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U.S. Citizenship
and Immigration
Services

134

[REDACTED]

FILE: [REDACTED]
WAC 03 088 51241

Office: CALIFORNIA SERVICE CENTER

Date: SEP 14 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.

f Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based petition. Counsel for the petitioner filed a motion to reopen and reconsider the director's decision; however, the director declined to treat the matter as a motion and forwarded the matter to the Administrative Appeals Office (AAO). The matter is now before the AAO on appeal. The appeal will be dismissed.

The petitioner is a branch office of a foreign Korean corporation. It was authorized to transact business in the State of California in November 2000. It is a representative office established to conduct liaison activities, such as, conducting research regarding economic and financial aspects of the U.S. market, collecting information with respect to economics, trade policies, U.S. laws and regulations relating to international trade, and assisting in travel accommodations for visiting officials of the company from time to time. 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.

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): improperly analyzes the petition on the basis the beneficiary would be employed in an executive capacity, rather than a managerial capacity; did not consider that the beneficiary's discretionary authority extends beyond mere staff oversight, thus improperly concluded that the beneficiary is a first-line supervisor; did not consider that even if the beneficiary's position was considered a first-line supervisory position, the beneficiary's subordinates' positions are professional positions; and, incorrectly concludes that the beneficiary performed menial tasks rather than management of a business function. Counsel also submits the petitioner's letter explaining the beneficiary's role within the organization.

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 capacity for the United States entity. The petitioner does not claim that the beneficiary's duties comprise primarily executive duties.

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.

In a January 6, 2003 letter appended to the petition, counsel for the petitioner attempted to explain the beneficiary's role within the Los Angeles liaison office of the foreign entity. Counsel indicated that the beneficiary:

[A]ssume[d] the functional managerial position of General Manager, Chief of Office at the [Los Angeles branch office] on a full-time basis. In such functional managerial position, the Beneficiary is the most senior person supervising the whole branch office. The Beneficiary controls three departments of the Company. The Beneficiary directs and supervises six subordinate market analysts and researchers on a daily basis and outside consultants on a project basis. He is responsible for the final decision for planning and executing the annual budget, examining and negotiating contracts, arranging the foreign investments. He has authorities of recruitment, dismissal, and evaluation for employees.

The petitioner provided its corporate organizational structure showing that the Los Angeles branch office, along with area offices in "Chicago, New York, Portland, etc." was: "doing preliminary and non-sales business such as market research[,] sourcing and procurement of goods and services[,] organizing foreign investment[,] initialization of trading[,] examination of contract[,] and exploring and testing market opportunities both in Korea and in the States."

The petitioner also provided the organizational chart for the Los Angeles office showing the beneficiary in the position of general manager/chief of office over a Latin American department, an entertainment department, and a Central and Southern American department. The Latin American department included a regional manager and a researcher, the entertainment department included a secretary/manager and an assistant manager, and the Central and Southern American department included a regional manager and an assistant manager. The petitioner noted that the job responsibilities of all the individuals subordinate to the beneficiary included: "Preparation for:

- Market Research
- Sourcing and Procurement of Goods and Services
- Organizing Foreign Investment
- Initializing of Trading
- Examination and Negotiation of Contracts
- Exploring and Testing Market Opportunities both in Korea and the U.S.

On April 7, 2003, the director requested, among other things: (1) a more detailed description of the beneficiary's duties in the United States, including the percentage of time the beneficiary spent in each of the listed duties; (2) a copy of the petitioner's organizational chart describing its managerial hierarchy and staffing levels, as of the date of filing the petition, which should include the names of all executives, managers, supervisors, and number of employees within each department or subdivision, and a brief description of job duties, educational levels, salaries/wages for all employees under the beneficiary's supervision; and, (3) the petitioner's California Forms DE-6 for the last two quarters that were accepted by the State of California.

In a June 27, 2003 response to the director's request for further evidence, the petitioner provided a list of the beneficiary's "jobs" as:

- | | |
|--|----|
| Control all the operation of branch office | 5% |
| Recruit and manage employees and organize their jobs | 5% |

Plan and control the annual budget and all kinds of expenses at the office	5%
Examine, negotiate and arrange local business contracts	15%
Arrange local investment as US headquarter of [REDACTED]	10%
Research and develop future business model for [REDACTED]	20%
Coordinate entire CJ affiliates for new business development	15%
Research and gather business informations [sic] for [REDACTED]	15%
Exploring and testing market opportunities both in Korea and in the States	10%

The petitioner also indicated that the beneficiary's jobs were in the business fields of "food and manufacturing and distribution (20%), biological fermentation (20%), pharmaceutical (5%), home shopping and logistics (10%), entertainment including film and cable (20%), real estate development (15%), investment and trust (5%), and system integration (5%).

The petitioner provided the same organizational chart previously submitted and the same list of subordinates performing the same job duties as previously submitted. The petitioner's California Form DE-6, for the quarter in which the petition was filed, confirmed the employment of the beneficiary's six subordinates. The California Form DE-6 also listed one individual not depicted on the petitioner's organizational chart.

