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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 29 2005
WAC 03 193 52183

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.

Erico Falda
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 seeking 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 Nevada that is authorized to provide management services in the State of California. The petitioner seeks to employ the beneficiary as its chief executive officer-operation manager.

The director denied the petition concluding that the beneficiary would not be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, counsel submits a statement claiming that the director erroneously disregarded relevant evidence in his denial of the immigrant visa. Counsel states that the director failed to consider the petitioning entity's level of development as a start-up company and only took into account the petitioner's staffing levels.

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 issue in this proceeding is 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 June 12, 2003, noting that it presently employed four workers, and requested the employment of the beneficiary as its chief executive officer-operation manager. It does not appear that the petitioner submitted with the immigrant petition a current job description of the beneficiary's proposed position. However, the record contains a July 3, 2002 letter from the petitioner submitted with a previously filed L-1A nonimmigrant petition describing the job responsibilities associated with the position of chief executive officer-operation manager. In the letter, the petitioner stated that in this capacity, the beneficiary would be responsible for implementing the company's administrative and operational policies, improving the performance of personnel, and reviewing monthly marketing activity. The petitioner further stated:

While working with [the petitioning entity], [the beneficiary] would direct and manage the operations of the accounting department. He would develop department policies, supervise the work of various professionals, accountants, auditors, team leaders and personnel. Moreover, he would monitor the progress and development of projects of his department through company meetings and conferences. In addition, he would conduct and supervise training of personnel and [hold] meeting[s] to discuss changes in policy and propose methods and procedures to increase department efficiency. Further, [the beneficiary] would evaluate lower level team leaders and personnel's performance and make decisions regarding salary raise, promotion, leave of absence, or termination. Finally, he would assign projects to team leaders and review work for quality.

On July 19, 2004, the director issued a request for evidence asking that the petitioner provide the following evidence with regard to the beneficiary's employment capacity in the United States company: (1) an organizational chart describing the company's managerial hierarchy and staffing levels, and identifying all employees, particularly those subordinate to the beneficiary; (2) a brief description of each subordinate employee's job duties, educational level, date of hire, and annual salary; (3) a detailed description of the beneficiary's job duties, including the education and qualifications necessary for the position, as well as evidence that the beneficiary meets the qualifications; (4) an allocation of the percentage of time the beneficiary spends on each task; and (5) California Employment Development Department (EDD) Form DE-6, Quarterly Wage Report, filed for the last four quarters.

In response, the petitioner's corporate secretary submitted an undated statement explaining that the beneficiary is responsible for "implementing administrative and operational policies and procedures," directing "activities and operations with regard to funds under his control," and for performing the following functions:

1. Delegation of works [sic] to staff in the Accounting, Management and Consultancy Section (15%)
2. Prepares proposals to prospective clients/customers (15%)
3. Final review of reports/job submitted by the staff in accounting, management and consultancy section. (20%)
4. Represents the company to clients meetings, seminars to promotes [sic] service and companys' [sic] welfare (10%)
5. Analyzes and controls expenditures to conform to budgetary requirements. (10%)
6. Prepares periodic reports to be submitted to the Vice President for Operations (foreign company) (10%)
7. Direct staffing, training and performance evaluation of employees (10%)
8. Researches market conditions, advertises and determine[s] service potentials (10%).

The petitioner explained that the beneficiary's qualifications for the proposed position include his completion of a Bachelor of Science degree in Business Administration and of various training courses in accounting, sales, and tax. The petitioner submitted the beneficiary's diploma and a certificate confirming the beneficiary's receipt of a degree in commerce from the University of Pangasinan in Dagupan City, Philippines.

The petitioner's requested organizational chart identified the beneficiary as the manager of the company's accounting, management, and consultancy departments, each of which consisted of two workers, for a total of six lower-level employees. In an accompanying statement, the petitioner indicated that three of its subordinate employees had not been hired until after the filing of the petition. Based on the "list of employees" submitted by the petitioner, the workers hired prior to the filing of the petition were employed in the positions of "accounting staff I," "management staff I," and tax consultant, which was a part-time position. The AAO notes, however, that it is unclear which positions were actually occupied at the time of filing the petition, as the petitioner did not submit its Form DE-6 for the second quarter of 2003, which would include the period during which the petition was filed. The petitioner's Form DE-6 filed for the quarter ending September 30, 2003 indicates that at this time the petitioner employed the beneficiary, a part-time tax consultant and an accounting clerk. The petitioner also submitted 2003 Internal Revenue Service (IRS) Form 1099, Miscellaneous Income, for two individuals working in the positions of "management staff I" and "accounting staff II."

