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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 02 251 51936 Office: VERMONT SERVICE CENTER Date: SEP 0 2 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy
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DISCUSSION: The Director, Vermont Service Center, denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a corporation organized in the State of New York in February 2001. It engages in international trade. It seeks to employ the beneficiary as its president. 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 the Form I-290B appeal, counsel states: "Please note that this is a motion for reconsideration in lieu of an appeal on this matter. Please see the attached letter of support as well as additional documentation and exhibits." In the May 15, 2003 attached letter, counsel observes that the director did not take into consideration the petitioner's 2002 third quarter Internal Revenue Service (IRS) Form 941, Quarterly Tax Return, even though it had been submitted as requested; but instead had determined that the petitioner had failed to submit the form or other evidence of the petitioner's employees. Counsel also observes that the director did not request IRS Forms W-2, Wage and Tax Statements but that the director noted the absence of these forms in his decision. Counsel asserts that the petitioner's response to the director's request for evidence provided evidence demonstrating the beneficiary's senior level.

The director chose not to reconsider the submitted documentation and forwarded the record to the AAO on appeal. The AAO acknowledges that the petitioner submitted its third quarter 2002 IRS Form 941 in response to the director's request for evidence. Further, the AAO notes that the director did not request IRS Forms W-2 issued by the petitioner. However upon review, the AAO concurs with the director's conclusion that the petitioner did not submit sufficient evidence to demonstrate that the beneficiary would be relieved from performing primarily operational tasks.

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):
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> * * *
>
> (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 would be employed in a primarily 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
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> 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;
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> 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
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> 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 response to the director's request for a more detailed description of the beneficiary's duties the petitioner indicates the beneficiary's duties as:

1. Direct the formulation and administration of departmental policies (10%).
2. Develop long-range goals and objectives for business operations (20%)
3. Confer with key personnel to review achievements and discuss required changes in goals or objectives resulting from current status and condition (15%).
4. Handle all personnel matters, including hiring, promotion, and vacation time (10%).
5. Finalize all contracts and negotiations with potential customers and service providers (40%).
6. Report to and counsel with executive officers in parent company to ensure consistency in policy, goals, and results (5%).

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. A 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 the beneficiary is both an executive and a manager.

In this matter, the petitioner merely paraphrased portions of the definitions of executive and managerial capacity. 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.).

In addition, the petitioner provided general and nonspecific descriptions of the beneficiary's duties that do not demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary spends 30 percent of his time directing the formulation and administration of departmental policies and developing long-range goals and objectives for business operations. The petitioner did not, however, further define the policies or objectives. 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). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava, supra.*

Further, the petitioner states that the beneficiary spends 40 percent of his time finalizing contracts and negotiations with potential customers and service providers. The beneficiary's signature on numerous invoices contained in the record confirms that the beneficiary actively participates in the petitioner's day-to-day operational tasks. 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. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Moreover, although the director did not consider the information contained in the petitioner's third quarter 2002 IRS Form 941, the information contained therein does not assist in a determination that the beneficiary's assignment would be primarily managerial or executive. The petitioner's organizational chart identifies the beneficiary's position as president and the positions of operations manager, assistant manager, sales manager, purchase manager, and salesperson. The petitioner's third quarter 2002 IRS Form 941 shows that the petitioner employed the beneficiary and the individuals identified on the organizational chart as the operations manager, assistant manager, sales manager, and salesperson. However, the petitioner describes the duties for the individuals occupying the positions of assistant manager, sales manager and salesman as the duties of two sales representatives and an office clerk. In addition, it is unclear whether the sales representatives and office clerk are employed full-time. 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 sum, the petitioner has failed to establish that the beneficiary performs tasks associated primarily with executive or managerial duties, rather than performs tasks that are operational and administrative. The petitioner has not demonstrated that it employs sufficient personnel to relieve the beneficiary from performing primarily operational and administrative tasks. The record does not contain sufficient evidence that the beneficiary's assignment would be primarily managerial or executive.

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 met this burden.

ORDER: The appeal is dismissed.