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U.S. Citizenship
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Services

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FILE: WAC 04 114 53574 Office: CALIFORNIA SERVICE CENTER Date: **DEC 01 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:

SELF-REPRESENTED

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner filed the instant immigrant visa 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 doing business in the engineering sector. The petitioner seeks to employ the beneficiary as its head of engineering.

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, the petitioner submits a revised organizational chart for the petitioning entity and a more comprehensive list of job duties performed by the beneficiary in his proposed position.

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.

The issue in the instant matter 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 March 16, 2004 requesting employment of the beneficiary as its head of engineering. In an attached letter, dated February 19, 2004, the petitioner stated that as the "Director of Manufacturing, Engineering and Quality Assurance," the beneficiary would be engaged in managerial job duties, including having "overall responsibility for all the technical aspects of production," advising the manufacturing and engineering departments on technical issues, and managing the "Bill of Materials system."

In a notice dated December 21, 2004, the director requested that the petitioner provide the following documentary evidence in support of the beneficiary's employment in a primarily qualifying capacity: (1) an organizational chart clearly identifying the beneficiary's position in relation to the petitioner's managerial hierarchy and its staffing levels and listing all employees subordinate to the beneficiary; (2) a brief description of the job duties, educational levels, dates of employment, and wages of each employee supervised by the

beneficiary; (3) a detailed description of the beneficiary's job duties, including the education and qualifications necessary for the position; (4) an allocation of the amount of time the beneficiary would spend on each job duty; (5) a description, if applicable, of how the beneficiary's employment satisfies that of a functional manager; (6) copies of the last four filed California Employment Development Department (EDD) Form DE-6, Quarterly Wage Report; and (7) Internal Revenue Service (IRS) Form 941, Quarterly Wage Report. The director also included an outline for the petitioner of the statutory requirements for establishing "managerial capacity" or "executive capacity."

The petitioner responded in a letter dated March 3, 2005, and submitted an organizational chart identifying the beneficiary as the manager supervising nine lower-level workers employed in the positions of deputy manager, senior engineer, and engineer. The petitioner attached a brief description of each employee's job duties, noting that the beneficiary managed "general control work" in the engineering department and tested and approved parts necessary for production. The petitioner provided the requested state and federal quarterly tax returns.

In a decision dated April 29, 2005, the director determined that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Following a comparison of the petitioner's organizational chart and state quarterly tax return for the period ending March 31, 2004, the director stated that the petitioner employed only four of the nine workers identified on the organizational chart at the time of filing the petition. The director noted that the petitioner's lower-level workers who were purportedly employed in the positions of senior engineer and engineer were not employed by the petitioner when the immigrant petition was filed. The director further stated that the job description provided by the petitioner was "broad and general," and contained "insufficient detail regarding the actual duties to be performed by the beneficiary and the percentage of time devoted to these duties." The director concluded that the few job duties named by the petitioner, particularly "general control work" and testing and approving parts for production are not managerial or executive in nature. The director determined that the petitioner has not established "that the beneficiary would be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing non-qualifying duties." Consequently, the director denied the petition.

In an appeal filed on May 31, 2005, the petitioner submits a revised organizational chart for the petitioning entity, on which it identifies twenty-five workers, including the beneficiary, all of whom are subordinate to the beneficiary. The petitioner also provided a list of the beneficiary's proposed job duties and noted the time that the beneficiary would spend on each. As the outline is part of the record, it will not be repeated herein.

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

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). 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).

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*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

Moreover, a visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). For this additional reason, the revised organizational chart, which identifies an additional fifteen workers under the beneficiary's supervision, will not be considered.

The record is devoid of a clear and comprehensive description of the position to be occupied by the beneficiary or the associated responsibilities. The petitioner has not clarified whether the beneficiary would be employed as the "head of engineering" as indicated on Form I-140, as the "Director of Manufacturing, Engineering and Quality Assurance," as noted on both Form I-140 and in the petitioner's February 19, 2004 letter, or as "Manager" as subsequently identified by the petitioner on its organizational chart. Clarification of the position to be occupied by the beneficiary is essential to establishing the beneficiary's employment. 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).

Additionally, the petitioner has not offered a comprehensive description of the beneficiary's proposed job duties. Due to the lack of evidence in the record, it is impossible to ascertain even an overview of the role the beneficiary would occupy in the petitioning entity. In fact, the petitioner essentially neglected the director's request for a detailed job description and an allocation of time spent on each job duty, instead providing two brief, vague and incomplete statements regarding engineering tasks and work approval. Moreover, the record contains no evidence explaining the "bill of materials system" referenced by the petitioner in its February 19, 2004 letter as one of the primary managerial responsibilities of the beneficiary. 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). It is implausible to expect the AAO to surmise the beneficiary's employment capacity from the limited information provided by the petitioner. 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). 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)).

Based on the foregoing discussion, the petitioner has failed to demonstrate that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. Consequently, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. The petitioner claims in its February 19, 2004 letter that the foreign company employed the beneficiary for over ten years in a primarily managerial or executive capacity. The company's organizational chart reflected the beneficiary as "manager" of nine employees whose positions were not identified. An attached "job contents" statement lists what appears to be

job duties performed by the beneficiary in his overseas assignment. Despite the list of job responsibilities, the specific managerial or executive job duties of the beneficiary in the foreign corporation are unclear. 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. Based on the limited statements provided by the petitioner, it would appear that the beneficiary personally performed functions related to the engineering or production of products. 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). Absent a more detailed job description, the AAO cannot conclude that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. Therefore, the petition will be denied for this additional reason.

The AAO recognizes the beneficiary's previously approved L-1A nonimmigrant petition. 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, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. Based on the lack of required evidence in the instant record, the director was justified in departing from the previous nonimmigrant approval and denying the immigrant petition.

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.