

**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**



**U.S. Citizenship  
and Immigration  
Services**

**PUBLIC COPY**

*B4*



FILE: WAC 03 023 55061 Office: CALIFORNIA SERVICE CENTER Date: **AUG 08 2005**

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:**

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.

*Erica Galdan*  
Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner filed the instant petition seeking to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of California that is engaged in providing architectural and design services. The petitioner seeks to employ the beneficiary in an executive capacity as its president.

The director denied the petition concluding that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, counsel claims that the director "failed to follow [Citizenship and Immigration Service (CIS)] regulations and definitions" in denying the petition. In a brief submitted in support of the appeal, counsel contends that as "the organization's top manager/executive," the beneficiary is employed in an executive position and is not engaged in the performance of the daily operations of the company. Counsel states that all non-executive duties of the business are performed by "other employees" or are outsourced abroad.

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 or 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 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. 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the beneficiary would be employed by the United States entity 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-

- (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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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.

The petitioner filed the instant petition on October 30, 2002. In an attached letter, dated October 24, 2002, counsel provided the following description of the beneficiary's employment in the United States entity:

[The beneficiary] was transferred to the U.S. subsidiary as President of the company. In this position, [the beneficiary] has been and will continue to be in charge of negotiating and securing various architectural and design contracts for the company. She will continue to be

responsible for planning, developing, and establishing policies and objectives of the company in accordance with the desires of the parent company and their expansion plans as a whole. [The beneficiary] will continue to review activity reports and financial statements to determine progress and status in attaining objectives and will revise plans if necessary. [The beneficiary] will continue to supervise and oversee the work of the Production Manager who supervises the work of the architectural team in coordination of arch production and production [sic] and coordination of architectural visualization. Furthermore, [the beneficiary] will continue to liaise and sign agreements with such [c]ompanies as Carl Ross Design, Inc., Henriksen Design Associates, Inc., Sue Firestone Associates and others so that [the petitioning organization] can continue to provide such services as architectural interior space planning and CAD management/drafting in various projects. In addition, [the beneficiary] will continue to deal with professional individuals such as bankers, lawyers, and accountants as business needs arise in the ongoing conceptualization of various architectural design projects. [The beneficiary] has and will continue to have discretionary authority over the entire operations of the company. Furthermore, [the beneficiary] will continue to direct and coordinate formulation of financial programs to maximize the company's profitability.

Counsel also submitted a letter from the petitioning entity, dated October 22, 2002, wherein the petitioner provided a similar description of the beneficiary's employment in the United States entity.

The director issued a request for evidence, dated July 23, 2003, wherein the director asked that the petitioner submit an organizational chart describing the managerial hierarchy and staffing levels of the United States entity, and clearly identifying the beneficiary's position in the company, particularly in relation to subordinate employees. The director asked that the petitioner provide a brief description of the job duties, educational levels and salaries of each of the workers supervised by the beneficiary. The director also requested copies of the petitioner's California Development Department (EDD) Form DE-6, Quarterly Wage Report, for the fourth quarter of 2002 and the first quarter of 2003.

Counsel responded in a letter dated October 10, 2003 and provided an organizational chart for the petitioning company, which identified the following five employees: president and chief executive officer, import and export manager, production manager, project manager, and job captain. The petitioner also identified an independent contractor who had been utilized by the company since the year 2000 in the position of "head of the [previsualization] department." The petitioner further noted the existence of three subordinate "teams": the "trade team" comprised of three workers from its affiliated Russian company; the "previzualization team" comprised of four workers from its affiliated Yugoslavian company; and, the "project development team" consisting of eight workers also from the Yugoslavian company. Counsel also submitted an organizational chart of the corporations affiliated with the petitioning organization and the departments within each company. According to the chart, the petitioning organization is comprised of a "computer aided design" department and an import-export department. Counsel further provided the requested Forms DE-6 for the quarters ending December 2002 and March 2003, each identifying the employment of two workers, the beneficiary and the production manager.

In a decision dated March 31, 2004, the director determined that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily executive capacity.<sup>1</sup> The director stated that despite the beneficiary's job title of "president," her employment did not satisfy the definition of "executive capacity." The director noted that when describing the job duties performed by the beneficiary, "[t]he petitioner . . . borrowed liberally from portions of the statutory definition of 'executive capacity' including duties such as 'establishing policies and objectives,' and 'discretionary authority over the entire operations,' and 'direct and coordinate.'" Counsel stated that paraphrasing the statutory definition "is not sufficient to convey an understanding of what the beneficiary will be doing on a daily basis."

