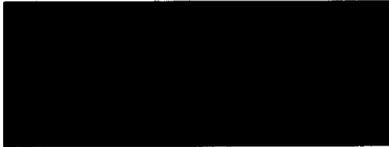


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FILE: EAC 03 209 51336 Office: VERMONT SERVICE CENTER Date: JUL 14 2005

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 preference visa petition was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a New Jersey corporation operating as an educational toy design, production, and distribution company. It seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the beneficiary would not be employed in a managerial or executive capacity and denied the petition.

On appeal, counsel disputes the director's conclusions and submits a brief and additional documents in support of his arguments.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this 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 this proceeding is whether the beneficiary would be employed in a 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) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the petition, the petitioner submitted the following list of the beneficiary's responsibilities under an approved petition:

1. Plan the business objectives of our US subsidiary
2. Hire, review and fire the our [sic] Subsidiary's employees.
3. Oversee, control & direct the overall business activities.
4. Coordinate with our Head Office for daily business activities.
5. Report the budgeting and disbursement to [the] Head Office[.]

6. Revise operating procedures in order to increase efficiency and productivity.
7. Develop and maintain good relationship with the executives of worldwide leading toy suppliers/makers.
8. Oversee and direct the scheduling/arrangements of participation at International Toy Shows.
9. Direct and oversee the new designing of toys to meet the market trends.

The petitioner also submitted its organizational chart naming 11 individuals, whom it claimed as part of its personnel structure either as direct company employees or as independent contractors. The individuals claimed as the petitioner's employees filled the positions of president, vice president, marketing, administration, and shipping. The outsourced employees were named in the positions of business consultant, legal advisor, designers, accountant, and sales consultant. The documentary evidence submitted by the petitioner did not establish that any of the claimed employees were employed by the U.S. entity at the time the petition was filed.

Accordingly, on December 10, 2003, the director issued a request for additional evidence instructing the petitioner to submit more detailed information regarding the beneficiary's proposed daily activities under an approved petition. The petitioner was also instructed to submit various tax documentation from 2002, as well as its *complete* Form 941 for the first two quarters of 2003.

The petitioner replied with a letter dated February 25, 2004 claiming that the beneficiary has four direct subordinate managers and five outsourced workers under the managerial positions. Specifically, the petitioner stated that its personnel structure consists of four department heads including an accounting manager, a shipping manager, an administrative manager, and a marketing and customer service manager. It is noted that the organizational chart initially submitted with the petition does not contain the position of accounting manager. Furthermore, the organizational chart does not indicate that the outsourced employees are managed by the department heads; rather, the chart suggests that the beneficiary himself oversees the work of the company's employees, whether outsourced or employed directly by the petitioner. The petitioner focuses on the beneficiary's heightened degree of discretionary authority over all business matters and submits the following description of the beneficiary's position:

As president, the beneficiary is responsible for making the final decision of what items to add, drop, keep and improve; he also makes the final selection of the works of designers, product developers and foreign makers for the development, design and packaging of new items. Above all these managerial tasks and responsibilities, he has been continuously keeping in touch with the executives of both toy importers & exporters for all informational exchange on things like new products, new manufacturers, new trends and the like.

The petitioner provided a handful of examples where the beneficiary would perform non-qualifying duties, but explained that these are merely exceptions to a position that is otherwise primarily focused on qualifying duties. The petitioner also provided several service contracts, one of which named [REDACTED] Inc. as the petitioner's exclusive sales representative in 13 of the Mid-Atlantic states. Another contract named the company that would provide the petitioner's accounting services. Although the petitioner provided a third

contract signed by DataTrans Solutions, Inc., the petitioner failed to submit the "Statement of Work" that would disclose the type of work this company would be doing on the petitioner's behalf. While the petitioner also submitted its quarterly tax returns for the first two quarters of 2003, neither came complete with the names of the employees who worked for the petitioner during each of the respective quarters. Finally, the petitioner's organizational chart, which was also submitted upon request, named additional employees who were not named in the initial chart that was submitted in support of the petition. While the petitioner indicated in Part 5 of the petition that it had three employees working directly for the company in addition to outside contractors, the updated organizational chart names five employees purportedly working directly for the petitioner. It is noted that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, the petitioner's organizational structure, while relevant to the petitioner's overall eligibility for the I-140 petition, is not probative of the issue of the petitioner's eligibility for the I-140 petition when the petition was filed.

On May 12, 2004, the director denied the petition noting that despite the number of individuals named in the petitioner's organizational chart, the petition indicates that the petitioner has only three employees, aside from the contract personnel. The director also noted that the petitioner failed to submit complete quarterly tax returns to indicate exactly how many employees it had when it filed its petition and who those employees were. The director concluded that the petitioner failed to establish that the beneficiary would be relieved from primarily performing the company's daily operational tasks.

On appeal, counsel submits a statement asserting several points. First, counsel states that the beneficiary fits the definition of "functional manager" claiming that the beneficiary manages the petitioner's essential function of designing and producing a line of toy products. 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. 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. 593, 604 (Comm. 1988)).

