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U.S. Citizenship  
and Immigration  
Services

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FILE:

Office: TEXAS SERVICE CENTER

Date:

DEC 01 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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas 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 immigrant petition 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 Texas that is engaged in the retail sale of cellular telephones and accessories. The petitioner seeks to employ the beneficiary 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, in her denial of the petition, the director erroneously focused on the number of workers employed by the petitioner without taking into account the company's reasonable needs and overall stage of development, as instructed in section 101(44)(C) of the Act. Counsel states that the petitioner's staff of five employees is sufficient in light of its "early stage of development." Counsel claims that the director's requirement that the beneficiary supervise a large number of employees undermines the concept of functional manager. Counsel presents a brief on appeal, in which he cites several decisions recognizing the concept of functional manager and the need to consider an organization's reasonable needs when determining a beneficiary's employment capacity.

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 January 11, 2005, noting that the beneficiary would be employed as the organization's president at an annual salary of approximately \$35,000. In an attached letter, the foreign company's president explained that in this capacity, the beneficiary held the following "executive functions":

- Confers with the Indian Company and develop[s] long-range goals and objectives of the US Company.
- Directs and coordinates activities of the organization and formulates and administers company policies[.]
- Directs and coordinates activities relating to purchasing, production, operations and sales for which responsibility is delegated and targeted to further attainment of goals and objectives.
- Reviews and analyzes activities, costs, operations, and forecasts data to determines [sic] progress toward stated goals and objectives.
- Discusses with employees to review achievements and discusses required changes in goals or objectives of the company.

The company's president noted the beneficiary's background as a "successful businessman," including his completion of a Bachelor of Arts "special degree," a Bachelor of Laws degree, and a Master of Arts degree.

The director issued a Notice of Intent to Deny on May 2, 2005. In her notice, the director asked that the petitioner submit Internal Revenue Service (IRS) Form W-2, Wages and Tax Statement, for all workers employed by the company in the years 2003 and 2004, a copy of the petitioner's 2004 IRS Form 1120, U.S. Corporation Income Tax Return, and an organizational chart of the company's employees identifying their start date, job duties, and full-time or part-time status. The director observed that the petitioner had not paid salaries or wages to any employees in the year 2003, and that the petitioner's 2004 quarterly wage statements do not reflect whether the petitioner's workers are employed full-time.

Counsel responded in a letter dated May 31, 2005, stressing the petitioner's need to employ the beneficiary as an executive at the time of filing the immigrant petition. Counsel references the appended organizational chart and description of positions in the organization, stating:

These documents serve to highlight the Beneficiary's role as President, over people and functions. As can be seen, the organization has several levels of employees below the Beneficiary who will carry out the day-to-day low-level operations of the organization. In other words, these lower levels of personnel will relieve the Beneficiary from performing non-qualifying duties. The immediate subordinates, as can also be seen, are professionals with college degrees and/or extensive experience.

The lowest level personnel like the cashier produce the final product – quality retail services. The Beneficiary will exercise discretion over the day-to-day activity of these lower[-]level personnel only to the extent necessary for effectuating the goals and guidelines of the Petitioner's organization.

Pursuant to his duties, the Beneficiary qualifies as an executive within the meaning of Title Eight of the Code of Federal Regulations at Section 214.2(l)(1)(ii)(C) – directing the overall management of the organization, exercising discretionary decision making, setting goals and policies, and doing all with little supervision.

Counsel, citing the regulation at 8 C.F.R. § 204.5(j)(2), further claims that the beneficiary would be employed in a managerial capacity as he "has managed the essential function of Presidency at the organization."

Counsel referenced an unpublished AAO decision, in which the AAO recognized the beneficiary's employment as a functional manager in a two-person organization, stressing that "in light of the [petitioner's] overall stage of development," the beneficiary would be employed as an executive.

In an attached statement, the petitioner provided essentially the same list of job duties for the beneficiary as that outlined above, and noted that the beneficiary would divide his time equally among the five responsibilities. The petitioner also provided a brief description of the job duties performed by each of the lower-level employees. In an appended organizational chart, the petitioner identified its store manager as the direct subordinate of the beneficiary, with the assistant of operations, the assistant of administration and the cashier employed below the store manager. The petitioner's March 31, 2005 employer's quarterly report confirmed the employment of its five workers at the time the petition was filed.