In a decision dated November 15, 2004, the director concluded that the petitioner had not established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The director addressed the petitioner's staff of three employees, noting that the beneficiary was the only full-time worker, and stated, "it appears that the beneficiary has been and/or will be performing many aspects of the day-to-day operations of the business." The director noted that the petitioner's "broad and general" description of the beneficiary's position was insufficient to identify the "actual duties" to be performed by the beneficiary. The director further noted that a portion of the beneficiary's job duties, including his responsibility to implement "administrative and operational policies and procedures" and direct and coordinate "activities and operations with regards to the funds under [the beneficiary's] control," are not managerial or executive in nature. The director also pointed out that the beneficiary's tasks "largely comprise market research [and] sales," which the director noted relate to providing the service offered by the petitioner. The director instructed, "a distinction must be drawn between the plain definition of 'manager' as understood in the ordinary course of the average business, and the regulatory definition of 'managerial capacity'." The director explained that for purposes of the immigrant visa classification, the term "managerial capacity" "restricts the beneficiary's duties and prevents the beneficiary from being able to actually perform the services of the company that employs him." The director concluded that the beneficiary would not be "primarily supervising a subordinate staff of professional, managerial or supervisory personnel," nor would the beneficiary "primarily manage an essential function of the organization or [] operate at a senior level within an organizational hierarchy." Consequently, the director denied the petition.

In an appeal filed on December 15, 2004, counsel claims that the director erroneously denied the petition, as he did not consider the petitioner's purpose and stage of development as a "start-up company." In a subsequently submitted brief, counsel contends that the director did not reconcile the denial of the instant immigrant visa petition with the petitioner's two prior approvals for an L-1A nonimmigrant visa petition to employ the beneficiary in the same capacity. Counsel recognizes that the director is not bound by the

previous approvals, yet cites *Omni Packaging, Inc. v. INS*, 733 F. Supp. 500 (D.P.R. 1990) as requiring the director to "explain why the earlier L-1 approvals were incorrect."

Counsel also claims that the director "failed to consider that [a] presumption of approvability exists strongly in the instant case." Counsel references a March 16, 1995 teleconference hosted by the Vermont Service Center as authority in establishing that "a presumption of approvability exists for a manager/executive petition filed by a petitioner for the same beneficiary of a previously approved L-1 petition." Counsel explains that in the instant petition, the job duties related to the proposed position are essentially the same as those performed by the beneficiary under the previously approved nonimmigrant visas. Counsel states:

There has been no change in the circumstances of employment. The beneficiary occupies the highest managerial position within the petitioner's corporate office with the exception of the President and Vice-President. He directs and manages the corporation's overall business operations with an eye towards its maximum efficiency, economy of operations and maximization of profits. He exercises full discretionary authority on corporate policies and ensures its implementation by department heads. He constantly monitors the progress and development of each department. He revises long and short-term company strategies upon review of each department['s] activity reports, financial statements, and economic forecasts to comply with changing economic situations. Likewise, he prepares, negotiates and executes service contracts, [and] memorandum of agreements with clients. He evaluates managers on their performance and renders decision[s] regarding promotion, leave of absence or termination. He approves final hiring of personnel through recommendation of department heads. Moreover, he prepares reports to the board of directors during meetings regarding company operations. Finally, he represents the company to client meetings, functions and corporate affairs to promote service and company's welfare.

Counsel claims that the petitioner's activities "constitute an extremely substantial business undertaking that requires significant executive decision-making." Counsel notes that although the petitioner may have employed "only a handful of workers" at the time of filing the petition, the petitioner's staff was sufficient to perform the operational functions of the business. Counsel further notes the concept of "functional manager," stating that the beneficiary would be employed in this capacity.

