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FILE: [REDACTED]
WAC 03 122 53920

Office: CALIFORNIA SERVICE CENTER

Date: OCT 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:



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 appeal will be dismissed.

The petitioner is a corporation organized in the State of California in May 1999. It is also authorized to conduct business in the State of New Jersey. It is an international trader and wholesaler of electronic products. 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.

The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner asserts that Citizenship and Immigration Services (CIS) erred when determining the description of the beneficiary's typical day failed to demonstrate the beneficiary's daily duties and erred when determining "that they [sic] were only four (4) employees at the time of filing of the petition." Counsel submits a brief and information in support of the appeal.

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

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

* * *

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives 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 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

- 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.

In a February 5, 2003 letter submitted in support of the Form I-140, Immigrant Petition for Alien Worker and Form I-485, Application to Register Permanent Resident or Adjust Status, the petitioner stated the beneficiary, as president, would have the following duties:

Direct and oversee the entire company's business; commute between California and New Jersey; exercise discretion over day-to-day operations; implement company policies; exercise authority over personnel decisions, including the hiring and firing of managers and employees; establish the company's development and expansion plans; execute business transactions and sign contracts, formulate appropriate courses of action; and submit reports to the Chairman of the Board.

Former counsel for the petitioner asserted that the beneficiary would manage the above stated essential functions, making the beneficiary a functional manager of the highest order within the petitioner's company hierarchy. The petitioner also provided evidence that it had employed individuals located in California and in New Jersey the previous year.

On October 8, 2004, the director requested a copy of the petitioner's organizational chart describing its managerial hierarchy and staffing levels, as of the date of filing the petition, April 10, 2003.¹ The director requested that the chart include the names of all executives, managers, supervisors, and employees within each department or subdivision. The director also requested a brief description of job duties, educational levels, salaries/wages for all employees under the beneficiary's supervision. The director further requested the petitioner's California Forms DE-6, Employer's Quarterly Report, (or if the company was not located in California, the state quarterly wage reports for the appropriate state) for the second, third, and fourth quarters of 2003. Finally, the director requested a more detailed description of the beneficiary's duties including a "typical day" description for the beneficiary's position.

In a December 27, 2004 response, counsel for the petitioner provided an organizational chart depicting the petitioner's employees and the petitioner's claimed subsidiary's employees as of 2003, the year the petition was filed and as of 2004,² the year in which the response to the request for evidence was made. The petitioner's 2003 organizational chart depicted the beneficiary in the position of chief executive officer for the petitioner and as chief executive officer of a separate entity. Counsel asserted that the petitioner controlled the separate entity by virtue of the petitioner's 55 percent ownership interest in the separate entity. Counsel

¹ The director incorrectly stated the date the petition was filed. The date stamp on the petition indicates that the petition was filed March 10, 2003.

² The 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). The petitioner's 2004 organizational chart will not be considered when determining the beneficiary's eligibility when the petition was filed.

claimed that control of the separate entity was transferred by the petitioner's parent company in China to the petitioner in February 2003.

The organizational chart showed the beneficiary as chief executive officer of the petitioner over a general manager, who had subordinates in the positions of accountant, secretary, sales manager, sales representative, project manager, public affairs officer and business consultant. The organizational chart identified two of the individuals, the general manager and the accountant, as holding management level positions. The petitioner provided a California Form DE-6, for the second quarter of 2003 that confirmed the beneficiary's employment and the employment of individuals in the positions of general manager and two sales representatives. The record also contained some evidence that the petitioner employed individuals in New Jersey in the year 2002.

The organizational chart also depicted the beneficiary as the chief executive officer of a separate entity over a chief operating officer and individuals in the positions of vice-president of sales, vice-president of finance/controller, logistics manager, and marketing director. The chart identified these individuals as holding management level positions with several subordinates under each position. The petitioner also provided copies of California Forms DE-6 to confirm the separate entity's employment of thirty-three individuals when the petition was filed.

Counsel claimed that the beneficiary had ultimate responsibility for both the petitioner and the separate entity and directly supervised the petitioner's general manager as well as the chief operations officer of the separate entity. Counsel noted that the beneficiary would also deal directly with the department heads of the separate entity but would include the chief operating officer or his executive assistant in any meetings. Counsel provided job descriptions for the chief operating officer, vice-president of sales, logistics manager, and marketing director of the separate entity, as well as for the petitioner's general manager. Counsel outlined the beneficiary's "typical day" by noting that the beneficiary reviewed correspondence and dictated responses, including a response to corporate counsel, met with the separate entity's chief operating officer, and vice-presidents of finance and sales, discussed a proposed audit as a necessary step to merge the petitioner and the separate entity, met with interested parties concerning trade policy, studied proposals for corporate reorganization, and met with the petitioner's general manager to discuss the proposed merger and to brief her on his visit to China.

On January 12, 2005, the director denied the petition determining that: (1) the description of the beneficiary's job duties was vague and failed to demonstrate what the beneficiary did on a day-to-day basis; (2) the petitioner had provided evidence that it employed only four employees and the evidence did not demonstrate that the beneficiary's subordinate staff was made up of managerial, supervisory, or professional employees; (3) it was reasonable to believe that with the petitioner's organizational structure, the beneficiary would assist with the day-to-day non-supervisory duties; and, (4) that the beneficiary did not qualify as a functional manager as he would be involved in performing routine operational activities rather than managing a function.

