

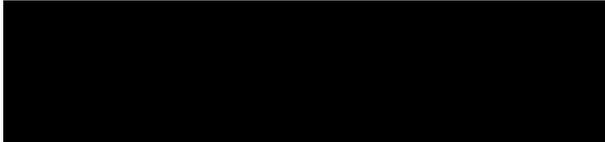
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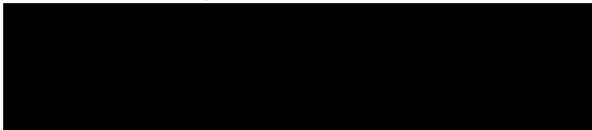
Office: TEXAS SERVICE CENTER Date:

DEC 14 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, 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 Florida that is engaged in the sale and export of construction equipment and parts. 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 for the petitioner claims that the director's denial of the immigrant petition, in which the director concluded that the petitioning entity did not need a full-time executive to manage two subordinate employees, was "arbitrary and capricious." Counsel emphasizes the beneficiary's job description, as well as his supervision of a supervisory employee as evidence of the beneficiary's proposed employment in an executive capacity. Counsel submits a brief in support of the appeal.

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 submitted the instant petition on March 30, 2004 noting that in addition to its two other employees, the beneficiary would be employed as the president of the organization at an annual salary of \$42,000. Counsel appended a letter, dated January 7, 2004, in which the petitioner outlined the following responsibilities of the beneficiary in his capacity as president: (1) establish and formulate the company's goals and policies; (2) hire employees and evaluate their work performance; (3) determine employees' salaries; and (4) oversee the company's business activity.

In a notice dated February 15, 2005, the director requested additional evidence in the form of a "definitive statement" establishing the beneficiary's proposed employment in a primarily managerial or executive

capacity, and including: (1) the beneficiary's proposed position title and his date of employment; (2) a list of the job duties to be performed and the percentage of time to be spent on each task; (3) the number of subordinate employees, including managers or supervisors, who would report to the beneficiary; (4) a brief description of the job titles and duties to be performed by the lower-level employees; (5) the qualifications necessary for the beneficiary's position; (6) the level of authority to be held by the beneficiary, as well as whether it would be considered a "senior level" position; and (7) an explanation of which employees sell the petitioner's products or provide the services necessary to produce the products. The director noted that if the beneficiary would not directly supervise employees, the petitioner should include an explanation of the specific essential function managed by the beneficiary. The director also requested the petitioner's Internal Revenue Service (IRS) Form W-2, Wages and Tax Statement, for all workers employed in the years 2002, 2003, and 2004.

Counsel responded in a letter dated May 12, 2005 noting that the beneficiary's proposed position as president goes beyond that of a first-line supervisor, as the beneficiary would be supervising a supervisory employee who has authority over the company's salesperson. In an attached letter, dated May 5, 2005, counsel provided the following job description for the beneficiary:

[A]s President of our corporation, [the beneficiary's] job duties and responsibilities include establishing the business and financial goals and policies of our corporation together with overseeing the achievements of these business and financial goals and policies, coordinating all activities between administration and sales, supervising and evaluating the work performance of our Vice President/Marketing Director, hiring and firing employees and setting their salaries. Approximately 30% of [the beneficiary's] work week involve[s] establishing the business and financial goals and policies of our corporation together with overseeing the achievement of the business and financial goals and policies. Approximately 30% of his work week involves coordinating all activities between administration and sales and approximately 20% of his work week involves supervising and evaluating the work performance of our Vice President/Marketing Director. The balance of [the beneficiary's] time is administrative in nature.

The petitioner identified the beneficiary's two subordinate employees as: (1) the "vice-president/marketing director," who is responsible for evaluating the performance of the salesperson, establishing new markets, and overseeing sales documents; and (2) the sales employee, who is responsible for selling the petitioner's products. The petitioner claimed that the beneficiary's authority over the lower-level personnel demonstrates the supervisory authority to be held by the beneficiary and illustrates the beneficiary's "senior level" position within the company.

The petitioner submitted its state quarterly tax return for the period ending March 31, 2004, which confirmed the petitioner's three-person staff at the time the petition was filed.

In a decision dated June 17, 2005, the director concluded that the beneficiary would not be employed by the United States entity in a primarily managerial or executive capacity. The director addressed the job description provided by the petitioner and stated that although the beneficiary exercises discretion over the business' daily operations, "it must be noted that he is also performing most of the day-to-day duties of the business." The director concluded that the petitioner's three-employee staff did not necessitate a full time executive to manage the employees or make corporate decisions. The director further stated that "the

petitioner has not demonstrated that the beneficiary's primary assignment has been or will be primarily directing or supervising a subordinate staff of professional, managerial, or supervisory personnel, who relieve him from performing nonqualifying duties." Consequently, the director denied the petition.

In an appeal filed on July 20, 2005, counsel claims that the director's decision was "arbitrary and capricious," as she made an erroneous assumption that the petitioner's three-person staff did not require supervision by a full-time executive. Counsel claims that the director's denial of the petition "is based on a generality" that a corporation of three employees cannot support an executive. Counsel contends that the beneficiary's employment in a primarily executive capacity is illustrated by his supervision of the company's "vice president/marketing director," as well as his "weekly duties" of "establishing the business and financial goals and policies of said corporation together with overseeing the achievement of said business and financial goals and policies, coordinating all activities between administration and sales[,] and supervising and evaluating the work performance of the Vice-President/Marketing Director." Counsel further states that section 101(a)(44) of the Act "was never intended to limit managers or executives to persons who supervise a large number of persons or large enterprises." Counsel specifically references the petitioner's 2004 sales of approximately \$5,500,000 and its issued Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, as supporting evidence of the petitioner's need to employ the beneficiary as an executive.