Upon review, the petitioner has not established 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 beneficiary's job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner has not specifically defined whether the beneficiary would be employed in a primarily "managerial capacity" or an "executive capacity." The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *See* 8 C.F.R. § 204.5(j)(5). A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. Here, although counsel states on appeal that the beneficiary occupies a managerial position within the organization, the petitioner described the beneficiary's position as including such "executive" job responsibilities as "direct[ing]" the accounting department and "the corporation's overall business operations," developing policies, "exercis[ing] full discretionary authority on corporate policies," and "revis[ing] long and short-term company strategies." A petitioner may not claim to

employ a beneficiary as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The petitioner's vague and nonspecific description of the beneficiary's proposed position fails to demonstrate what the beneficiary does on a day-to-day basis. The petitioner explained in its response to the director's request for additional evidence that the beneficiary would be responsible for "implementing administrative and operational policies and procedures," and "direct[ing] and coordinat[ing] activities and operations with regard to the funds under his control." The petitioner did not, however, define the goals, policies, activities or operations controlled by the beneficiary, or the managerial or executive activities associated with the beneficiary's control of corporate "funds." Additionally, on appeal, counsel outlines broad responsibilities of the beneficiary such as directing and managing "overall business operation," exercising discretionary authority over corporate policies, implementing the company's policies, monitoring each department's progress, revising long and short-term strategies, evaluating the managers' performance, and approving personnel decisions. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *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). Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Id.* at 108.

Counsel correctly notes 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.*

At the time of filing, the petitioner was a three year-old management company. It appears from the record that at this time, the petitioner employed a chief executive officer-operations manager, an accounting clerk, a part-time tax consultant, and contracted with a management clerk to maintain company accounts. Other than the company's chief executive officer-operations manager, the petitioner's employees appear to be responsible for such lower-level functions as the company's bookkeeping and account maintenance, and providing tax advice to clients. The petitioner has not identified a subordinate managerial or supervisory staff over which the beneficiary would manage, or the employment of professional employees. See 8 C.F.R. § 204.5(j)(2). A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of his supervisory duties unless the employees supervised are professional. 8 C.F.R. § 204.5(j)(4). The petitioner's mere reference to the college-level education held by the subordinate employees does not demonstrate employment in a "professional" position. See *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988) (stating that the term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor). In the instant case, the petitioner has not established that a bachelor's degree is actually necessary to perform the accounting or bookkeeping tasks of

the organization. The petitioner has failed to demonstrate that it employs a subordinate managerial, supervisory, or professional staff to be managed by the beneficiary.

Additionally, the petitioner has not established that it employs a staff sufficient to relieve the beneficiary from performing non-qualifying functions of the company. Based on both the petitioner's and counsel's job descriptions, the beneficiary would be responsible for selling the services of the company, including preparing proposals and service contracts, meeting with clients, and representing the company at seminars. Moreover, the beneficiary would research the market for potential clients and perform the company's advertising. While the petitioner indicated that the beneficiary would devote 25 percent of his time to performing the sales of the company, it does not seem plausible that the beneficiary, as the sole salesperson for the petitioning entity, could effectively market and sell the company's services in such a limited period. It is equally unrealistic for the petitioner to propose that one employee would dedicate only four hours per week¹ to the company's market analysis and advertising, including analyzing market conditions and identifying potential clients. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The AAO notes that the petitioner has not identified any subordinate staff members who would assist or relieve the beneficiary from performing these non-qualifying functions 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 support counsel's blanket assertion on appeal that the beneficiary is 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). The term "essential function" is not defined by statute or regulation. 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. In this matter, other than referencing an unpublished AAO decision that address the concept of "functional manager," counsel has not provided any specific evidence describing the essential function to be managed by the beneficiary. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel references a 1989 Immigration and Naturalization Service (now CIS) memorandum as authority for the presumption that CIS must find a gross error in an original L-1A nonimmigrant petition or a change in the beneficiary's employment that would disqualify him from this visa classification in order to deny a subsequently filed petition. Counsel claims that this presumption should apply to the instant matter, as CIS

¹ As the petitioner did not identify the number of hours the beneficiary would work per week, this is assuming at least a forty-hour workweek.

has approved two prior petitions for the same beneficiary. Counsel also contends that the director failed to reconcile the previously approved L-1A nonimmigrant petitions with the instant denial. 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, the record of proceeding does not contain copies of the visa petitions that the petitioner claims were previously approved. It must be emphasized that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). As the director properly reviewed the record before him,² it was impracticable for the director to provide the petitioner with an explanation as to why the prior approvals were erroneous, as counsel suggests.

The AAO acknowledges the receipt of documents on appeal pertaining to the petitioner's current staffing levels and business activities. A petitioner, however, is required to 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). Therefore, this information will not be considered.

Based on the foregoing discussion, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.

² The AAO notes the director's incorrect reference to the date of the petitioner's Form DE-6 as "December 31, 2004," rather than the year 2003. The director's error, however, is not significant to the denial of the petition. The director properly considered the record and satisfied his duty of explaining the specific reasons for the denial and informing the petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i).