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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: DEC 1 4 2005
SRC 04 078 50861

IN RE: Petitioner: [redacted]
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:

[redacted]

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 appeal will be dismissed.

The petitioner, ., purports to do business in the State of Texas under a Certificate of Authority granted to on October 15, 2003. is a corporation organized in the State of Missouri in September 2001. . and the beneficiary, individually, own and operate a convenience store/service station in Roeland Park, Kansas. c. 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 petitioner.

On appeal, counsel for the petitioner asserts that the director did not present any reasoning why the concepts of functional management, executive duties, and overall stage of development were inapplicable in this matter. Counsel contends that the director provided little notice regarding why the petition was denied. Counsel submits a brief on 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):
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> * * *
>
> (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 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).

Preliminarily, the AAO observes that the petitioner in this matter was apparently created to conduct business in Texas using the fictitious name, [redacted]. The AAO notes that [redacted] Inc appears to be one and the same as [redacted]. holds only one asset, a gas station/convenience store located in Roeland Park, Kansas.

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
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> i. manages the organization, or a department, subdivision, function, or component of the organization;
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> 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;
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> 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
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> 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
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> 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 an undated exhibit (exhibit 31) appended to the petition, the petitioner indicated that the beneficiary as president would engage in the supervision of the management of branches, financial management, marketing management, human resources management, strategic decision making, and new business development. The petitioner further explained that the beneficiary would supervise store managers, day-to-day shift management, oversee vendors, review merchandise orders, oversee contracts, negotiate prices, terms, and merchandising area. The petitioner added that the beneficiary would oversee the accountant's work, review future financial requirements, and oversee the preparation of financial documents and would also oversee the set-up of the store, placement of merchandise, advertisements, signage, and employee presentation. The petitioner included hiring employees, evaluating performance, and negotiating compensation among the beneficiary's duties. The petitioner also noted that the beneficiary would assess threats and opportunities, establish long-term and short-term objectives, and define management, financial, marketing, and human resource strategies. Lastly, the petitioner indicated that the beneficiary would search for locations for new stores, negotiate leases, oversee necessary remodeling, executive contracts with gasoline suppliers, and take strategic steps to make the branch successful.

The petitioner also provided an organizational chart depicting the beneficiary as president that showed two proposed gas station/convenience stores under the beneficiary's supervision as well as one gas station/convenience store that according to the petitioner had been sold in late 2003. The organizational chart also depicted one gas station/convenience store, currently owned by [redacted] and the beneficiary, individually, in Roeland Park, Kansas that employed a manager, a cashier, and a cashier/stocker under the beneficiary's supervision.

The petitioner also provided Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement, issued to employees of the sold gas station/convenience store in 2001 and 2002.

On February 1, 2005, the director requested, among other things, additional evidence detailing the beneficiary's proposed position with the petitioner including: the position title; a list of all duties; the percentage of time spent on each duty; the names of subordinate managers/supervisors or other employees reporting directly to the beneficiary; a brief description of their job titles, and educational levels, or if the beneficiary would not supervise other employees, the essential function the beneficiary would manage; an organizational chart specifying the beneficiary's position within the organizational hierarchy; and, who provides the product sales/services or produces the petitioner's products. The director also requested evidence of the petitioner's staffing levels including IRS Forms W-2 for all employees in 2003 and 2004.

In an April 26, 2005 response, the petitioner provided essentially the same job description of the beneficiary's duties and the same organizational chart as submitted with the initial petition. The petitioner also listed the employees and duties of those individuals identified as working for the Roeland Park, Kansas gas station/convenience store on the organizational chart. The petitioner identified the manager's duties as managing the retail operations, including preparing work schedules, assigning duties, formulating pricing policies, coordinating sales promotion activities, preparing or directing workers to prepare merchandise displays and advertising copy, supervising employees, and ensuring bills are paid and that employees complied with procedures and practices. The petitioner identified the three sales clerks' duties as performing administrative and sales duties.

The petitioner also provided [redacted]'s IRS Forms W-2 issued to seven individuals during the 2004 year. The IRS Forms W-2, showed that the individual identified as holding the managerial position as receiving $560; the individuals identified as sales clerks as receiving $1938, $4196, and $6,200; and the beneficiary as receiving $20,500. The IRS Forms W-2 of the two other individuals showed that these individuals had received $296 and $5,900 in the 2004 year, but the record did not include information regarding their duties or services rendered to the petitioner.