The director also noted an inconsistency in the managers and subordinate workers identified on the petitioner's organizational chart and the two full-time employees reported on its Form DE-6. The director stated that "[t]he petitioner has not established that the nature of the petitioner's business would require as many managers or executives to run this business," and concluded that the beneficiary would likely be assisting in the performance of the daily non-supervisory duties of the business. The director further stated that CIS would not consider the beneficiary to be employed in an executive capacity simply because the beneficiary has been given an executive title. Consequently, the director denied the petition.

Counsel filed an appeal on April 27, 2004, claiming that the director disregarded CIS regulations and the statutory definitions when determining that the beneficiary would not be employed in a primarily executive capacity. In an accompanying brief, counsel states that as "the organization's top manager/executive," the beneficiary is employed in an executive position, in which "she manages and directs the entire operations of the business enterprise." Counsel states:

As President of the company, [the beneficiary] is in charge of overseeing the entire operations of the organization. As part of her daily duties, she plans, develops and oversees the implementation of various organizational policies and pricing strategies. [The beneficiary] reviews activity reports and financial statements and provides direction and sets policies to better position the company in the industry, contemplating budgeting issues, project implementation processes, and profit margins. She is also in charge of negotiating and signing contracts with project managers of large architectural and design firms as well as establishes and oversees the implementation of marketing strategies. She oversees the implementation of the company projects through employees of the U.S. subsidiary and headquarters and branch offices of the Cypriot parent company. At times it is necessary for the organization to hire outside services to assist the company with the implementation of those projects. Needless to say, [the beneficiary] oversees the implementation of those projects through the outside contractors.

Counsel further states that to understand the beneficiary's job duties, it "is essential . . . to understand the business model of the petitioner." Counsel explains that as "a professional service oriented business," the petitioning entity "outsourc[e]s most of its work to overseas companies contemplating the lower costs of labor outside of the United States." Counsel claims that it is therefore "not necessary for [the petitioner] to employ many workers in the United States to continue running its operations as well as to grow."

---

<sup>1</sup> The director noted that in its October 24, 2002 letter the petitioner requested classification of the beneficiary as a "multinational executive." The director, therefore, reviewed the instant petition pursuant to the definition of "executive capacity" only.

Counsel contends that the director's denial of the petition is not supported by the record. Counsel claims that the director's conclusion that the beneficiary would perform non-managerial and non-executive job duties of the business is speculative, and notes that these tasks "[would] be performed by lower level employees of the organization even though they hold managerial titles." Counsel states that in accordance with the definition of "executive capacity," which requires only that the beneficiary "primarily" manage or direct the organization, the beneficiary would spend "more than 99% of her time managing and directing the entire operations of the organization and does not and will [not] perform menial tasks." Counsel claims that the size of the petitioning entity "is irrelevant [if] one can show that the beneficiary is the organization's top manager and utilizes outside independent contractors."

Counsel further contends that the beneficiary's employment in a qualifying capacity is supported by CIS' previous three approvals of the beneficiary as an L-1A nonimmigrant intracompany transferee.

On review, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

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). While the petitioner provided a description of the beneficiary's responsibilities as president, it is unclear what specific "executive" job duties the beneficiary would perform in relation to the petitioner's business as an architectural and design firm comprised of a "computer aided design" department and an "export-import" department. These two departments are the only departments depicted on the petitioner's organizational chart, and appear to be the sole two services offered by the organization. The petitioner does not define the beneficiary's "executive" job duties associated with these two departments. Rather, the beneficiary's job description contains broad responsibilities, such as "planning, developing, and establishing policies and objectives of the company," "review[ing] activity reports and financial statements," "supervis[ing] the work of the Production Manager," "[exercising] discretionary authority over the entire operations of the company," and directing the business' profitability. On appeal, counsel is similarly vague in his claims that the beneficiary "plans, develops and oversees the implementation of various organizational policies and pricing strategies," "reviews activity reports and financial statements," and "oversees the implementation of the company projects." The actual duties themselves reveal the true nature of the 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).

