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U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: [Redacted]
SRC 03 176 50827

Office: TEXAS SERVICE CENTER

Date: MAY 17 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, 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 company organized in the State of Florida in January 2000. It provides consulting services. 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.

On March 12, 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 the director erred in both fact and law when determining that the descriptions of the beneficiary's duties for the foreign entity and the petitioner were vague and general and did not clearly establish that the beneficiary's position had been or would be primarily managerial or executive. Counsel also contends that it is unreasonable to deny the petition on the sole basis of the limited number of employees. Counsel references the director's recent approval of the petitioner's L-1A intracompany transferee petition on the same evidence as submitted with this petition in support of the beneficiary's eligibility for this visa classification.

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 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 would be employed in a managerial or executive capacity for the petitioner.

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.

The petitioner initially submitted a copy of its Form I-539, Application to Extend or Change Nonimmigrant Status, accompanied by a number of exhibits in support of the Form I-140, Immigrant Petition for Alien Worker. The petitioner included in the exhibits a January 5, 2003 list of the petitioner's employees and their duties. The petitioner described the beneficiary's duties as:

President and owner of [the petitioner].

Direct and manage the continuous day to day operation of [the petitioner].

Make and enforce company policy as to meet demands of [the petitioner] and the industry.

Assign tasks and duties to management of [the petitioner].

Allocate annual bonus, salary increases, leave periods and assign and dismiss personnel as and when seen fit to do so.

Establish and implement suitable bank accounts and overdraft securities.

Act as multi-national Director / company owner both in the USA and South Africa.

Attend meetings with other consulting companies and sign partnering agreements.

Perform quality control checks on design work performed by staff.

Assure timely submittals of contracts.

The petitioner indicated that it employed: (1) an electrical design engineer who designed water and wastewater plant instrumentation and control systems and electrical and emergency power generation systems; (2) an office manager and legal advisor who managed the office and administrative tasks, prepared advertising material for the president's approval, and scrutinized contractual issues upon presenting and closing bids; and (3) an accounting manager who was responsible for the petitioner's financial systems, accounts payable and receivable, general ledger posting, payroll, upkeep of county and state license requirements, and conferring with the petitioner's official accounting firm. The petitioner provided payroll documentation showing that the beneficiary and the electrical engineer were employed full-time and the office manager and accounting manager were employed 16 hours per week.

The petitioner also included its May 6, 2003 offer of employment to the beneficiary stating that his job duties would be:

Directing the day to day duties of [the petitioner].

Market [the petitioner] to County, Municipal and Consulting Engineering firms.

Seek employment opportunities and recruit Engineers for these positions from within the U.S.A.

Prepare the quarterly reports of [the petitioner] and meet with South African affiliated companies to formulate an active business plan.

Promote the group's products and services in the U.S.A.

On November 3, 2003, the director requested documentary evidence to establish that the beneficiary's position would be in a managerial or executive capacity.

In a January 28, 2004 response, the petitioner re-submitted the January 5, 2003 description of the beneficiary's duties and provided a job description dated March 18, 2002.¹ The March 18, 2002 description indicated that the beneficiary would manage the company, its employees, finances, decision-making, and "regular provision of specialty services on a day to day basis." The petitioner also indicated that the beneficiary would commence and terminate contracts, formulate and establish the petitioner's goals and policies, schedule and lead company meetings, and ensure that line management reports on a regular basis.

The director determined that the description of the beneficiary's duties was vague and general in scope and did not establish that the beneficiary would be working primarily in a managerial or executive capacity. The director also observed that the petitioner employed only one full-time employee in addition to the beneficiary and concluded that the beneficiary would perform a wide variety of the non-qualifying day-to-day duties of the company.

On appeal, counsel for the petitioner states that the beneficiary's primary duties are to direct and manage the continuous day-to-day operations of the company, including directing the electrical design engineer and office manager/legal advisor. Counsel also indicates that the beneficiary establishes financial, market share, personnel and all other policies, exercises discretionary decision-making in the functions of senior employees, and that the beneficiary receives only general supervision from the board of directors in South Africa. Counsel claims that the director's denial contradicts the earlier determination that the beneficiary is an executive/manager.

Counsel's assertions are not persuasive. First, counsel correctly observes that 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). However, neither counsel nor the petitioner clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

Second, the director's determination, that the petitioner's descriptions of the beneficiary's duties are vague and general, is correct. More specifically, the petitioner states that the beneficiary will "[d]irect and manage the continuous day to day operation of [the petitioner]," and "[m]ake and enforce company policy," and "[a]ct as multi-national Director / company owner both in the USA and South Africa." These statements, in addition to borrowing liberally from the definition of executive capacity, are general and do not convey an understanding of the beneficiary's daily duties. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. 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.). *See also* section

¹ The director recites the complete description in her decision, thus the description is only paraphrased here.