The director determined that: (1) the petitioner's description of the beneficiary's job duties was more indicative of an individual performing the necessary tasks to provide a service or a product; (2) it was reasonable to believe that with the petitioner's organizational structure identifying all employees as managers, that the beneficiary would be assisting with the day-to-day non-supervisory duties, thus the beneficiary could not be considered an executive; (3) the petitioner had not shown that the positions subordinate to the beneficiary were so complex to require the subordinate to have a degree; and (4) it appeared the beneficiary would be involved in the performance of routine operational activities rather than in the management of a function of the business, thus the beneficiary could not be considered a functional manager. The director concluded that the record did not contain sufficient evidence to demonstrate that the beneficiary had been and would be employed in a primarily executive or managerial capacity.

Counsel's indication on appeal that the petitioner had never claimed the beneficiary would be employed in an executive capacity is noted. However, the director's analysis of the petitioner's description of the beneficiary's duties also applies to an individual who is claiming to perform primarily managerial duties. The AAO, however, will limit its discussion to the petitioner's claim that the beneficiary will be employed primarily as a functional manager or in the alternative, a first-line supervisor of professional employees.

Counsel asserts that the beneficiary's responsibilities involve high-level discretionary decision-making for the Los Angeles office and that he not only controls the branch office's staffing but also oversees the direction of his listed job duties. Counsel contends that the beneficiary's duties extend beyond the discretionary hiring and firing of subordinates and that the duties show that the beneficiary exercises a broad scope and high level of managerial authority. Counsel also claims *arguendo* that the beneficiary's subordinates hold professional positions. Counsel contends that the crux of 8 C.F.R. § 101(a)(32), which provides a definition of "profession," focuses on the extent particularized knowledge and skill are required for a job and not on

educational attainment. Counsel asserts that the beneficiary's subordinates have particularized knowledge and skill in international business and marketing.

Counsel also addresses the director's conclusion that the beneficiary failed to show that he primarily managed a business function as opposed to performing menial tasks. Counsel asserts that the petitioner's description of the beneficiary's tasks is a delineation "of the tasks whose performance [the beneficiary] is responsible to direct and oversee." Counsel references a December 17, 2004 letter submitted by the president of [REDACTED] in support of the appeal. The petitioner, through its president, notes that the description of the beneficiary's duties was made from the perspective of how the liaison office fit into the petitioner's overall corporate scheme. The petitioner indicates that the beneficiary's position exists to direct relevant and important market information to [REDACTED] Board of Directors and the chief executive officers of its affiliates. Further the petitioner clarifies that its description of the beneficiary's job duties was not intended to communicate that the beneficiary performed all of the delineated functions, but rather that the delineated functions fell within the beneficiary's managerial authority. The petitioner states further that the beneficiary "is responsible for assigning work to three different employees who fulfill the assigned functions and take the initial responsibility for their work." The beneficiary is then ultimately responsible for his subordinates' work. The petitioner notes that the time allocations next to each of the beneficiary's duties were meant to indicate the importance the beneficiary, as a manager, attributes to each of the duties.

Finally, counsel avers that the record shows that the beneficiary's role within the Los Angeles office is distinct from and superior to the other employees in the office. Counsel asserts that the beneficiary is responsible for oversight and direction and the subordinate employees are responsible for performing tasks necessary to actually carry out the function the beneficiary oversees. Counsel notes that the description of the beneficiary's subordinates' duties clearly states that these individuals are involved in the preparation of market research, etc. while the beneficiary is responsible for directing the work the subordinates carry out in amassing market data, etc.

Counsel concludes that the beneficiary manages the overall operations of the Los Angeles office; supervises and controls the jobs of his subordinates; has the authority to hire and fire employees in the Los Angeles office; and exercises discretion over the day-to-day operations of the Los Angeles office. Counsel specifically disputes that the beneficiary is a first-line supervisor, contending that the beneficiary directs the entire function of the Los Angeles liaison office.

Counsel's assertions are not persuasive. The petitioner has not submitted sufficient evidence to establish that the beneficiary's duties for the petitioner will be primarily managerial or executive. 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's description of the beneficiary's duties is general. It is not possible to determine from the description provided whether the beneficiary's duties are primarily managerial duties or whether the beneficiary's duties involve the daily routine tasks associated with market research or first-line supervision of other individuals engaged in market research. The description provided does not sufficiently demonstrate that the beneficiary's tasks are the high level responsibilities that are specified in the definitions.