Additionally, it appears that a portion of the beneficiary's job duties would involve the performance of non-qualifying tasks of the organization. As correctly noted by counsel on appeal, whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. According to the job descriptions offered by the petitioner and counsel, the beneficiary would be responsible for negotiating contracts for the company, acting as a liaison between the petitioning organization and outside companies, participating in signing agreements, dealing with business "professional[s]" associated with architectural projects, and establishing the marketing strategies of the corporation. The petitioner fails to document what proportion of the beneficiary's time would be devoted to the performance of these non-executive operational tasks of the business. Absent this documentation, the AAO cannot conclude that the beneficiary is primarily performing executive job duties. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Moreover, the record does not demonstrate that the petitioning entity employs a subordinate staff sufficient to relieve the beneficiary from performing the non-executive operational tasks of the organization. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner had been established for approximately three years as an architectural and design firm. While the petitioner noted on the petition that it employed five workers, the petitioner's corresponding quarterly wage and withholding report for the fourth quarter of 2002 identified two employees, the beneficiary and a production manager. The AAO notes that this figure is also inconsistent with the petitioner's organizational chart, which identifies the beneficiary, an independent contractor, and three "teams" consisting of an additional fifteen workers.

On appeal, counsel repeatedly stresses that the petitioner's work is "outsource[d] . . . to overseas companies," and contends that the non-qualifying tasks of the business would be performed by lower-level employees. Counsel, however, offers no evidence in support of the claim. The AAO acknowledges that the petitioner individually identified the "team" members on the petitioner's organization chart. Other than the identification of foreign employees, the record is devoid of evidence confirming the petitioner's outsourcing of labor, such as additional "cost of labor" expenses incurred by the petitioner or the petitioner's reimbursement to its claimed Russian and Yugoslavian affiliates for services purportedly performed by their employees. As a result of these discrepancies, it is impossible to ascertain an accurate number of workers employed by the petitioner or utilized as independent contractors. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Based on the petitioner's quarterly wage and withholding report, which appears to be the only reliable documentation of the petitioner's true staffing levels, the petitioner employed the beneficiary and a production manager at the time of filing. It is unlikely that the petitioner's reasonable needs as an architectural and design firm, in which the petitioner offers import, export and computer design services may plausibly be met by the employment of a production manager and of the beneficiary as president. Despite counsel's unsupported claims, it is reasonable to conclude from the record that the beneficiary would be required to perform many functions associated with the operation of the petitioning organization. As corroborated by the brief description of the production manager's job duties, the petitioner does not employ any workers to provide the design services offered by the organization. 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).

Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to

sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Counsel is misguided in his claim on appeal that the beneficiary's employment in an "executive" capacity is further supported by CIS' prior approvals of the beneficiary's classification as an L-1A nonimmigrant intracompany transferee. It must be noted that many I-140 immigrant petitions are denied after CIS approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427. Because CIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

Furthermore, the AAO's 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, the AAO 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).

Based on the foregoing discussion, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the beneficiary was employed overseas for at least one year in a managerial or executive capacity as required in the regulation at 8 C.F.R. § 204.5(j)(3)(B). Counsel noted in his October 24, 2002 letter that the beneficiary was employed as the foreign entity's "Executive Director of Architectural Department" from 1994 through August 1997, when she entered the United States. Neither counsel nor the petitioner offers a description of the job duties performed by the beneficiary in this capacity. Also, because the petitioner failed to submit a translated copy of its organizational chart, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. 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. at 165. The petitioner has not demonstrated that the beneficiary was employed by the foreign entity for at least one year in a primarily managerial or executive capacity. As a result, the petition will be denied for this additional reason.

An additional issue not addressed by the director is whether the petitioning entity is a subsidiary or affiliate of the beneficiary's foreign employer as required in the Act at § 203(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;

\* \* \*

*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 his October 24, 2002 letter, counsel stated that the foreign entity was the parent corporation of the petitioning organization. In support of the qualifying relationship, counsel submitted the petitioner's articles of incorporation, by-laws, minutes from the first organizational meeting, and stock certificates. The minutes from the petitioner's August 12, 1999 meeting indicated that 1,000 of the petitioner's 10,000 authorized shares of common stock were issued equally to "Urbis (Cyprus) Limited," the beneficiary's foreign employer, and "Natasha Bajc," the beneficiary. The petitioner's shareholders and each individual's ownership interest were confirmed in the submitted stock certificates.

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 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In 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.*, *supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

Here, as the petitioning organization is owned equally between the two shareholders, the relevant issue is whether the beneficiary's foreign employer has control of the petitioning entity. The petitioner's by-laws stipulate that the company's directors manage its business and affairs. The beneficiary is named in the

minutes of the petitioner's first organizational meeting as the sole director of the company. The petitioner has not offered any documentary evidence, such as agreements affecting the voting of shares or management of the company, that the beneficiary's foreign employer *controls* the petitioning organization. As the petitioner has not established this essential element, the AAO cannot conclude that a parent-subsiary relationship exists between the foreign and United States entities. For this additional reason, the petition will be denied.

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

**ORDER:** The appeal is dismissed.