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20 Mass. Ave., N.W., Rm. A3042  
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U.S. Citizenship  
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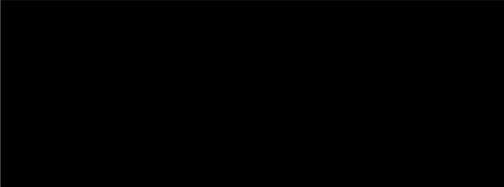
Office: NEBRASKA SERVICE CENTER

Date: MAY 10 2005

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska 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 claims to be a limited liability company organized in 1991 or 1996 that began doing business in 1999 or in July 2001<sup>1</sup>. It retails fresh "halal" meat and eastern and western grocery products. It seeks to employ the beneficiary as its general 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 June 18, 2004, the director determined that the record did not demonstrate that: (1) the beneficiary had been performing in a managerial or executive capacity for the foreign entity; or, (2) the beneficiary would be employed in a managerial or executive position for the U.S. entity.

On appeal, counsel for the petitioner asserts that a combination of mistakes of fact and law caused the denial of this petition. Counsel submits a brief and explanations regarding the claimed mistakes of fact and law.

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.

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<sup>1</sup> Counsel includes a copy of the petitioner's Form I-129, Petition for a Nonimmigrant Worker as an exhibit to this appeal. The Form I-129 states that the petitioner was established in 1991. In a January 17, 1999 letter accompanying the Form I-129 petition, the petitioner states that the petitioner was recently incorporated. The petitioner's Form I-140, Immigrant Petition for Alien Worker also states that the petitioner was established in 1991. Counsel on appeal states that the record shows that the petitioner was incorporated in 1996 and also indicates that the beneficiary was transferred to the petitioner in January 1999 when the petitioner was a start-up corporation. The petitioner's 2002 and 2003 Internal Revenue Service (IRS) Forms 1065, U.S. Return of Partnership Income indicate that the business started on July 1, 2001. The petitioner also refers to itself as a corporation and uses the appellation "Inc." to so designate but its tax returns indicate it is a limited liability company owned by two partners.

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 first issue in this proceeding is whether the petitioner established that the beneficiary's employment for the foreign entity had been in a managerial capacity for one year prior to entering the United States as a nonimmigrant. The petitioner does not claim that the beneficiary was employed in an 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.

The petitioner's Form I-140, Immigrant Petition for Alien Worker stated that the Canadian entity employed five individuals in Canada. In an undated letter appended to the petition, the petitioner stated that the beneficiary was employed in a managerial capacity prior to his transfer to the United States. The petitioner stated:

In his capacity as Manager in Canadian operations, [the beneficiary] was responsible from [sic] the managing and overseeing the opening and start-up of new outlets in various regions of Canada. In addition, he was responsible for hiring and training staff, controlling the work of other professional, supervisory and managerial employees, and has had the authority to hire, terminate, and recommend all personnel actions. Accordingly, in Canada he exercised managerial level discretion over the daily operations for the corporation.

On August 1, 2003, the director requested further evidence to establish that the beneficiary's position abroad was in a primarily managerial capacity. In an October 14, 2003 response, the petitioner indicated that the beneficiary spent 50 percent of his time managing the entire Canadian organization and overseeing business development. The petitioner included in this 50 percent allocation of the beneficiary's time, oversight of the accounting firm, meat production managers, local managers of the various locations, and the sales manager. The petitioner noted that the beneficiary spent 30 percent of his time on duties relating to expanding business operations in Canada and 20 percent of his time hiring and firing Canadian personnel and performing necessary personnel actions. The petitioner also provided the Canadian entity's current organizational chart showing a meat processing plant, a restaurant, a sales department, and an accounting firm subordinate to the position of vice-president/general manager. The chart depicted a manager and unidentified staff in the meat processing plant, restaurant, and sales divisions.

The director observed that the Canadian entity's organizational structure conflicted with the information provided on the petitioner's Form I-140 relating to the Canadian entity's number of employees. The director determined that the record lacked evidence establishing that employees, other than the beneficiary, performed the Canadian entity's work, thereby relieving the beneficiary from primarily performing non-qualifying duties.

On appeal, counsel for the petitioner claims that the Form I-140 petition contained a typographical error when listing the number of individuals employed at the Canadian facility when the petition was filed. Counsel and the petitioner state that the Canadian company had 17 employees when the beneficiary was transferred to the United States in 1999 and submit a copy of the petitioner's Form I-129 petition submitted in 1999 which states that the Canadian entity employed 17 staff. Counsel also submits the Canadian entity's organizational chart for the 1998 time period.<sup>2</sup> The 1998 Canadian entity's organizational chart shows the beneficiary in the position of general manager managing the overall Canadian operations, supervising first-line supervisors, and reporting to a vice-president who in turn reports to a president. The chart identifies three first-line supervisors including a restaurant manager over two staff employees, a meat production plant manager over three meat processors/meat cutters, and a sales manager over four sales staff and four stock clerks. Counsel asserts that when considering the correct levels of the Canadian entity's staffing in conjunction with the Canadian entity's 1998 organizational chart, the record substantiates that the beneficiary's duties were managerial prior to his entry into the United States as a nonimmigrant.

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<sup>2</sup> Counsel explains that the organizational chart submitted in response to the director's request for further evidence was the Canadian entity's current chart and thus did not show the beneficiary in the position of vice-president/general manager, because the beneficiary was in the United States in an L-1 classification.

