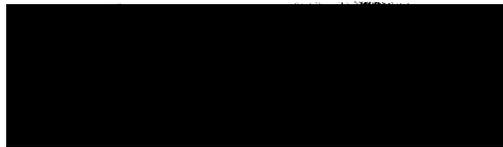


identifying... to
prevent clearly unwarranted
invasion of personal privacy



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FILE: WAC 03 117 53578 Office: CALIFORNIA SERVICE CENTER Date: JUN 16 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:
[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, California 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 petition seeking to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of California that is operating as an importer of greenhouse equipment and is engaged in crop growing. The petitioner seeks to employ the beneficiary as its general manager.

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.

Counsel subsequently filed an appeal. The director declined to treat the appeal as a motion, and forwarded it to the AAO for review. On appeal, counsel states "[Citizenship and Immigration Services (CIS)] erred in finding that [the petitioner] did not establish that the nature of its business required a manager or executive or that the beneficiary will not hold a managerial position within the company." Counsel claims the petitioner demonstrated a need for a manager or executive, and contends that the job duties associated with the beneficiary's position of general manager are managerial and do not include the performance of the day-to-day operations of the company. 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 his 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. 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

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

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

- (i) Manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

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

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

The petitioner filed the instant petition on March 4, 2003 requesting the beneficiary's proposed employment as the corporation's general manager. In an appended letter, dated February 11, 2003, the petitioner noted that in this capacity, the beneficiary would hold the following responsibilities: (1) manage the daily operations of the business; (2) direct and coordinate the company's operations; (3) aid the president and chief executive officer in planning and developing the company's policies and goals; (4) devise plans for implementing the

company's goals; (5) manage the budget; and (6) approve and issue payments due from the corporation. The petitioner further stated:

As General Manager of [the petitioning organization], [the beneficiary] will oversee and direct all administrative aspects of the import business and the agricultural production business.

He will be required to oversee and manage the office budget, prepare documentation for imports and, where applicable, exports, ensure the release from customs of goods and containers arriving from Israel, prepare daily transaction reports for the company executives, ensure the highest quality and efficiency in customer service, and oversee the preparation of documentation for inspection. [The beneficiary] will be required to formulate and implement marketing programs aimed at capturing a greater share of the U.S. market. He will be required to identify staffing needs and to interview and hire additional U.S. personnel to meet the company's needs.

[The beneficiary] will also be responsible for coordinating the activities of the different departments of [the petitioning organization] to affect operational efficiency and economy. This means that he will have general management over the farming and production segment of the business as well as of the import segment of the business. To this end [redacted] as Project Manager, and [redacted] as Agricultural Production Manager, will both report to him[.]

In addition, [the beneficiary] will be responsible for analyzing budget requests to identify areas in which reduction can be made, and for allocating operating budgets. He will be responsible for conferring with administrative personnel, and reviewing activity, operating, and sales reports to determine changes in programs or operations required. Further, [the beneficiary] will be responsible for directing and coordinating all operational and functional changes that are required within the business in order to promote profitable expansion and growth.

* * *

[The beneficiary] will be responsible for overseeing technical staff who perform the installations at commercial agricultural facilities and for directing and overseeing all technical solutions to customer after-sale problems. Specifically, [the beneficiary] will be responsible for overseeing and managing the scheduling of all work projects and for assigning technical staff to various installation and maintenance jobs. He will be responsible for making decisions regarding modification of technical components and for deciding what strategies to take to resolve issues as they arise, with regard to problems that occur at customer sites. Further, he will be responsible for managing and overseeing the work product of the technical staff to ensure that their technical knowledge of [the petitioner's] product is applied in such a way that best reflects the company's high standards of both merchandise and workmanship.

[The beneficiary] will also be responsible for managing and overseeing the inventory of replacement equipment and for liaising with the all [sic] management on issues pertaining to orders from Israel.

The petitioner submitted an organizational chart of the company, wherein it identified five employees, the president, chief executive officer, general manager, project manager, and agricultural production manager, and noted that the petitioner employed an additional thirty-five "technical and agricultural" workers.

In a request for evidence, issued on November 1, 2003, the director asked that the petitioner submit the following evidence in support of the beneficiary's employment in a managerial capacity: (1) the company's organizational chart identifying its managers, staff, and employees subordinate to the beneficiary at the time of filing the petition; (2) a brief description of the job duties and educational levels for all employees supervised by the beneficiary; (3) a statement explaining the source of remuneration for all employees; (4) a detailed description of the beneficiary's "typical" daily job duties in the United States entity; and (5) a copy of the petitioner's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Report, for the quarter ending March 2003.

