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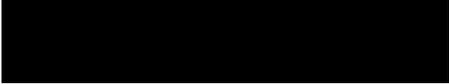
U.S. Citizenship
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Services

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FILE:  Office: CALIFORNIA SERVICE CENTER Date: NOV 23 2005
WAC 04 001 50851

IN RE: Petitioner: 
Beneficiary: 

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, 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 immigrant petition 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 doing business as a construction company. The petitioner seeks to employ the beneficiary as its "Executive/Principal Officer."

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.

On appeal, counsel claims that the director failed to take into consideration the petitioner's reasonable needs when determining that its "small size" would not support the beneficiary in a primarily managerial or executive position. Counsel states that the beneficiary qualifies as both an executive and functional manager, as the beneficiary exercises discretion over the petitioner's essential function, which counsel explains is performing the framing on construction projects. Counsel submits an appellate brief in support of the claims.

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 this classification. The prospective employer in the United States must furnish a job offer in the form of a statement, which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The AAO will consider the issue of 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 September 29, 2003 noting that the beneficiary would be employed in the position of "Executive/Principal Officer." In an attached letter, dated September 25, 2003, counsel provided the following job description for the beneficiary's proposed position:

[The beneficiary's] responsibilities include general day-to-day management of the company as well as the supervision of the constructions [sic] projects undertaken by the company. He is responsible for the staffing needs including the sub-contractors for each phase. In addition[,] he is responsible for resolving the conflicts if any with the suppliers and labor. [The beneficiary] exercises authority in regard to hiring, firing and delegation of assignments

according to capabilities, preferences and technical goals. He ensures that projects are performed with efficiency and are fulfilled according to the specifications of clients. [The beneficiary] meets regularly with various department units who are looking for a construction company to build up their projects.

In an August 28, 2003 letter also appended to the petition, the petitioner stated:

[The beneficiary] has performed supervisory tasks of construction projects, is responsible for day to day management of [the] company which includes tasks of hiring-firing an employee(s), he directs the workers with their respective constructions [sic] tasks and he is responsible for the sub[-]contractor needs. [The beneficiary] interprets plans, estimate[s] costs, plans construction methods and procedures, co-ordinate[s] the supply of labor and materials, stud[ies] building contract documents and negotiate[s] with building owners and subcontractors, control[s] preparation of cost estimates and payment of sub-contractors.

[The beneficiary] gives general contractors, and sub contractors specific direction about tasks, quantity, quality, schedules through contracts and contract administration. [The beneficiary] ensures that subcontractors meet the safety and regulatory standards. Requires that specific performances [sic] standards and time-sensitive contracts be in compliance. He regularly assesses performance by on-site inspections and review of plans and records, then immediately takes whatever actions are necessary to complete projects successfully. He assures that appropriate records and reports are prepared in a timely and accurate manner and those proper files are maintained and secured. In addition, [the beneficiary] consults architects, engineers and other technical workers to make sure that designs are in conformity with the building specification.

He is solely responsible for ordering, procuring the raw material and the tools required. . . . In case there are any variation(s) required after the work has already started, [the beneficiary] make[s] a re-estimate of work, time and cost require[ments].

The petitioner further noted that the beneficiary would be responsible for ensuring regulatory compliance by the petitioning entity, and would exercise "autonomous control," and wide latitude and discretionary decision-making authority over establishing the petitioner's "courses of action."

In a request for evidence, dated December 16, 2004, the director asked that the petitioner provide the following documentary evidence demonstrating the beneficiary's proposed employment in a qualifying capacity: (1) an organizational chart of the United States company's managerial hierarchy and staffing levels, clearly identifying all employees supervised by the beneficiary and briefly describing their job duties, educational levels, dates of employment and wages; (2) a detailed description of the beneficiary's job duties, noting the percentage of time the beneficiary spends on each of the tasks; and (3) Form DE-6, Quarterly Wage Report, filed by the petitioner during the last four quarters.

Counsel responded in a letter dated March 8, 2005, explaining that as the petitioner's "chief financial officer" and "general manager," the beneficiary "is exclusively in charge of company budgets when negotiating new contracts and customer relationships." The petitioner stated that the beneficiary approves the work contracts of sub-contractors, "establishes the goals and policies of the corporation," and notifies the company's foremen

of the corporate goals and policies. The petitioner further stated that the beneficiary "control and administers the essential function of [the petitioning entity]: framing," explaining:

Like [the foreign entity], the overall majority of contracts that [the petitioner] retains [are] comprise[d] of framing work, with general contracting being an incidental or additional component. As a functional manager, [the beneficiary] is devoted to managing the operation of framing, and has wide authority to hire and fire employees, including Project Foremen. He exercises discretion over day-to-day operations and organizational structure by creating work schedule[s], allocating the workload to different project foremen, and assigning the required framers to their respective foremen supervisors.

