U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship
and Immigration
Services

B4

[redacted]

FILE: [redacted] SRC 03 027 51625 Office: TEXAS SERVICE CENTER Date: JUN 27 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:

SELF-REPRESENTED

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 is a corporation organized in the State of Florida in April 1996. It operates a bakery/delicatessen. It seeks to employ the beneficiary as its pastry department manager. 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.

On October 4, 2004, the director determined that the record did not demonstrate that the beneficiary would be employed in a managerial or executive position for the U.S. entity. The director alluded to the fact that the record also did not demonstrate that the beneficiary had been employed in a managerial or executive capacity for the foreign entity.

On appeal, the petitioner asserts that the beneficiary had been employed by the foreign parent company from 1998 to 2001; the beneficiary had been working for the petitioner in an L-1A intracompany transferee classification since 2001; and that the beneficiary was transferred to the United States entity to continue working in a managerial capacity. The petitioner also claims the beneficiary works in an executive capacity.

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

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

The issue in this proceeding is whether the petitioner has established that 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;
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> ii. establishes the goals and policies of the organization, component, or function;
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> 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 October 21, 2002 letter appended to the petition, the petitioner stated that the beneficiary would be "instrumental in assessing potential markets." The petitioner described the beneficiary's responsibilities as:

1. Maximizing revenues. (5% of his time)
2. Supervision of cooks as head and Manager of the [redacted], in the preparation of baked cakes, cookies, pies, puddings, or desserts. (20% of his time)
3. Supervision and coordination of activities of personnel in the Department. (25% of his time)
4. Planning production according to daily requirements of such Department. (10% of his time)
5. Requisition of supplies and equipment for such Department. (10% of his time)
6. Maintenance of production records for such Department. (10% of his time)
7. Will direct and control of work flow, [sic] setting the standard for the general guidelines. (10% of his time)
8. Will coordinate and schedule work. (10% of his time)

The petitioner also provided its organizational chart. The organizational chart depicted the beneficiary's position as pastry department manager reporting directly to the executive chef. The chart depicted two individuals under the beneficiary's supervision.

On July 3, 2004, the director requested further evidence of the work performed by the beneficiary including documents requiring the beneficiary's signature such as evaluation reports, supervisory reports, leases, contracts, invoices, or bills of sale. The director also requested: the beneficiary's position title, a list of all his duties, the percentage of time he spent on each duty, the number of subordinate managers/supervisors or other employees who would report directly to the beneficiary and a brief description of their job titles, duties, and educational levels, or if the beneficiary would not supervise other employees, the essential function within the organization that he would manage. The director further requested the qualifications required for the beneficiary's position, the level of authority held by the beneficiary, and whether or not the beneficiary would function at a senior level within the corporation, his position within the organizational hierarchy, and an indication of who would provide the product sales/services or produce the product of the business.

In an October 14, 2003 response, the petitioner attached an undated letter describing the beneficiary's job duties as manager of pastry department including the following responsibilities:

2.1 Establishment of goals, policies and procedures for the [redacted] Dedicating 15% of his time to this duty)

2.2 Administration, supervision and execution of the following aspects: Administration and finances. Budgeting, costs, human resources, internal control, control of production and inventory of the Department under his direction[.] (Dedicating %25 [sic] of his time to this duty), [sic]

2.3 Maximizing revenues. (5% of his time to this duty)

2.4 Supervision of the [redacted] Unit as the Head and Manager of the [redacted] in the preparation of all pastry, delicatessen and food[.] (Dedicating 15% of his time to this duty)
2.5 Supervision and coordination of activities of personnel in the Department[.] (10% of his time)
2.6 Planning production according to daily requirements of such Department. (5% of his time)
2.7 Requisition of supplies and equipment for such Department. (5% of his time)
2.8 Maintenance of production records for such Department. (10% of his time)
2.9 Will direct and control of work flow, [sic] setting the standard for the general guidelines. Will coordinate and schedule work[.] (10% of his time)

The petitioner also provided a revised organizational chart. The organizational chart depicted the beneficiary in the position of manager of the pastry department directly supervising individuals in the positions of "big pastry manager," "specialty food manager," and "chemical processing." The individual in the position of "big pastry manager" was shown supervising two technicians who in turn supervised two individuals in untitled positions. The petitioner noted that the beneficiary reported directly to the president and supervised other managers and technicians. The petitioner provided brief job descriptions for the individuals in the positions of "big pastry manager," "specialty food manager", "chemical processing," "ice cream technician," and "ice cream chief." The petitioner also included numerous purchase and sales orders with the beneficiary's signature.