In a decision dated June 8, 2005, the director concluded that the petitioner had not established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The director observed that for eight months the beneficiary was the petitioner's sole employee in 2004, and stated that based on the limited number of workers "it becomes questionable as to whether the beneficiary is acting primarily in a managerial or executive function." The director stated that it is reasonable to conclude "that a wide range of daily functions associated with running a business will be performed [by the beneficiary] and that these duties are unrelated to the definitions of manager or executive." The director stated that the petitioner did not demonstrate that the beneficiary would be primarily "directing the management of the organization [or] that the beneficiary has been or will be primarily directing or supervising a subordinate staff of professional, or supervisory personnel, who relieve him from performing non[-]qualifying duties." Consequently, the director denied the petition.

Counsel filed a timely appeal on July 8, 2005. In a subsequently filed appellate brief counsel claims that the director erred in her consideration of the petitioner's "limited number of employees" as a basis for the beneficiary's employment in a non-qualifying capacity. Counsel states that the director failed to take into account the approximately \$167,000 increase in the petitioner's gross receipts from the year 2003 to 2004, and the fact that at the time of filing the immigrant petition the petitioner had been operating for less than five years and required few employees. Counsel references *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570 (N.D. Ga. 1988) as authority that Citizenship and Immigration Services (CIS) cannot "infer the executive nature of the beneficiary on the basis of the number of subordinate employees" or the employees' job titles. Counsel also challenges the director's finding that the beneficiary would be performing the operational functions of the company, stating that the beneficiary's position satisfies the regulatory criteria of a functional manager. Counsel states that the beneficiary would manage the finance function of the company. Counsel claims that the petitioner's overall stage of development is a "critical factor" in the analysis of the beneficiary's employment capacity, and stresses that the company's status as a "relatively new business" should not be viewed negatively.

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.

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). Here, the petitioner's limited outline of the beneficiary's job responsibilities fails to identify the specific managerial or executive job duties to be performed by the beneficiary as the company's president. In three separate instances in his January 4, 2005

letter, the foreign entity's president noted that the beneficiary would direct, coordinate, review and analyze "activities" either related to the organization or to functions of the organization. However, the company's president failed to specifically define the managerial or executive "activities" to be performed by the beneficiary. Additionally, he stated that the beneficiary would "develop long-range goals and objectives," and would work with the petitioner's employees to attain these goals and objectives, but did not identify the specific corporate goals to be set or achieved by the beneficiary. In fact, the record is devoid of any evidence noting the specific job duties to be performed by the beneficiary in connection with his position as the president of a cellular telephone and accessories retailer. The petitioner's exceedingly vague language fails to even address the petitioner's business operations and the beneficiary's role in the company. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will 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)).

Additionally, it is unclear whether the petitioner is claiming to employ the beneficiary in a primarily managerial capacity as defined under section 101(a)(44)(A) of the Act, or in a primarily executive capacity pursuant to section 101(a)(44)(B) of the Act. The foreign entity's president referenced the beneficiary's "executive" responsibilities in his January 4, 2005 letter. Although counsel also noted in his May 31, 2005 letter that the beneficiary would be employed in an executive capacity, he subsequently claimed that the beneficiary would be a "functional manager/executive." Counsel further stresses on appeal the concept of functional manager. The petitioner cannot claim to employ the beneficiary 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. The petitioner has not satisfied this essential standard for classification as a multinational manager or executive.

Counsel's claim on appeal that the beneficiary would be employed as a functional manager is not supported by the record. 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). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing 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 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* the function rather than *performs* the duties related to the function.