In an attached statement, the petitioner outlined the following job duties of the beneficiary:

- | | |
|---|--------|
| 1. Hire/reduce the work force including the Project Foreman | 5.00% |
| 2. Prepare work schedule and allocate the work to different Project Foremen and also allocate the required Framers to the Foremen | 10.00% |
| 3. Supervision of the works | 10.00% |
| 4. Conduct the Foremen meetings and giving directions to them | 10.00% |
| 5. Coordination of [government] [a]gencies for the Code compliance and inspections | 15.00% |
| 6. Ensure the maintenance of the company property at the project site | 5.00% |
| 7. Negotiate the new contracts and customer relationships | 25.00% |
| 8. Identifying the sub-contractors, issuing the tenders and finalizing the contract amounts and on-site meetings | 10.00% |
| 9. Other administrative and other works | 10.00% |

The petitioner provided an organizational chart, identifying two foremen and three framers as the lower-level employees supervised by the beneficiary.

In a decision dated April 5, 2005, the director concluded 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 stated that the beneficiary's job duties were described in "broad" and "general" terms, which the director determined prevented a finding that the beneficiary would be employed in a primarily qualifying capacity. The director also stated that many of the beneficiary's job duties, such as negotiating new contracts and establishing customer relations, demonstrated that the beneficiary would be performing the day-to-day operations of the company by "directly providing the services of the business." The director further found that the petitioner did not "possess the organizational complexity to warrant having an executive," noting that the beneficiary would not function at a senior level and would not be "primarily supervising a subordinate

staff of professional, managerial or supervisory personnel who provide relief from the performance of non-qualifying duties." The director also found that the beneficiary would not be primarily managing an essential function of the petitioning organization. Consequently, the director denied the petition.

Counsel filed a timely appeal on May 5, 2005, contending that the record demonstrates that the beneficiary would be performing "mainly senior-level duties and this should be categorized [sic] as an executive [sic] and manager." In an appended appellate brief, counsel outlines the statutory criteria for "managerial capacity" and claims that because the beneficiary satisfies each, he qualifies as a multinational manager or executive. Counsel states that, in accordance with section 101(a)(44)(A) of the Act, the beneficiary, as the company's chief executive officer and general manager, exercises discretion over the day-to-day operations of the business. Counsel explains that in the absence of the company's chief executive officer, who resides in Canada, the beneficiary "directs and manages the operation of framing, which involves approving contract amounts, reviewing budgets, Code compliance, while peripherally managing the foremen, who are in charge of the framer employees that actually perform the essential function.". Counsel further explains that in his capacity as a manager and executive, the beneficiary "engages in more-senior level duties essential to the management of the company rather than those concerned with producing a product or providing a service," while being supervised by the chief executive officer. Counsel states that the beneficiary manages the corporation in his exercise of "significant authority over generalized policy of [the petitioning entity]," while also functioning as a function manager. Counsel contends that the beneficiary qualifies as a function manager as he has "complete managerial control and authority over [the petitioner's] important functions and operations," particularly the petitioner's essential function of framing. Counsel also states that although the beneficiary does not supervise supervisory, managerial or professional employees, "he still qualifies as a manager because he manages the organization through other employees who are on the company's payroll and/or working as outside contractors." Counsel notes that as a manager and executive of the company, the beneficiary also possesses the authority to make "high-level decisions" and to hire and fire personnel.

Counsel makes the additional claim that the director failed to consider in his denial of the petition the petitioner's reasonable needs. Counsel cites section 101(a)(44)(C) of the Act, noting that with regard to employment capacity, the relevant statute "[does not contain any] statutory impediments or bars due to the small size of an organization." Counsel contends that the petitioner's four employees, as well as the independent contractors hired in "busier months," perform the "everyday duties" of the business, thereby "allowing [the] beneficiary to perform mainly executive and senior-level managerial duties." Counsel claims that the "distinguishable" hierarchy and staffing levels of the petitioning entity demonstrate that "[t]he framer employees are supervised by the foremen employees, and both are involved with performing the duties necessary to provide the service of framing," while the beneficiary manages and directs the petitioner's functions.

Upon review, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity 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). In the instant matter, the petitioner has not clarified the position to be occupied by the beneficiary, nor has the petitioner explained whether the beneficiary would be primarily performing "managerial" job duties, as defined in section 101(a)(44)(A) of the Act, or would primarily perform the "executive" job duties outlined in section 101(a)(44)(B) of the Act. On Form I-140, the petitioner identified the beneficiary as an executive of the organization, yet subsequently

referenced the beneficiary's position as a "general manager" and "chief financial officer." In addition to the discrepancy in the beneficiary's proffered position, counsel claims on appeal that the beneficiary "qualifies as an executive and functional manager," but outlines the statutory criteria for "managerial capacity" only. See § 101(a)(44)(A) of the Act. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity. 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. Here, the petitioner has not clarified the beneficiary's role within the organization.