Counsel's assertions are not persuasive. The petitioner has provided statements and an organizational chart to demonstrate that the beneficiary's duties for the Canadian entity were managerial. However, the petitioner has not provided documentary evidence of the number of employees for the Canadian entity. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). As the director observed, 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 provided some evidence that the Form I-140 contained a typographical error regarding the Canadian entity's number of employees. However, the record does not contain any documentary evidence substantiating the Canadian entity's employment of five or seventeen staff in the time period between 1996 and 1999. The record does not contain documentary evidence of the Canadian entity's claimed meat processing plant, three distribution centers, or its restaurant.

The record is insufficient to establish the beneficiary's position for the Canadian entity was in a managerial capacity prior to entering the United States as a nonimmigrant. The director's decision will be affirmed on this issue.

The next issue in this matter is whether the petitioner established that the beneficiary would be employed in a managerial capacity for the petitioner. The petitioner requests consideration of the beneficiary's position only in a managerial capacity.

The petitioner stated on the Form I-140, that the U.S. entity employed seven staff. In an attachment to the petition, the petitioner described the beneficiary's duties as:

Managing and overseeing the continued growth and expansion of the business; responsible for hiring and training staff; organizing, supervising and controlling [sic] the work of other professional supervisory and managerial employees such as the meat production managers; managing the functions of the meat processing production, marketing and sales at the current location; sign contracts on behalf of the company for goods to be produced on a wholesale basis; in charge of hiring, terminating and recommending all personnel actions at the current location.

The petitioner also provided a similar description in an unsigned letter appended to the petition.<sup>3</sup> On August 1, 2003, the director requested additional evidence to establish that the beneficiary would be employed in a primarily managerial capacity. In a September 23, 2003 letter, the petitioner indicated that the beneficiary spent 50 percent of his time overseeing the work of the accounting manager, the meat production manager, and the sales and market manager. The petitioner added that the beneficiary spent about 30 percent of his time managing the function of marketing and business expansion, which included making initial contact with new business markets, such as restaurants, schools, grocery stores, and delicatessens. The petitioner noted that the beneficiary spent the remaining 20 percent of his time hiring and firing U.S. personnel and taking necessary personnel actions. The petitioner also submitted its organizational chart depicting the beneficiary as general manager and

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<sup>3</sup> The director recited the complete description in his decision. The description will not be repeated here.

subordinate to the president of the entity. The chart also depicted a production manager supervising meat processors and meat cutters, a sales manager supervising store clerks and stock persons, and an accounting manager supervising a bookkeeper with each of the managers directly subordinate to the beneficiary.

The director observed that the number of employees depicted on the petitioner's organizational chart conflicted with the petitioner's statement on the Form I-140 that it employed only seven employees. The director also observed that the organizational chart listed seven employees as managers and that the petitioner's 2002 IRS Form 1065 showed that only \$112,375 had been paid in salaries for the year. The director determined that the amount of salaries paid was not sufficient to support the claimed managerial structure of seven employees. The director also noted that a significant percentage of the beneficiary's duties involved performing non-qualifying duties, thus disqualifying the beneficiary from eligibility for this visa classification. The director concluded that the petitioner had failed to establish that the beneficiary's United States position would be managerial.

On appeal, counsel for the petitioner acknowledges the inconsistency between the Form I-140 and the petitioner's organizational chart regarding the petitioner's number of employees. Counsel and the petitioner state that the number of employees identified on the Form I-140 is a typographical error. Counsel submits the petitioner's Form I-129 petition that shows the petitioner employed 20 individuals in 2002. Counsel claims that the salaries listed on the petitioner's IRS Form 1065 is exclusive of the two owners of the company, who receive a share of business income rather than a salary and a third individual who is also partially paid by the foreign entity.

Counsel asserts that the petitioner employs 15 individuals in 2003, a number that reasonably requires the beneficiary's position of manager. Counsel submits IRS Forms W-2, Wage and Tax Statement, issued by the petitioner in 2003 to 16 individuals. Counsel also submits a copy of the petitioner's payroll journal. Counsel asserts that the beneficiary is the top manager of the U.S. company.

Counsel's assertions are not persuasive. The petitioner's 2003 IRS Forms W-2, do not show the petitioner's number of employees when the petition was filed. The petition was filed February 18, 2003. 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). The IRS Forms W-2 reflect that a number of the petitioner's 2003 employees did not work the full year, were employed part-time, or were not paid the minimum wage. The petitioner's payroll journal reflects payments made to only one individual in February 2003. The record is not sufficient to substantiate the petitioner's actual number of employees when the petition was filed.

Moreover, the petitioner's initial description of the beneficiary's duties is broadly cast, paraphrasing elements of the definition of managerial capacity. *See* section 101(a)(44)(A)(i), (ii), and (iii) of the Act. 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). Further, the petitioner's allocation of the beneficiary's time spent on his duties is not substantiated in the record. The petitioner indicates that the beneficiary spends 50 percent of his time supervising employees and 20 percent of his time hiring and firing employees because of the petitioner's expansion to a third location. However, as observed above the record does not clarify and substantiate the petitioner's actual number of employees when

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 Treasure Craft of California*, 14 I&N at. 190. The AAO cannot determine based on the current record that the petitioner employs a sufficient number of employees to relieve the beneficiary from performing primarily first-line supervisory duties and operational tasks associated with developing the petitioner's United States business.

The record does not contain sufficient evidence to overcome the director's decision on this issue. The director's decision will be affirmed.

Beyond the decision of the director, the petitioner has not adequately documented the qualifying relationship between the petitioner and the foreign entity. The AAO acknowledges the petitioner's claim, that the same two individuals who own the petitioner, also own the foreign entity. However, the record is devoid of any documentary evidence demonstrating the ownership. Likewise, as observed above, the record contains inconsistencies regarding the legal status of the petitioner and when it began its operations in the United States. Again, 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 at 591-92. Without clarifying evidence on this issue, the petition will 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.

**ORDER:** The appeal is dismissed.