Here, the sole basis given by counsel for the beneficiary's role as a functional manager is that the beneficiary would manage "the essential function of finance and, as corroborated by her pay, the Beneficiary exercises discretion over the day-to-day operations of the financial activities." The petitioner has not defined the function to be managed by the beneficiary as required by the regulations. Of the five job responsibilities provided the petitioner, only one addresses job duties that may be deemed to be remotely associated with the

company's finance function, i.e., the beneficiary's analysis of "activities, costs, operations, and forecasts data to determines [sic] progress toward stated goals and objectives." If the petitioner is representing the beneficiary as a functional manager of the company's finances, it is essential that the petitioner clearly define the managerial and executive job duties associated with its finance function that the beneficiary would perform, specifically outline how the beneficiary would manage this function, and demonstrate that the beneficiary would be primarily managing the finance function rather than performing the related non-managerial and non-executive tasks. Again, the petitioner has offered only a single statement declaring the beneficiary as a functional manager. Despite the beneficiary's title as "president," or the suggestion that the beneficiary receives a salary comparable to that of an executive or manager, the beneficiary may not be deemed a functional manager without comprehensive documentary evidence describing his employment in a primarily qualifying capacity. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported 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).

Counsel correctly emphasizes on appeal 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). At the time of filing the petition, the petitioner was a two-year old company that employed the beneficiary as president, plus a store manager, an assistant of operations, assistant of administration, and a cashier. Based on the wages reported on the petitioner's quarterly wage report, it appears that the store manager, assistant of operations, and cashier were each employed on a part-time basis. The approximately \$183,000 of income reported on the petitioner's 2004 profit and loss statement indicates that the petitioner has experienced success in its sales, presumably more than that which would be sold by a part-time employee. Additionally, in accordance with the petitioner's lease, the petitioner, which appears to be operating from a kiosk in the mall, is required to operate during the shopping center's hours, which presumably is at least ten hours a day. The petitioner has not identified those employees who would be responsible for performing the business' sales, promotions, and inventory during the absence of the three lower-level part-time employees. But for the beneficiary or the company's administration assistant, there are no additional full-time employees to perform these non-qualifying functions. As a result, it is reasonable to conclude that at least a portion of the beneficiary's time would be spent performing the non-managerial and non-executive functions of the company. 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).

Counsel references on appeal an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has not furnished evidence to establish that the facts of the instant petition are analogous to those in the referenced unpublished decision. 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.

Counsel also references *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570 (N.D. Ga. 1988) to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the cited cases. The AAO has long interpreted the regulations

and statute to prohibit discrimination against small or medium size businesses. However, the AAO has long required the petitioner to establish that the beneficiary's position consists of primarily managerial or executive job duties. The petitioner has not established this basic eligibility requirement.

Counsel further notes the director's issuance of an intent to deny rather than a request for additional evidence, which would have allowed the petitioner a longer period of time within which to submit the requested evidence. The regulation at section 214.2(l)(8) addresses the use of a notice of intent to deny an L-1A nonimmigrant petition, whereas the regulations pertaining to the immigrant classification as a multinational manager or executive do not account for the use of a notice of intent to deny. Despite the director's error, counsel does not address in his May 31, 2005 letter any difficulty on the part of the petitioner in obtaining the requested evidence, and, in fact, acknowledges "the interest of [an] expeditious adjudication." Additionally, the petitioner has been given the opportunity on appeal to supplement the record with additional documentary evidence. As a result, the director's issuance of a notice of intent to deny is not material to the adjudication of the instant petition.

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

Beyond the decision of the director, the petitioner has not demonstrated that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. The regulation at 8 C.F.R. § 204.5(j)(3)(B) requires that the petitioner demonstrate that the beneficiary was employed overseas for at least one year during the three years preceding entry as a nonimmigrant in a primarily managerial or executive capacity. Here, the petitioner provided an essentially equivalent broad statement of the beneficiary's job duties as "executive officer/partner" in the foreign organization as that describing his role in the United States company. In its January 4, 2005 letter, the foreign entity's president neglected to explain the "activities" and "policies" directed, coordinated, and formulated by the beneficiary, or define the company's goals and objectives that the beneficiary purported developed. The petitioner's brief outline of five job responsibilities is not sufficient to demonstrate the beneficiary's employment in a primarily managerial or executive capacity. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. As a result, the AAO cannot conclude that the beneficiary was employed abroad in a primarily managerial or executive capacity. Accordingly, the petition will be denied for this additional reason.

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.