Additionally, the record demonstrates that the majority of the beneficiary's time would be spent performing non-qualifying tasks of the business, rather than functioning in a primarily managerial or executive capacity. Specifically, the beneficiary would spend 85 percent of his time negotiating contracts, developing customer relations, meeting and finalizing contracts with sub-contractors, ensuring compliance with state regulations and inspections, maintaining the petitioner's property at the worksite, preparing work schedules for lower-level non-professional, non-supervisory or non-managerial employees, and performing "administrative and other works." Despite counsel's claims on appeal that the beneficiary is not performing the petitioner's day-to-day operations, the petitioner's representations clearly demonstrate that the beneficiary, himself, is primarily responsible for non-managerial and non-executive tasks of the business. 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).

The record does not establish that the petitioner employs a staff sufficient to relieve the beneficiary from the above-named non-qualifying tasks. Counsel correctly observes on appeal 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 § 101(a)(44)(C) of the Act, 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). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

In the instant matter, the petitioner has not represented that any of the five lower-level employees would relieve the beneficiary from the responsibilities of personally performing the above-outlined non-qualifying tasks. While the petitioner's lower-level employees may perform the "everyday duties" associated with the construction of building frames, the petitioner's focus on this one particular task is misplaced. Job duties performed in connection with a business' sales, purchasing, marketing, finances and general administration may be deemed non-qualifying if they involve the actual performance of the function. As discussed above, the beneficiary is personally performing these non-qualifying tasks rather than managing or supervising the performance by other subordinate employees. The AAO notes that although the petitioner's organizational chart identifies the positions of "corporate secretary/administration" and "administrative assistant/accounting," neither the petitioner's quarterly tax returns nor paystubs reflect the employment of these workers.

Moreover, despite the claims that the beneficiary also supervises sub-contractors, there is no evidence that the petitioning entity contracts for services performed by outside workers.¹ The petitioner did not identify on its 2003 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, any fees paid for "cost of labor," "salesperson wages and commissions," or "indirect labor." Nor does the petitioner specifically explain for which job duties the sub-contractors would be responsible. This information is relevant, as it would assist in the analysis of whether the beneficiary is primarily employed as a manager or executive. Absent additional documentation, the AAO cannot conclude that employees or independent contractors relieve the beneficiary from performing in a non-managerial and non-executive capacity. 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)).

Further, counsel has not provided evidence to substantiate the claim that the beneficiary would be employed as a functional manager. 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). Here, the petitioner purportedly supervises five lower-level employees, and therefore, by definition, cannot be deemed a function manager. In fact, based on the record, the proper classification of the beneficiary is as a first-line supervisor, as he is not supervising managerial, supervisory or professional employees. See 8 C.F.R. §§ 204.5(j)(2) and (4). 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. Again, as discussed previously, 85 percent of the beneficiary's time would be spent performing in a non-managerial and non-executive capacity. Accordingly, the beneficiary cannot be deemed a function manager.

Counsel further refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel also cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.2 (5th Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1574 (N.D. Ga. 1988), to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the cited cases. The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium size businesses. However, the AAO has long required the petitioner to establish that the beneficiary's position consists of primarily managerial or executive job duties. The petitioner has not established this basic eligibility requirement.

¹ The AAO notes that the petitioner included four paystubs for the period of August 15, 2003 through August 28, 2003. The four employees named on the paystubs, however, are not identified on the petitioner's organizational chart. Nor does not petitioner address the job duties performed by the workers.

Based on the above discussion, the petitioner has not established 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 petitioner demonstrated that the beneficiary was employed abroad in a primarily managerial or executive capacity. The petitioner stated in its August 28, 2003 letter that prior to his transfer to the United States, the beneficiary was employed in the Canadian company as its senior manager, and was responsible for coordinating the activities of the lower-level employees, verifying the completion of projects in accordance with customer specifications, supervising sub-contractors, and obtaining raw materials, tools and machinery for projects. In its response to the director's request for evidence, the petitioner also provided an outline of additional job duties performed by the beneficiary and the percentage of time spent on each task. Based on the petitioner's representations, 85 percent of the beneficiary's time was spent primarily performing non-managerial and non-executive job duties. Again, 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. at 604. Additionally, as the beneficiary did not supervise supervisory, managerial or professional employees, or manage an essential function the beneficiary cannot be deemed to be a manager. See 8 C.F.R. § 2043.5(j)(2) and (4)(i). Accordingly, the petition will be denied for this additional reason.

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).

The AAO recognizes the beneficiary's previously approved L-1A nonimmigrant petition. It must be noted that many I-140 immigrant petitions are denied after CIS approves prior nonimmigrant 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 I-129 nonimmigrant petitions than 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). Furthermore, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.