

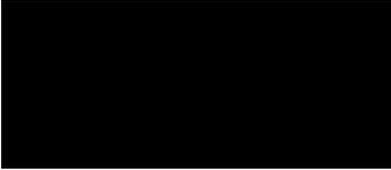
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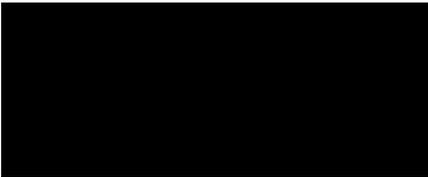
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FILE: WAC 03 199 53308 Office: CALIFORNIA SERVICE CENTER Date: **AUG 22 2005**

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
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 appeal will be dismissed.

The petitioner is a corporation organized in the State of California in April 2002. It builds custom-configured computers, provides service and support, and sells computer parts to businesses and individuals. 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 primarily managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner submits a brief.¹

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

¹ Counsel observes preliminarily, that the director misstated the classification sought by noting that the petitioner was filing a Form I-129, Petition for Nonimmigrant Worker. However, the AAO notes that the director cited the applicable law, section 203(b)(1)(C) of the Act, when rendering his decision. The typographical error does not adversely affect the petitioner's notice of the deficiencies in the record. The AAO sees no purpose in remanding the decision on the basis of a typographical error.

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 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 May 22, 2003 letter appended to the petition, the petitioner stated:

As President, [the beneficiary] will continue to be the highest-level person in the U.S. responsible for the company's operations. Specifically, as President, [the beneficiary], plans, develops, and establishes policies and objectives of [the petitioner]. He plans business objectives, develops organizational policies, and established [sic] responsibilities and procedures for attaining objectives. [The beneficiary] also plans and develops public relations policies designed to improve company's image and relations with customers, employees, and the public. He evaluates performance of employees for compliance with established policies and objectives of firm and contributions in attaining objectives. In addition he is responsible for hiring and firing of personnel.

The petitioner also included its organizational chart showing the beneficiary as chief executive officer, and a vice-president of "sales/technical" and an "office manager/purchasing" immediately subordinate to the beneficiary's position. The chart also depicted two outside salespersons, a "technical and PC assembly," and a warehouse/shipping employee, as well as additional proposed positions.

The petitioner also included a California Form DE-6, Quarterly Wage and Withholding Report for the second quarter of 2003. The California Form DE-6 was dated May 9, 2003, but apparently proposed to cover the quarter ending June 30, 2003. The "proposed" California Form DE-6 indicated that the petitioner employed one individual but included five individuals on the form by name and salary. The individuals listed included the beneficiary and individuals in the positions of vice-president "sales/technical," "office manager/purchasing," "technician/assembly," and warehouse/shipping person.

On July 16, 2004, the director requested: (1) a more detailed description of the beneficiary's duties in the United States; (2) a copy of the petitioner's organizational chart describing its managerial hierarchy and staffing levels, as of the date of filing the petition, which should include the names of all executives, managers, supervisors, and number of employees within each department or subdivision, and a brief description of job duties, educational levels, salaries/wages for all employees under the beneficiary's supervision; and, (3) the petitioner's California Forms DE-6 for the last four quarters that were accepted by the State of California.

In an October 7, 2004 response to the director's request for further evidence in support of the petition, counsel for the petitioner indicated that the beneficiary spent: 20 percent of his time overseeing financial decisions including setting a budget, monitoring expenditures, analyzing income, setting short-term and long-term goals, and working with the company's accountant; 35 percent of his time working with the vice-president of "sales/technical" on product and service strategy and product development, as well as reviewing sales reports, evaluating marketing recommendations, and supervising the vice-president "sales/technical" and the "office

manager/purchasing;" 35 percent of his time on the organization's structure, workflow, chain of authority, and internal procedures, as well as setting up the marketing and product development components of the business; and 10 percent of his time dealing with problems that other employees could not handle as well as traveling to the parent company to monitor its performance and to facilitate coordination between the two companies.

The petitioner also provided a slightly revised organizational chart showing the proposed addition of a marketing department and a product development department. The petitioner indicated that: the vice-president of "sales/technical" had been employed since May 2002 and oversaw the sales and technical departments; the "office manager/purchasing" had been employed since September 1, 2003 and oversaw the office and purchase of various items as required; the warehouse/shipping employee had been employed since January 1, 2003 and oversaw shipping and maintaining the warehouse; and the "technical and PC assembly" had been employed since January 1, 2003 and oversaw the assembly of personal computers and tested various products sold.

The petitioner also claimed to have employed two outside sales executives since May 2002 who handled customer accounts. The petitioner also again listed several proposed positions. The petitioner provided its California Forms DE-6 for the previous four quarters, as requested by the director. The 2003 fourth quarter California Form DE-6, closest in time to the date the petition was filed, showed that the petitioner employed the beneficiary and the individuals in the positions of "office manager/purchasing," warehouse/shipping person, and "technical and PC assembly."