The director determined that the beneficiary's proposed position would not be executive or managerial. Upon review of the petitioner's description of the beneficiary's job duties, the purchase and sales orders, and staffing levels, the director determined that the beneficiary would be in charge of the day-to-day purchasing, sales, inventory, and fulfilling daily requirements of producing the petitioner's product. The director noted that the petitioner had submitted two different organizational charts and concluded that the beneficiary would be at most a first-line supervisor. The director concluded that the petitioner had not established the beneficiary's eligibility for this visa classification and that the petition could not be approved.

On appeal, the petitioner claims that the beneficiary manages the pastry department, controls and supervises the work of other supervisory personnel, has the authority to hire and fire, recommends personnel actions, and exercises discretion over day-to-day operations of an activity or function. The petitioner claims that the two different organizational charts were submitted because it was not possible to present the organizational hierarchy on one sheet, but that nonetheless, the beneficiary as head of his department reported directly to the president. The petitioner also claims that the beneficiary manages an essential function. The petitioner states that the beneficiary is an indispensable individual in the development of the department he manages as well as serving as a link and mediator between the departments of the bakery and teaching other employees. The petitioner notes that the beneficiary establishes and explains the organizational policies and goals, as well as performing administrative duties, saving funds, and coordinating the distribution of raw material and funds.

The petitioner also contends that the beneficiary performs in an executive capacity. The petitioner asserts that the beneficiary has a high level of authority, a broad range of job responsibilities, and plans, organizes, directs, and controls the department's goals and strategies. The petitioner claims that a majority of the beneficiary's time is spent on duties relating to the policy or operational management of the petitioner. The petitioner explains that the purchase orders bear the beneficiary's signature because he reviews and authorizes the purchase orders.

The petitioner's assertions are not persuasive. The petitioner's initial description of the beneficiary's responsibilities assigned more than 60 percent of the beneficiary's time to supervisory duties. The beneficiary's proposed duties included supervising cooks, supervising and coordinating the department personnel's activities, directing and controlling workflow, and coordinating and scheduling work. This is a job description for an individual employed primarily as a supervisor. The actual duties themselves 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 petitioner's initial organizational chart confirms that the beneficiary is in a first-line supervisory role supervising two subordinates, while the beneficiary is under the direct supervision of an executive chef. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. The record does not substantiate that the beneficiary's two subordinates hold professional positions. 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)).

The majority of the beneficiary's remaining responsibilities relate to the operational tasks of requisitioning supplies, planning production, and maintaining records. However, 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)). The record initially presented to Citizenship and Immigration Services (CIS) did not establish that the beneficiary's position would be primarily managerial or executive.

The petitioner's second iteration of the beneficiary's duties submitted in response to the director's request for evidence provided different and additional duties to the beneficiary's position. The petitioner indicated that the beneficiary spent 25 percent of his time on administration and supervision of the budget, costs, human resources, and production and inventory control. The petitioner added a second tier of "managerial" employees between the beneficiary and his subordinates and noted that the beneficiary spent 15 percent of his time supervising the intermediate tier of employees and 10 percent of his time coordinating workflow and scheduling work. The petitioner also indicated that the beneficiary spent 10 percent of his time supervising and coordinating personnel activities and 20 percent of his time planning production, requisitioning supplies, and maintaining production records. This portion of the second description varies from the initial description in the amount of time allocated to the tasks, in the insertion of an additional tier of employees, and in the addition of the beneficiary's tasks related to the budget.

The second iteration of the beneficiary's job duties appears to be enhanced to more closely align with the definition of managerial capacity.[1] However, whether the beneficiary's duties were actually expanded after the initial petition was filed or whether the petitioner has increased the beneficiary's level of responsibility to correspond with the definition of managerial capacity, the record does not establish that the beneficiary's duties were primarily managerial when the petition was filed. 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. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The petitioner has not adequately resolved the differences between the two organizational charts submitted. The petitioner's claim on appeal that the only difference in the two organizational charts is that the organizational hierarchy could not be submitted on one sheet is not persuasive. The petitioner initially provided evidence that the beneficiary reported directly to the executive chef and had two non-professional subordinates. The petitioner's revised organizational chart placed the beneficiary's position in an elevated position and provided no explanation for this revision. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has only provided credible evidence that the beneficiary's responsibilities related primarily to first-line supervisory tasks and operational tasks when the petition was filed.