Counsel further contends that the beneficiary would be directing the petitioner's "major functions" through his supervision of the company's business and financial goals, while the two subordinate employees would perform the "major functions" and day-to-day operations of the business.

On appeal, counsel submits letters from the foreign entity and the petitioning organization that had already been provided for review by the director. Counsel also provides the petitioner's 2003 and 2004 IRS Form W-2 and corporate tax returns for the same years.

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). Despite the director's request to supply a "definitive statement" of the beneficiary's job duties, the petitioner relied on a broad and general statement of the beneficiary's qualification as an executive to establish the beneficiary's employment in a qualifying capacity. Although the petitioner's reference to the beneficiary's responsibilities of establishing and overseeing the implementation of the corporation's business and financial goals and policies and coordinating "activities between administration and sales" identifies broad responsibilities that are executive in nature, it does not clarify the specific executive tasks to be performed by the beneficiary. The petitioner's statement does not specify the beneficiary's executive "activities" related to the company's administration and sales, nor does it clarify the goals and policies to be supervised by the beneficiary. As these responsibilities purportedly consume 60 percent of the beneficiary's workweek, the specific related job duties are essential to demonstrating the beneficiary's employment in a primarily managerial or executive capacity. 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).

The AAO notes that notwithstanding the opportunity on appeal to refine the job description of the beneficiary's executive job duties, counsel provided essentially the same vague claim that the beneficiary will be establishing and overseeing the company's business and financial goals and coordinating administrative and sales activities. 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 Obaigbena*, 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).

Additionally, it does not appear that the petitioning entity would support the beneficiary in a primarily managerial or executive capacity. Counsel correctly notes on appeal that the statutes defining "managerial capacity" and "executive capacity" were not intended to limit classification as a manager or executive to those persons managing or supervising a large number of persons or enterprises. 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, Citizenship and Immigration Services (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 was a two-year-old export company that claimed to have a gross annual income of approximately \$280,000. The firm employed the beneficiary as president, plus a vice-president/marketing director and a salesperson. The petitioner represents that the lower-level employees perform the day-to-day functions and activities of the business, such as establishing new markets, overseeing sales documents, and selling the petitioner's products. However, the petitioner does not account for the performance of other non-qualifying tasks of the business, such as devising marketing strategies, maintaining financial records and documents related to the sale and export of the petitioner's products, performing financial and bank transactions, and stocking and monitoring inventory. While the petitioner mentions "administrative work" to be performed by the beneficiary, there is no explanation of the associated tasks. Additionally, the AAO recognizes the vice-president/marketing director's responsibility of "developing new markets," and the sales associate's job of preparing sales documents, but notes that the petitioner has failed to identify whether its two lower-level employees would perform any of the above-named non-qualifying tasks. 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 petitioner's limited representations, it does not appear that the reasonable needs of the organization would be met by the services of the beneficiary and two other workers.

Moreover, counsel has not demonstrated on appeal that the beneficiary is a functional manager. 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, counsel merely states that the beneficiary "[would direct] the Petitioner's major functions," which would

be performed by the subordinate employees. Counsel's single reference to business and financial functions does not meet the regulatory requirement of specifically identifying and describing the essential function to be managed by the beneficiary. *Id.* Again, the unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

Furthermore, the record does not substantiate counsel's claim that the beneficiary would not perform business functions of the company. The beneficiary is identified on several of the petitioner's sales invoices as its sales representative. Counsel has not reconciled the beneficiary's title as sales representative with the claim that the beneficiary would not be performing day-to-day functions of the organization. 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).

Based on the foregoing discussion, the petitioner has failed to establish that the beneficiary would be employed by the United States entity 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. As the foreign entity's marketing director, it appears that the beneficiary was personally performing the business' marketing functions, including establishing "marketing goals and strategies" and "new markets." While the beneficiary was described as "overseeing the achievement" of the marketing goals, the petitioner did not specifically identify the lower-level employees who would perform the goals established by the beneficiary. The beneficiary's two managerial subordinates, the sales manager and parts manager, were identified as overseeing the sale of products and maintaining inventory, but the petitioner did not describe their job responsibilities as performing the marketing functions of the business. Absent additional information, it is reasonable to conclude that the beneficiary devoted 60 percent of his time to performing the marketing functions of the foreign 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). The AAO also notes that the petitioner accounted for only 90 percent of the beneficiary's time and did not identify the tasks performed by the beneficiary during the remaining ten percent. 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. For this additional reason, the petition will be denied.

An additional issue not addressed by the director is whether the petitioner established the existence of a qualifying relationship between the petitioning entity and the foreign organization. The petitioner claims an affiliate relationship between the two companies based on common ownership of the organizations. The petitioner submits a stock certificate identifying [REDACTED] as the owner of 750 of the petitioner's 1,000 shares of authorized stock. The petitioner, however, did not submit documentation identifying [REDACTED] as the majority shareholder of the foreign company. A 2002 income tax return for the foreign entity identifies [REDACTED] as the legal representative of the organization and does not reflect the company's ownership. 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)). Absent

additional evidence, the AAO cannot conclude that the foreign and United States organizations are affiliates. 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.