Counsel for the petitioner claimed that the organizational chart depicted the senior level placement of the beneficiary and showed that the beneficiary would manage the highest-level executive function at the petitioner's organization. Counsel also contended that the organizational chart showed that the beneficiary had at least two layers of personnel beneath him and that the lower levels of personnel would relieve the beneficiary from performing non-qualifying duties.

The director denied the petition on May 3, 2005, determining that the proffered position was not managerial or executive. The director determined that there was only one full-time employee in 2004[1] and assumed that the beneficiary would be performing most of the day-to-day duties during this time period. The director observed that the beneficiary "evidently exercises discretion over the day-to-day operations of the activity," but also performs most of the day-to-day duties of the business. The director specifically found that an executive may manage a function within an organization but indicated that the petitioner must demonstrate that the executive does not perform the function. The director concluded that it is reasonable to assume that the petitioner's business does not need a full-time executive to manage part-time employees and make decisions regarding the company.

On appeal counsel for the petitioner asserts that Citizenship and Immigration Services (CIS) improperly based its denial on the petitioner's employment of only one full-time employee and ignored the petitioner's part-time employees. Counsel takes issue with the director's assumption that the beneficiary must be performing most of the petitioner's day-to-day duties because the petitioner lacks employees to perform the daily duties. Counsel questions whether the director had properly considered the petitioner's reasonable needs in light of

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[1] The director also noted the number of employees purportedly under the beneficiary's supervision in 2002 and 2003; however the pertinent time period for consideration for this immigrant visa classification is when the Form I-140, Immigrant Petition for Alien Worker, was filed in January 2004.

the petitioner's overall purpose and stage of development. Counsel also contends that the director did not consider the concept of functional management or the beneficiary's executive duties.

Counsel asserts the director committed legal error when: focusing on the petitioner's number of full-time employees; when acknowledging that an executive may manage a function but denying the presence of "functional management" in this matter; and, when utilizing the concept of "overall stage of development" as a negative factor when the petitioner employs part-time employees. Counsel cites an unpublished decision as well as a district court decision and precedent decisions to support his assertions on the issue of the beneficiary's managerial or executive capacity for the petitioner.

Counsel's assertions and references to other decisions are not persuasive. Counsel's citation to unpublished matters carries little probative value. When examining the managerial or executive capacity of a beneficiary, CIS reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy. Upon review of the record in this matter and as discussed further below, the petitioner has not established that the beneficiary's duties and those of his claimed subordinates elevate the beneficiary's position to a primarily managerial or executive position. Further, counsel should take note that unpublished decisions are not binding on CIS in its administration of the Act. *See* 8 C.F.R. § 103.3(c).

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). Counsel seems to suggest that the beneficiary qualifies as both a manager under section 101(a)(44)(A) of the Act, and an executive under section 101(a)(44)(B) of the Act. Counsel suggests as well that the beneficiary may be a "function manager." However, a petitioner may not claim a beneficiary is to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager. In this matter the petitioner has not established that the beneficiary will perform primarily managerial or primarily executive functions.

Upon review of the description of the beneficiary's job duties, the petitioner has listed several general management functions, such as financial management, marketing management, human resources management, and strategic decision-making and business development. The petitioner then claims that the beneficiary will supervise store managers, day-to-day shift management, as well as oversee vendors, review merchandise orders, oversee contracts, negotiate prices, terms, and merchandising area. The petitioner, however, does not substantiate that it had any managers on its payroll, when the petition was filed, for the beneficiary to supervise. When the petition was filed, the petitioner employed an individual identified as the "station manager" who received only $560 for the 2004 year.[2] Thus, the record does not support the petitioner's claim that the beneficiary was supervising an individual in the position of store manager or

[2] Although the petitioner issued IRS Forms W-2 in 2004 to two individuals who received $296 and $5,900 respectively, the petitioner does not identify the positions held by these two individuals.

engaged in shift management. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Moreover, the description of the station manager's duties does not comport with this individual's limited employment. Even if the petitioner claimed that the employee who received $5,900 in the 2004 year was employed in a position of station or shift manager, the salary this individual received does not realistically relate to an individual with the full-time responsibilities detailed in the petitioner's description of the station manager's duties. The AAO finds that the record does not substantiate that the petitioner employed any individuals in the position of station or shift manager that could relieve the beneficiary from performing the necessary first-line supervisory duties of a gas station/convenience store manager. Further, counsel's attempt to conform the beneficiary's duties to that of an individual with at least two layers of personnel beneath him is not credible. The nature of the petitioner's business when the petition was filed and the number of the petitioner's employees in 2004 does not support counsel's claim that the beneficiary supervised other managers or supervisors.