On November 15, 2004, the director determined that: (1) the description of the beneficiary's job duties was broad and general and did not provide sufficient detail regarding the beneficiary's actual duties and the percentage of time devoted to those duties; (2) some of the beneficiary's described duties such as overseeing financial decisions had not been shown to be managerial or executive responsibilities; (3) the petitioner did not possess the organizational complexity to warrant an executive position; and (4) the record indicated that a preponderance of the beneficiary's duties would be directly providing the services of the business. The director denied the petition concluding that the record did not establish that the beneficiary had been or would be employed in a qualifying managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the petitioner has provided evidence that the beneficiary directs an organization of five employees. Counsel claims that the size of the petitioner is irrelevant and that if staffing levels are considered, Citizenship and Immigration Services (CIS) must take into account the petitioner's reasonable needs and state of development. Counsel argues that as the petitioner has been in business for little more than a year, it is unreasonable to require that the petitioner have grown to an "immense" size. Counsel cites an unpublished decision in support of his claims and argument. Counsel concludes by noting that managing a subordinate staff of professional, managerial, or supervisory personnel is not a requirement to qualify as a manager/executive and that in this matter, the beneficiary, as president of the company, has ultimate authority over the operation of the entire organization, thus "clearly he 'manages an essential function' of the company."

Counsel's assertions are not persuasive. 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 provides a general description of the beneficiary's duties, initially paraphrasing elements of the definition of both managerial and executive capacity. See sections 101(a)(44)(A)(iii) and 101(a)(44)(B)(ii) of the Act. First, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. Second, indicating that the beneficiary's duties include planning and developing public relations policies and establishing goals and policies do not sufficiently define the beneficiary's actual duties. 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*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In response to the director's request for evidence, counsel for the petitioner indicated that the beneficiary, among other things, oversees financial decisions, works with the vice-president on product and service strategy and product development, oversees the vice-president and office manager, as well as spending 35 percent of his time on the organization's structure, workflow, chain of authority, and internal procedures. However, guiding a start up company in the early stages of its development, including setting up the organization's structure, workflow, chain of authority, and internal procedures, do not constitute managing or directing the management of the company in this instance. A petitioner must be sufficiently established to support a managerial or executive position when it filed the petition. 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. 1971). Moreover, the general statements regarding the beneficiary's work with the vice-president on product and service strategy and product development and his oversight of other employees appears more directly related to operational and supervisory tasks rather than performing primarily managerial or executive duties related to those 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).

The record also contains confusing evidence relating to the petitioner's number of employees. The petitioner provided a "proposed" copy of a California Form DE-6 for the second quarter of 2003, the quarter in which the petition was filed. The proposed copy listed an individual in the position of "office manager/purchasing." However, the petitioner later indicated that the individual in this position was not employed until September 1, 2003, thus would not have been properly listed on the second quarter California DE-6. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The AAO questions the employment of this individual when the petition was filed.

Counsel's assertion that the beneficiary directs an organization of five employees is not persuasive. As noted above, the petitioner has provided confusing and misleading evidence regarding the actual employment of the "office manager/purchasing." 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 addition, the petitioner has not provided substantive evidence that it employed outside sales executives. 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)).

Regarding counsel's claim that the size of the petitioner is irrelevant, counsel should note that 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). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* The AAO acknowledges 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* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In this matter, the company's size is not the determining factor in the decision, rather the determining factor is the petitioner's general and insufficient description of the beneficiary's duties. However, even if considering staffing levels, the AAO observes that the petitioner has not clarified how the beneficiary's subordinate employees carry out the majority of the operational and administrative tasks necessary to establish and operate a new business.

Counsel's argument that a petitioner that has been business for little more than a year should not be required to be "immense" is disingenuous. The AAO notes that the director has not required that the petitioner be of an "immense" size, but only that the petitioner is sufficiently complex to require the services of an executive or manager. In this matter, the petitioner has not provided evidence that the petitioner's business at this stage of its development requires the services of a manager or an executive as defined by the statute. Again, 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. at 49. The petitioner's intent to increase its number of employees and departments is not relevant to establishing the beneficiary's current managerial or executive status.

Counsel's claim that the beneficiary, as president of the company is managing an essential function is also not persuasive. If a petitioner claims that the beneficiary is managing or directing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e. 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 or directing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* or directs the function rather than *performs* the duties related to the function. Again 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. at 604.) In this matter, as referenced above, the petitioner has not provided evidence that the beneficiary manages or directs

the organization or a function, rather than performing the ongoing operational and administrative tasks associated with a start-up company. The petitioner has not adequately explained how the petitioner's three or four other employees relieve the beneficiary from primarily providing the petitioner's everyday operational services. Again, 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.

With reference to the unpublished decisions counsel cites in support of his assertions, the record does not contain sufficient evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Moreover, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the United States petitioner comprise primarily executive or managerial duties. For this reason, the petition will not be approved.

Beyond the decision of the director, the petitioner has not submitted sufficient evidence to establish that it had been doing business for one year prior to filing the petition as required in 8 C.F.R. § 204.5(j)(3)(i)(D). The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part: "*Doing Business* means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

In this matter, the petitioner was incorporated on April 24, 2002. However, the record does not contain evidence that the petitioner began conducting business by June 26, 2002, one year prior to filing the petition. The record contains the petitioner's 2002 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return. However, the 2002 IRS Form 1120 does not demonstrate when the petitioner began providing products or services in 2002. The record contains copies of the petitioner's invoices beginning in November 2002. The record does not contain invoices or other documentation to establish that the petitioner began providing goods or services prior to that date. For this additional reason, 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).

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, 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.