CIS in its administration of the Act. See 8 C.F.R. § 103.3(c). In addition, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters even arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. Further, counsel's citation to service operating instructions pertaining to the adjudication of nonimmigrant intracompany transferees is not relevant

to this I-140 proceeding; instructions pertaining to the reasonable needs of a "new office" extension petition do not affect the adjudication of an organization that must demonstrate it is a viable company capable of supporting a managerial or executive position when the petition is filed.

In sum, the petitioner has not provided evidence to demonstrate that the beneficiary's assignment for the petitioner will be primarily managerial or executive.

Beyond the decision of the director, the petitioner has not submitted sufficient evidence demonstrating that the beneficiary had been employed for the foreign entity in a managerial or executive capacity. In addition, the petitioner has not submitted sufficient evidence to show that the foreign entity continued to do business once the beneficiary transferred to the United States. The record contains only a brief description of the beneficiary's duties for the foreign entity and numerous untranslated documents as well as one translated copy of the foreign entity's unaudited financial statement for 2001. The regulation at 8 C.F.R. § 103.2(b)(3) states: "Any document containing foreign language submitted to the Service shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English." Without the complete translation of the submitted documents, the AAO cannot conclude that the beneficiary was employed by the foreign entity or that his assignment was primarily managerial or executive. Further, the AAO cannot determine that the foreign entity continued to conduct business, thus maintaining the petitioner's multinational aspect, when the petition was filed.

For these additional reasons, the petition will not be approved. 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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.