The petitioner also indicated that the beneficiary would oversee the accountant's work. However, the petitioner does not provide evidence that it employed a salaried accountant and does not submit sufficient evidence to substantiate that supervising an accountant would require the beneficiary's primary focus. The petitioner does not identify anyone other than the beneficiary who would perform duties relating to the preparation of financial documents, the placement of merchandise, advertisements, and signage, the search for new locations, or the negotiation of leases, remodeling, and executing contracts with gasoline suppliers. These duties are not traditionally managerial duties but rather the necessary tasks associated with operating a gas station/convenience store and exploring potential investments. 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 remainder of the petitioner's description of the beneficiary's duties is general, principally reciting elements contained in the definition of both managerial and executive capacity. *See* section 101(a)(44((A)(iii) and section 101(a)(44)(B)(ii) of the Act. Such a description is not sufficient to establish that the beneficiary performs primarily in a managerial or executive capacity. 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).

Counsel correctly observes 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 addition, the AAO acknowledges that the director should have more articulately discussed the beneficiary's duties and how the description failed to establish that the beneficiary's duties would be primarily managerial or executive. However, the totality of the record in this matter raises questions regarding the legitimacy of the beneficiary's position. Upon review, the description of the beneficiary's duties, the petitioner's type of business when the petition was filed, the petitioner's organizational chart, and the absence of evidence confirming the employment of individuals other

than in a part-time or intermittent capacity, cast doubt on the legitimacy of the petitioner's offer of employment.

Further, 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.* 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). In this matter, the AAO finds that the petitioner's description of the beneficiary's duties does not show a realistic relationship with the nature of the petitioner's business and the necessary number of personnel hours to operate a gas station/convenience store.

Furthermore, to establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of the pragmatic duties of overseeing service personnel or performing the administrative and operational tasks necessary to operate a gas station/convenience store. 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. Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner cannot excuse a beneficiary who spends the majority of his time on non-qualifying duties.

The AAO does not find counsel's specific assertions regarding the director's "legal error" persuasive. Again, although the director could have better articulated her decision regarding the deficiencies in the record, upon review of the totality of the record the petitioner has not provided evidence that it employs a sufficient number of employees (whether part-time or full-time) to relieve the beneficiary from performing primarily non-qualifying duties. The statute continues to require that an individual "primarily" perform managerial or executive duties in order to qualify as a managerial or executive employee under the Act. The word "primarily" is defined as "at first," "principally," or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service, that individual cannot also "principally" or "chiefly" perform managerial or executive duties. In this matter, when the petition was filed, the record demonstrates that the beneficiary performed primarily non-qualifying duties, including the duties of a first-line supervisor over non-professional employees intermittently employed to operate a gas station/convenience store.

Counsel's implied assertion that the beneficiary's position satisfies the criteria of a functional manager or an executive who directs the management of a function is not persuasive. Neither counsel nor the petitioner identify the particular function the beneficiary directs the management of or purportedly manages. Neither

does the petitioner's description of the beneficiary's job duties comport with an individual responsible primarily for managing or directing the management of a function, essential or otherwise. Counsel should note that if a petitioner claims that the beneficiary is managing an essential function or directing the management of a 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 or directing the management of the 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. 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, the petitioner has not provided evidence that establishes that the beneficiary satisfies the criteria of an executive who directs the management of a function or of a manager who manages an essential function.

Counsel's citation to district court decisions and precedent decisions do not support counsel's claim that the beneficiary will perform primarily managerial or executive duties for the petitioner. The facts provided in this matter, including the description of the beneficiary's duties, the lack of evidence substantiating the employment of sufficient personnel to relieve the beneficiary from performing operational and administrative tasks, the description of the beneficiary's subordinates' duties, and the nature of the petitioner's business when the petition was filed do not establish the beneficiary's eligibility for this visa classification.

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

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.