The petitioner's claim in the response to the director's request for evidence and on appeal that the beneficiary manages an essential function is also not persuasive. 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. However, 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. Again, an employee who primarily performs the tasks necessary

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[1] The petitioner's statement that the beneficiary spends 15 percent of his time establishing goals, policies and procedures paraphrases section 101(a)(44)(B)(ii) of the Act, a portion of the executive capacity definition. However, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

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 at 604. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

The petitioner's conclusory statement that the beneficiary is indispensable to the organization does not assist in determining that the beneficiary manages an essential function. The petitioner does not differentiate between the beneficiary's qualifying and non-qualifying duties. This distinction is important because as discussed above, the beneficiary has a number of non-managerial responsibilities including first-line supervisory duties and operational and administrative functions. The evidence in the record does not establish that serving as a link between bakery departments, teaching other employees, performing administrative tasks, saving funds, and coordinating the distribution of raw material and funds are managerial tasks. The petitioner has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. Absent a clear and credible distinction between the beneficiary's daily operational and supervisory tasks which do not fall under traditional managerial duties as defined in the statute and duties that are primarily managerial, the AAO cannot conclude that a majority of the beneficiary's duties would be managerial or executive, nor can it deduce that the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Also in response to the director's request for further evidence, the petitioner inserts language in the description of the beneficiary's duties that corresponds with a portion of the definition of executive capacity. The petitioner ascribes 15 percent of the beneficiary's time to establishing goals, policies and procedures. However, merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

On appeal, the petitioner again contends that a majority of the beneficiary's time is spent on duties relating to the policy or operational management of the petitioner. However, the petitioner's contention does not comport with the previous descriptions provided nor does the petitioner account for the beneficiary's performance of non-qualifying duties. 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.

The petitioner has not established that the beneficiary's proposed position is primarily managerial or executive. For this reason the petition cannot be approved.

The next issue in this matter is whether the petitioner established that the beneficiary was employed by the foreign entity in a managerial or executive capacity in one of the three years prior to entering the United States as a nonimmigrant. Again, the petitioner does not provide a comprehensive description of the beneficiary's duties sufficient to distinguish between the beneficiary's non-qualifying duties and those duties that could be defined as managerial or executive.

The petitioner indicated that the beneficiary spent 20 percent of his time establishing objectives, policies and procedures as manager of the foreign entity's pastry department; 20 percent of his time performing administrative duties including finances, accounting, financial statements, taxes, costs, budgeting and payroll; 10 percent of his time on human resources and employee recruitment; 10 percent of his time controlling inventory and production; 10 percent of his time presenting sales reports to the Board of Directors; and 20 percent of his time receipting merchandise and signing purchase orders and bills of sale relating to the pastry department. Although the petitioner did not allocate any of the beneficiary's time to supervising employees, the petitioner noted that the beneficiary directly supervised nine employees.

The petitioner's description of the beneficiary's duties for the foreign entity paraphrases a portion of the definition of executive capacity, indicates generally that the beneficiary is involved in duties relating to finances, accounting, financial statements, taxes costs, budgeting and payroll as well as human resources and employment recruitment, and that the beneficiary spends a significant portion of his time on operational tasks relating to inventory, production, and signing purchase orders, bills of sale, and receipting merchandise. The petitioner does not further define the objectives, policies, and procedures allegedly established by the beneficiary. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. The petitioner does not provide an understanding of the beneficiary's duties relating to finances, accounting, financial statements, taxes costs, budgeting and payroll as well as human resources and employment recruitment. 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. *Id.* The petitioner does not explain how the beneficiary's performance of operational tasks elevates the beneficiary's position to a managerial or executive position. The actual duties themselves reveal the true nature of the employment. *Id.*

On appeal, the petitioner simply provides evidence that the beneficiary worked for the foreign entity prior to entering the United States as a nonimmigrant L-1A intracompany transferee. The issue in this matter as it relates to the beneficiary's foreign employment, however, is whether the beneficiary's position with the foreign entity was actually managerial or executive. The record does not contain sufficient evidence to establish that the beneficiary was employed primarily in a managerial or executive capacity for the foreign entity. For this additional reason, the petition will not be approved.

The petitioner's reference to previously approved L-1A intracompany transferee petitions on behalf of the beneficiary is not persuasive evidence that the beneficiary is or was a managerial or executive employee. It must be noted that many Form I-140 immigrant petitions are denied after CIS approves prior nonimmigrant Form I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427. Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

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.