101(a)(44)(B)(i) and (ii). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

The petitioner's indication that the beneficiary "[a]ssign[s] tasks and duties to management of [the petitioner]," and "[p]erform[s] quality control checks on design work performed by staff," and attends to personnel issues including hiring and firing suggests that the beneficiary performs supervisory duties. However, the petitioner does not allocate the percentage of time the beneficiary spends on "supervisory" duties and does not provide sufficient evidence that the electrical engineer position or any other position is a professional position. 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). Based on the current record, the AAO is unable to conclude that the beneficiary's supervision of the electrical engineer and the petitioner's other employees constitutes the majority of the beneficiary's duties. *See e.g. Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The petitioner does state that the beneficiary "[m]arket[s] [the petitioner] to County, Municipal and Consulting Engineering firms," and [p]romote[s] the group's products and services in the U.S.A.," and [a]ttend[s] meetings with other consulting companies and sign[s] partnering agreements." These are the duties of an individual marketing the petitioner's services and procuring the consulting contracts necessary for the petitioner to continue its consulting business.² 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).

Further, a critical analysis of the nature of the petitioner's business raises questions regarding the performance of the petitioner's consulting services. The electrical engineer appears to provide some of the consulting services detailed in the petitioner's contracts regarding wastewater treatment design systems, but the record does not clarify who provides the consulting services detailed in contracts for other businesses. Again, 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.

Counsel correctly observes that a company's size alone 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). However, it is appropriate for Citizenship and Immigration Services (CIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). In this matter, the petitioner has not provided evidence that the beneficiary will be relieved from primarily performing the petitioner's operational tasks associated with promotion, sales, and marketing as well as providing consulting services to other firms.

² The petitioner's March 18, 2002 description of the beneficiary's duties also suggests that the beneficiary provides the petitioner's specialty services, as well as entering into and terminating the contracts supporting the petitioner's consulting business.

Moreover, the AAO has long required the petitioner to establish that the beneficiary's position consists of primarily managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks. Further, to establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not established the basic eligibility requirement that the beneficiary is primarily performing managerial or executive duties.

The next issue in this matter is whether the petitioner established that the beneficiary's employment for the foreign entity had been in a managerial or executive capacity for one year prior to entering the United States as a nonimmigrant.

The petitioner indicates that the foreign entity in this matter is [REDACTED] and that the beneficiary founded and worked for PDI (Pty) Ltd. from 1983 to August 27, 1999. On August 27, 1999 the beneficiary began work for [REDACTED] until his transfer to the United States on August 4, 2000 to start work for the petitioner in an L-1A classification. The petitioner provided the same general description of the beneficiary's duties for the foreign entity as had been provided for the beneficiary's duties for the petitioner. The petitioner noted that the beneficiary was an owner and director of the foreign entity along with one other individual who also worked for the foreign entity. The foreign entity apparently also employed a secretary, an accounting manager, and a data systems and software development manager.

The director determined that the description of the beneficiary's duties for the foreign entity was general and vague and did not provide an accurate description of the beneficiary's actual day-to-day duties.

On appeal, counsel for the petitioner asserts that the beneficiary established the goals and policies of the organization regarding sales and distribution, attended monthly meetings with senior management, directed and managed the secretary, accounting manager, and data systems and software development manager, exercised discretionary decision-making when choosing projects, and received only general supervision from the board of directors.

Counsel's assertions are not persuasive for reasons similar to those discussed above. The record does not substantiate the beneficiary's employment for the foreign entity and the description is couched in general terms. 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. at 1103. The record does not support the conclusion that the beneficiary was working primarily as an executive or a manager when employed by the foreign entity.

Counsel's claim that the director's denial of this Form I-140 petition contradicts the past approval of the beneficiary's classification as an L-1A intracompany transferee is not persuasive. The AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Although the statutory definitions for managerial and executive capacity are the same, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity.

There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant 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.

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. at 1103. Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L1-A 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).

Furthermore, the AAO is not bound or estopped by the previous decisions of the service center director. The AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). Counsel should further note that the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N at 597.

Beyond the decision of the director, the petitioner has provided confusing information regarding the qualifying relationship between the petitioner and the beneficiary's foreign employer. As referenced above, the beneficiary worked for PDI (Pty) Ltd. from 1983 to August 27, 1999 and then began work for [REDACTED] until his transfer to the United States on August 4, 2000.

The record contains: a July 27, 1999 agreement between [REDACTED] and [REDACTED]; [REDACTED] states the owners of the two companies agree upon a merger of the companies; a copy of [REDACTED] undated share certificate issued to [REDACTED] 1,560 shares; a copy of [REDACTED] and unsigned share certificate issued to the beneficiary for 20 shares; a copy of [REDACTED] undated share certificate issued to [REDACTED] for 400 shares; and, a copy of the petitioner's 2002 Internal Revenue Service (IRS) Form 1120 showing on Schedule E, Line 2(d) that the beneficiary owns 100 percent of the petitioner's common stock.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;

- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

Based upon the definitions, the record does not establish that the petitioner is a subsidiary of the foreign entity or that the petitioner and the foreign entity are affiliated.

The petitioner has also failed to establish its ability to pay the beneficiary the proffered annual wage of \$50,000.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

When determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In this matter, the beneficiary's 2003 IRS Form W-2, Wage and Tax Statement, shows the beneficiary received \$16,000. The record does not contain the petitioner's 2003 IRS Form 1120, thus the AAO cannot determine if the petitioner could establish its ability to pay the beneficiary the proffered wage by alternate means. The petitioner has not established its ability to pay the proffered wage.

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.