Counsel responded in a letter dated January 21, 2004 and submitted a letter from the petitioner addressing the director's specific requests. In the petitioner's December 19, 2003 letter, the company's president provided a job description for the beneficiary similar to that outlined above. The petitioner further provided the following description of the beneficiary's "typical" daily job duties:

A typical day of [the beneficiary] consists of arriving in his office at 8:30 am and obtaining a detailed report from [the project manager] concerning current projects in Borrego Springs, where [the project manager] is based because that is where the agricultural production part of the business is based and that is where easy access to clients for the imported greenhouses is situated. Thus, it is possible for [the project manager] to manage support staff who are required to supply either technical or agricultural know-how on an as-needed basis on any given day.

[The beneficiary] will talk to major clients and maintain contact with them as a senior representative of the company to ensure continued service in the face of growing competition in the market.

He will communicate via email to suppliers or talk to suppliers first thing in the morning and arrange payment terms with them and negotiate prices and manage costs. He will also communicate with the shipping company through which [the petitioning organization] imports its products if necessary to iron out any issues that exist with respect to expected orders.

He will review expenses and accounts that have come in for the business and liaise with his accountant, [REDACTED] whose administrative staff acting on behalf of [the petitioning organization] receives new bills and invoices. He will approve expenditures to be made on behalf of the company and take calls from other management regarding marketing and technical issues.

Insofar as [the petitioning organization] faces any legal issues, [the beneficiary] will communicate with attorneys of the company and deal with day to day issues that arise in this respect. Further, he will deal with day to day issues pertaining to any wage issues or wage disputes.

He will put in time towards setting up and putting in place the new manufacturing business that [the petitioning organization] will start in the new year by liaising with executives of the company and acting as the company representative in talking with commercial brokers and other people who will be instrumental in helping [the petitioner] meet its new business goals. He will also have regular communication with financial institutions with which the company is working to secure financing for its U.S. business development.

Given that [the beneficiary] will manage the day to day operation of the company, he will have to be flexible to deal with issues that may arise in the field with respect to both installation of greenhouses at client sites and agricultural production. He may be called upon by the Project Manager to discuss specific issues pertaining to either.

[The beneficiary] will, if the need arises, communicate up the chain to his executives to discuss with them any major decision that need to be taken with regards to the management of the business or if any decisions need to be taken that will depart from the underlying procedures and policies of the company.

The petitioner also submitted a current organizational chart for the United States entity and provided a description of the job duties performed by each of the beneficiary's four subordinate employees. However, as the organizational chart and description are part of the record, and each pertains to the organization's current personnel levels rather than the staffing at the time of filing the petition, the petitioner's descriptions will not be repeated herein. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971) (stating 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).

The director issued a decision on April 7, 2004, 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. The director noted "[t]he beneficiary's current job description does not establish that the beneficiary primarily directs the management of the organization, establishes the company's policies and goals, exercises wide latitude in discretionary decision-making, and maintains autonomy over the petitioner's operations." The director further noted that according to the petitioner's quarterly wage statement for March 2003, the only workers employed by the petitioner who were also identified on the company's organizational chart were the beneficiary and the project manager. The director determined that it was "unreasonable to believe that the beneficiary as 'general manager' would not be assisting with the day to day non-supervisory duties [of the organization]." The director stated that while the beneficiary possesses the job title of "general manager," "he does not qualify as an executive for immigration purposes." The director also concluded that the petitioner did not establish that the "nature of [its] business" required the employment of a manager or executive.

In addition, the director concluded that the beneficiary would not be employed as a functional manager because the petitioner did not show "that the beneficiary manages or directs the management of a department, subdivision, function, or component of the petitioning organization." The director noted that, instead, it

appeared that the beneficiary would perform "routine operational activities of the entity." Consequently, the director denied the petition.

In an appeal filed on May 7, 2004, counsel claims that CIS erred in its finding that the petitioner's business does not require the employment of a manager or executive, and in concluding that the beneficiary would not be employed by the United States entity in a primarily managerial capacity. Counsel contends that the director neglected to analyze the beneficiary's job duties in terms of "managerial capacity," and instead concluded that the job duties do not meet the definition of "executive capacity." Counsel states that the beneficiary's job duties "comport with CIS' definition of manager."

In addition, counsel states that CIS' "entire analysis of the beneficiary's managerial duties [focused] on the staffing levels of the company and [organizational] chart," which resulted in the erroneous conclusion that the beneficiary would be performing the day-to-day operations of the business. Counsel claims that CIS failed to consider the petitioner's current organizational chart, which "best reflected the management structure of the company the way it will look when the beneficiary assumes the permanent position of General Manager." Counsel contends CIS should have taken into account the petitioner's anticipated and realized growth.

Counsel also challenges the director's finding that the beneficiary would perform the day-to-day operations of the business. Counsel explains that the daily "non-supervisory duties involve being out in the field, both at the agricultural site and at customer sites where installations and technical troubleshooting takes place under the management of the Project Manager." Counsel states that these tasks would be performed by current and future employees of the petitioning organization. Counsel also states that the administrative tasks of the company are performed by the staff of the petitioner's accountant, and contends that the beneficiary, as the general manager, "will play no part in these non-supervisory duties."