In this matter, counsel has not specified which function within the organization the beneficiary is presumed to be managing. Rather, counsel seemingly resorts to the term "function manager" as a means of avoiding the issue of the beneficiary's subordinate staff. Counsel's claim that the beneficiary is a function manager is without merit. Counsel fails to provide evidence of who performs the daily tasks associated with performing the function. Instead, the "essential function" in the instant case is overbroad and all-encompassing indicating only that the beneficiary oversees the workings of the petitioner's entire operation. While this certainly indicates that the beneficiary plays an important role within the petitioning organization, counsel has provided no specific information about the beneficiary's duties. 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).

Counsel states that the beneficiary is not engaged in day-to-day duties of design and production claiming that those duties are performed by independent contractors or seasonal employees. However, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The 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). In the instant matter, the petitioner's evidence of outside contractors is in the form of ten checks made out to seven different individuals or businesses between April and June of 2003, directly prior to the filing of the petition. Out of the seven individuals or businesses, three were not included in either of the petitioner's organizational charts. Therefore, it is unclear what services were provided by the one business and two individuals that were paid by the petitioner during the relevant time period. Further, [REDACTED] who was named as one of the petitioner's designers, was paid a total of \$1,600 prior to the filing of the petition. The petitioner did not elaborate as to the number of hours of design work performed in exchange for the \$1,600 fee. Since the petitioner has clearly indicated that design is among its essential functions, it is reasonable and even necessary to provide a detailed explanation as to the number of hours [REDACTED] carrying out this essential task. Based on the nominal fee received for performing an essential function, the AAO is left to question whether the beneficiary is, indeed merely managing the design function. Although the petitioner's organizational charts listed several other names in the position of designer, there is no evidence that anyone other than [REDACTED] was actually paid for any design services.

Additionally, the petitioner provided a sales representative agreement retaining the services of Zadeh Enterprises. However, the petitioner's second organizational chart indicates that this company was retained for two distinct services: business consultation and sales services. As evidence that Zadeh Enterprises actually provided services to the petitioner, the petitioner provided three checks totaling \$4,665.91 paid to members of Zadeh Enterprises in April and May of 2003. However, two of the three checks indicate that the payments were for consultation services and the third check indicates that it was payment for marketing services. There is no indication that any of the checks represented sales commissions. As such, the AAO is unable to ascertain who was assisting with the sale of the petitioner's products, as the sales task was not attributed to any of the permanent employees listed on either of the petitioner's organizational charts.

Counsel also asserts that the director exaggerated the significance of the size of the petitioner's personnel without giving adequate consideration to its reasonable needs in light of its overall stage and purpose. However, the reasonable needs of the petitioning organization do not override the petitioner's burden of establishing that the beneficiary performs primarily managerial duties. To the contrary, if the petitioner's reasonable needs are such that the beneficiary is required to be directly involved in running its daily operations, that factor in and of itself suggests that the petitioner has no need for a primarily managerial or executive position. Furthermore, the director's consideration of the size of the petitioning organization comports with current law. While size cannot be the sole consideration in determining eligibility for classification as a multinational manager or executive, the director can and should consider the number of the petitioner's personnel for the purpose of establishing whether the petitioner has sufficient staff to relieve the beneficiary from performing non-qualifying duties. In the instant matter, the record does not define with any degree of clarity which employees were part of the petitioner's organizational structure at the time the petition was filed. The

petitioner submitted two organizational charts depicting its hierarchical structure. However, neither of those charts is corroborated by the petitioner's partially legible state quarterly wage report for the third quarter of 2003, which includes the names of the petitioner's employees at the time the petition was filed. Even though the state quarterly report names a total of seven people, only four show earned wages for the third quarter of 2003. Of those four paid employees, only three were named on the petitioner's initial organizational chart, and of those three only two received wages that were commensurate with wages of full-time employees. Further, the petitioner has failed to explain why an employee who was listed as an outside contractor actually appears in the quarterly wage report. Based on the incomplete documentation provided by the petitioner, the AAO cannot determine who was employed by the petitioner and what duties those employees performed at the time the petition was filed. In light of counsel's claim that the beneficiary was relieved of having to perform non-qualifying duties, the petitioner's inability to provide the AAO with sufficient documentary evidence of its personnel structure during the relevant time period gives rise to uncertainty as to who was performing which duties and whether the petitioner had attained a level of complexity such that the beneficiary was primarily performing qualifying duties at the time the petition was filed. 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)).

In examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the beneficiary's job duties. See 8 C.F.R. § 204.5(j)(5). In the instant case, the description of the beneficiary's job duties is too general to convey an understanding of exactly what the beneficiary would be doing on a daily basis and who, if not the beneficiary, would actually carry out the petitioner's essential functions and daily operational tasks. As such, the AAO cannot affirmatively conclude that the beneficiary would primarily perform managerial or executive duties. A review of the record does not indicate that the beneficiary would be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel or that he would otherwise be relieved from performing non-qualifying duties. The petitioner has not demonstrated that it has reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Based on the evidence furnished, it cannot be found that the beneficiary would be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition will not be approved.

Beyond the director's decision, the petitioner has not submitted any documentary evidence to establish that it has a qualifying relationship with the beneficiary's foreign employer. Although the petitioner claims that it is 100% owned by the foreign entity, it has not submitted any documents to substantiate this claim. As previously stated, supporting documentary evidence is essential in order to establish common ownership between the petitioner and the beneficiary's foreign employer. See *Matter of Soffici*, 22 I&N 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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). Therefore, based on the additional ground discussed in the above paragraph, this petition cannot be approved.

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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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.