For example, the petitioner indicates that the beneficiary spends 20 percent of his time researching and developing business models for the foreign entity, 15 percent of his time researching and gathering information for affiliates, 15 percent of his time examining, negotiating and arranging local business contracts, and 10 percent of his time exploring and testing market opportunities. This description indicates that the beneficiary spends 70 percent of his time performing these duties. The AAO notes that the beneficiary's subordinates are also engaged in market research, examination and negotiation of contracts, and exploring and testing market opportunities. The petitioner does not sufficiently clarify that the beneficiary's role is either a function or activity manager over subordinates, rather than a senior staff member performing essentially the same duties as other employees in the branch office 60 to 70 percent of the time. Counsel and the petitioner's explanation on appeal that the beneficiary's listed duties are restricted to oversight of these tasks is not adequately supported in the record. 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)).

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that the beneficiary's duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to sufficiently describe what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. This failure is important because several of the beneficiary's daily tasks, such as "[e]xamine, negotiate and arrange local business contracts," "[r]esearch and develop future business model for [REDACTED]" "[r]esearch and gather business informations [sic] for [REDACTED]" and "[e]xploring and testing market opportunities both in Korea and in the States" do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine that the beneficiary is primarily performing the duties of a manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). Again the petitioner's statement that its description of the beneficiary's job duties was not intended to communicate that the beneficiary performed the functions but that the beneficiary was responsible for the subordinates performance of these functions is not substantiated in the record. Rather than supporting the managerial aspect of the beneficiary's position with documentary evidence, it appears that the petitioner is attempting to enhance or alter the initial description provided to conform to CIS requirements. However, the petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Counsel's argument on appeal that the beneficiary is a function manager is also not sufficiently documented. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. The term "essential" is commonly defined as "inherent" or "indispensable." *Webster's II New College Dictionary* 384 (2001). Accordingly, based on the plain meaning of the word "essential," the petitioner must establish that the function managed by the beneficiary is inherent and indispensable to the petitioner's operations rather than a non-essential or superfluous task.

When examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). If a petitioner claims that the beneficiary is primarily managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in that capacity, 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. If a petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial, the AAO cannot determine that the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d at 24. In addition, the petitioner's description of the beneficiary's daily duties must clearly demonstrate that the beneficiary primarily *manages* the function rather than *performs* the duties related to the function. 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 Int'l*, 19 I&N Dec. 593, 604 (Comm. 1988); *see also, Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991); *Boyang Ltd. v. INS*, 67 F.3d 305 (Table), 1995 WL 576839 at *5 (9th Cir. 1995 (unpublished))(citing to *Matter of Church Scientology Int'l*. and finding an employee who primarily performs operational tasks is not a managerial or executive employee). The petitioner indicates that the beneficiary controls all the operations of the branch office, recruits and manages employees and organizes their jobs, and plans and controls the budget and office expenses using only 15 percent of his time. This allocation of time is most clearly interpreted as the petitioner's response to the director's request that the petitioner provide the percentage of time the beneficiary spent in each of the listed duties. The petitioner has not established that the beneficiary is primarily engaged in managing the Los Angeles liaison office.

Beyond the required description of the job duties, CIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In this matter, upon review of the totality of the record, the petitioner has not established that the beneficiary is primarily serving as a function manager. The AAO is not satisfied that the beneficiary's role within the organization is that of a senior-level manager responsible for the management of an "essential function," rather than the role of a senior staff officer or specialist. The Los Angeles liaison office in this matter provides market information to the foreign entity's management. The beneficiary's primary duties and those of the other employees in the branch office consist of providing that market research. The petitioner's description of the beneficiary's duties does not adequately demonstrate that the beneficiary's role is elevated to a primarily managerial role rather than the performance of market research required for the foreign entity. 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.

Moreover, the AAO is not persuaded that the beneficiary's role is primarily supervisory or primarily supervisory of professional positions. Again, the petitioner does not allocate a significant portion of the beneficiary's time to supervising other employees. The petitioner indicates that the beneficiary's oversight of the office and recruiting and managing employees and organizing their jobs is limited to 10 percent of the beneficiary's time. The AAO acknowledges that percentages provided are often estimates of the time an employee will allocate to particular

tasks. However in this matter, the petitioner's indication that the beneficiary is involved in performing the same or similar tasks as other employees a majority of the time suggests that the beneficiary's role is principally that of a senior staff member with experience and ability to advise and mentor other staff members.

On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the United States petitioner comprise primarily executive or managerial duties. For this reason, the petition will not be approved.

Beyond the decision of the director, the petitioner has not submitted sufficient evidence to establish that the beneficiary's position for the foreign entity was primarily managerial or executive. In this matter, the organizational chart depicting the beneficiary's role with the foreign entity shows that the beneficiary is a senior specialist in a department with three analysts and two secretaries. The petitioner claimed that the beneficiary served as a leading spokesperson in corporate affairs relating to new business development and strategic planning and supervised a staff of five subordinates. However, the description and organizational chart provided do not adequately demonstrate that the beneficiary's position was managerial or executive as defined by the statute. Further, the director specifically requested a detailed description of the beneficiary's duties with the foreign entity in his April 7, 2003 request for further evidence but the petitioner did not provide a detailed description. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). 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.