Upon review, the petitioner has not demonstrated that the beneficiary would be employed by the petitioning organization 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).

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). While the petitioner identifies managerial responsibilities to be performed by the beneficiary, it fails to document what proportion of the beneficiary's duties would be managerial and what proportion would be non-managerial. The beneficiary's job duties include both managerial and administrative or operational tasks. Specifically, the beneficiary would be analyzing and allocating the company's budget, approving and issuing payments from the organization, preparing documentation for imports and exports, "ensur[ing] the release from customs of goods and containers arriving from Israel," "prepar[ing] daily transaction reports," creating and implementing the company's marketing plans, and interacting and negotiating with suppliers. Based on the petitioner's representations of the beneficiary's job duties, a portion of the beneficiary's time would be devoted to personally performing the non-qualifying functions associated with the petitioner's import and export, financial and marketing operations. As the petitioner fails to quantify the time the beneficiary spends on the non-managerial tasks of

the business, the AAO cannot determine what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Absent additional evidence, the petitioner has not established that the beneficiary *primarily* performs high-level managerial responsibilities and does not spend a majority of his or her time on day-to-day functions.

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* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). 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, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

As correctly noted by the director, the record indicates that at the time of filing the petition the petitioner employed the beneficiary as its general manager, a project manager and thirty-three workers who are purportedly employed as technical and agricultural workers. According to counsel, the technical and agricultural workers are employed "out in the field," at both agricultural and consumer sites. In a December 19, 2003 letter, the petitioner suggested that at least a portion of the project manager's time is also spent outside of the company's main office, as he is managing an "agricultural operation" in Borrego Springs, California. As a result, it appears that the beneficiary is the sole employee working at the corporate location. The AAO notes that the petitioner's 2002 corporate income tax return indicates that the company's president and chief executive officer each received compensation during the year 2002, however, each individual's role in the operation of the company is unclear. Based on the representations, it is reasonable to assume that the beneficiary is either the sole individual or the lowest level employee working at the company's main office. The petitioner does not account for any employees who would relieve the beneficiary from performing such duties of the business as administration, clerical, marketing, sales and finances. 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). Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

The AAO recognizes the additional evidence submitted by the petitioner describing the petitioner's current and anticipated personnel structure. Counsel emphasizes on appeal that CIS should have taken into account the petitioner's additional employees when determining the beneficiary's employment as a manager. Counsel however, fails to realize the petitioner's obligation to 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). Despite counsel's claims, the AAO is not required to consider the petitioner's anticipated or realized growth. Rather, the petitioner's actual current staffing levels are properly considered when reviewing the reasonable needs, purpose and stage of development of the organization. As a result, the AAO need not and does not consider the additional evidence submitted on appeal.

Based on the foregoing discussion, the petitioner has not demonstrated 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, an additional issue is whether the petitioning organization is a subsidiary or an affiliate of the beneficiary's foreign employer as required in the Act at § 203(b)(1)(C). The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

The petitioner noted in its February 11, 2003 letter that it is an affiliate of the foreign entity, as both organizations are "owned and controlled by the same entity." The petitioner submitted stock certificates and the minutes from a January 10, 2000 shareholders meeting as evidence of its ownership. The three submitted stock certificates identified the following stockholders: [REDACTED] 500 shares; [REDACTED] 40 shares; Menachem Dagan, 500 shares. The petitioner did not provide sufficient documentary evidence pertaining to the ownership of the foreign entity. Absent this essential information, the AAO cannot determine whether the two organizations are affiliates. 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, the evidence reflecting ownership of the petitioning organization by two individuals undermines the petitioner's claim that the two organizations are owned and controlled by the same "entity" of the beneficiary's foreign employer. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The petitioner has failed to establish a qualifying affiliate or subsidiary relationship between the foreign and United States entities. For this additional reason, the petition may not be approved.

Beyond the decision of the director, an additional issue is whether the beneficiary was employed abroad in a managerial or executive capacity as required in section 203(b)(1)(C) of the Act. The petitioner, stating only that the beneficiary was employed abroad "for the requisite 12-month period," did not identify the exact dates during which the foreign company purportedly employed the beneficiary in a managerial or executive capacity. Additionally, the job duties of the beneficiary, as outlined by the petitioner in its February 11, 2003 letter, are similar to those of a first-line supervisor rather than the job duties performed by an individual in a primarily managerial or executive capacity. For instance, the beneficiary oversaw a "technical staff" that was responsible for off-site product installations, scheduled and assigned work projects, and handled consumer issues or complaints. There is no indication in the record that the beneficiary's subordinate staff was comprised of supervisory, professional or managerial employees. *See* 8 C.F.R. § 204.5(j)(2). A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). For this additional reason, the petition may not be approved.

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).

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.