On appeal, counsel for the petitioner asserts that the director failed to consider the individuals employed by the petitioner's subsidiary including at least eight persons who function in an executive or managerial mode. Counsel contends that the beneficiary: directs the management of an organization that has significant sales and assets and does not participate in menial and non-supervisory tasks; establishes the goals and policies of

the organization and has subordinates who also are involved in policy making and setting goals; exercises discretionary decision-making by approving or vetoing proposals for credit and warehouse expansion as issues covered in his "typical day" meetings; and holds the proxy vote to all of the stock in the petitioner's subsidiary subject only to the parent company's right to revoke this option. Counsel further claims that the beneficiary's actions described in the beneficiary's typical day are not vague, but rather detail several important decisions affecting the petitioner's fate, such as: responding to a proposed settlement of a lawsuit; responding to a proposal to acquire a chain of electronic stores; overruling the vice-president of finance (of the separate entity) on an issue involving collections; scheduling meetings on the issue of integrating departments; and, vetoing the shipping manager, the general manager, and the chief operations officer's plan to build new warehouse space.

Counsel submits the separate entity's 2003 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, which shows the petitioner as its 55 percent interest owner. Counsel provides a translated document from the foreign entity, dated July 2002, certifying the beneficiary's authority to vote the stock owned by the petitioner in the separate entity. Counsel also submits a copy of New Jersey Form WR-30, Employer Report of Wages Paid, for the quarter in which the petition was filed. The New Jersey Form WR-30 shows that the petitioner employed five individuals, four of the individuals named correspond to the petitioner's 2003 organizational chart in the positions of accountant, project manager, sales manager, and secretary.

Counsel's assertions and evidence are not persuasive. The AAO observes, preliminarily that the record does not include sufficient independent documentation that the petitioner and the separate entity are significantly interrelated. 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)). Counsel claims that the petitioner in this matter acquired a 55 percent interest in the separate entity when the petitioner's parent company in China transferred the interest to the petitioner in February 2003. The only other documentation to verify this transfer is a copy of an uncertified 2003 IRS Form 1120 that contains a statement that the petitioner owns a 55 percent interest in the separate entity and a copy of a purported proxy giving the beneficiary the right to the vote the petitioner's claimed interest in the separate entity. The record does not substantiate the actual transfer or purchase of the petitioner's purported 55 percent interest. Neither does the record contain stock certificates, agreements, or other documentation disclosing the elements of ownership and control. The AAO cannot conclude, without supporting documentation, that the beneficiary acting through or on behalf of the petitioner or the petitioner controls the separate entity. See *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986).

In addition, the initial description of the beneficiary's duties limited the beneficiary's duties to oversight of the petitioner's employees located in California and New Jersey. The petitioner did not provide any detail regarding the petitioner's purported ownership of a separate entity and the beneficiary's involvement in that entity. The lack of information in the initial filing regarding a separate entity and the lack of documentation substantiating the date of transfer casts doubt on the legitimacy of the beneficiary's involvement with the separate entity when the petition was filed. As referenced previously, 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). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

The AAO thus will review the beneficiary's managerial or executive capacity only as it relates to the petitioner and the petitioner's employees. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner initially did not clarify whether the beneficiary would 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 petitioner may not claim a beneficiary is 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.

The petitioner initially provided a general description of the beneficiary's duties. The description paraphrased elements of the definition of managerial capacity without providing a comprehensive understanding of the beneficiary's daily duties. *See* section 101(a)(44)(A) of the Act. 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.). Moreover, when the description referenced the beneficiary's actual tasks, the petitioner indicated that the beneficiary would "execute business transactions and sign contracts," as well as "formulate appropriate courses of action." It is not readily apparent from the general description of these tasks whether these tasks are managerial or executive or are part of the routine operational and administrative functions associated with the ongoing operations of the petitioner. 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).

In addition, former counsel for the petitioner initially claimed that the beneficiary's duties comprised the management of an essential function. 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, the petitioner in this matter recited the beneficiary's vague job responsibilities and broadly-cast business objectives and failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Further, in response to the director's request for evidence, the petitioner provided a description of the beneficiary's "typical day" that included primarily tasks relating to the beneficiary's involvement with a separate entity. As noted above, the record is not sufficient to tie these tasks to the daily operations of the petitioner in this matter when the petition was filed. Furthermore, counsel provided limited information relating to the petitioner's actual employees, only describing the general manager's duties as running a parallel accounting and sales department dealing with smaller customers and a different marketing and pricing policy than the petitioner's claimed subsidiary. The petitioner did not provide job descriptions for its sales manager, project manager, accountant, sales representatives or secretary. The information contained in the record of this matter is not sufficient to establish that the beneficiary's subordinates were engaged in providing primarily supervisory, professional, or managerial services or that the beneficiary's primary responsibility was to supervise supervisory, professional, or managerial personnel. *See* § 101(a)(44)(A)(ii) of the Act.

On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the petitioner will include primarily executive or managerial duties.

Beyond the decision of the director, the petitioner has not adequately described the beneficiary's duties for the foreign entity. The record is deficient in establishing that the beneficiary's position for the foreign entity was primarily managerial or executive in the one year prior to the beneficiary's entry into the United States as a nonimmigrant. For this additional reason, 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).

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.