

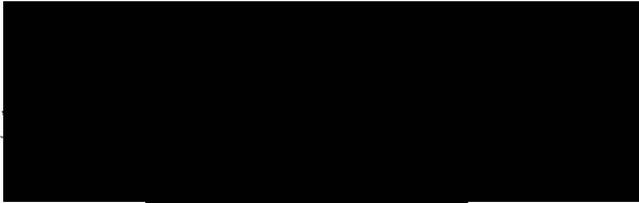
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U.S. Citizenship  
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FILE: [REDACTED]  
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Office: TEXAS SERVICE CENTER

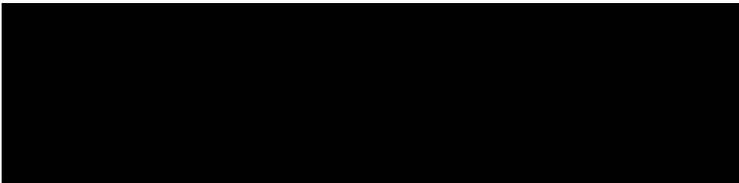
Date: APR 03 2006

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)

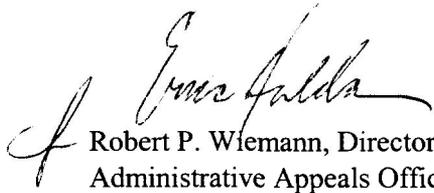
ON BEHALF OF PETITIONER:

COURTESY COPY TO:



**INSTRUCTIONS:**

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days of service of the unfavorable decision. In accordance with 8 C.F.R. § 103.2(a)(7)(i), an application received in a Citizenship and Immigration Services (CIS) office shall be stamped to show the time and date of actual receipt, if it is properly signed, executed, and accompanied by the correct fee.

In accordance with 8 C.F.R. § 103.3(a)(1)(iii)(B), "affected party" means (in addition to the Service) the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition.

In this matter the record contains a Form I-290B signed by an attorney whose Form G-28, Notice of Entry of Appearance as Attorney or Representative, does not indicate that he is representing the affected party. Inasmuch as neither the beneficiary nor his representative has standing to file an appeal in this matter, the appeal must be rejected as improperly filed. 8 C.F.R. § 103.3(a)(2)(v)(A)(1).

Of note, the petitioner is a corporation organized in the State of Texas in August 2002. The petitioner is a bakery that employs the beneficiary, the beneficiary's wife as an unpaid employee, and two part-time assistants. **The petitioner 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 had been employed in a managerial or executive capacity for the foreign entity for one year prior to entering the United States as a nonimmigrant or would be employed in a primarily managerial or executive capacity for the United States petitioner.

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 petitioner in this proceeding stated on the Form I-140, Immigrant Petition for Alien Worker, that the beneficiary would have overall direction of the business and would train bakers, negotiate contracts, and oversee food preparation, sales, and deliveries.

On June 10, 2005, the director requested among other things, additional evidence detailing the beneficiary's proposed position with the petitioner including: the position title; a list of all duties; the percentage of time spent on each duty; the names of subordinate managers/supervisors or other employees reporting directly to the beneficiary; a brief description of their job titles, and educational levels, or if the beneficiary would not supervise other employees, the essential function the beneficiary would manage; an organizational chart specifying the beneficiary's position within the organizational hierarchy; and, who provides the product sales/services or produces the petitioner's products.

In an August 31, 2005 response, counsel for the beneficiary in the matter, indicated that the beneficiary prepared bakery products and would be responsible for supervising, training, baking, pricing, delivering, purchasing supplies, advertising and customer service duties for the petitioner.

The petitioner indicated that the beneficiary spent 30 hours per week baking the petitioner's specialty cakes and other items, 10 hours on "supply," and five hours on deliveries. The petitioner also noted that his wife spent 30 hours per week as a "volunteer" pastry cook, that a third individual spent 15 hours per week employed as a helper, and a fourth person spent 10 hours per week employed as a dishwasher.

On September 26, 2005, the director denied the petition, cited the applicable statutory provisions defining managerial and executive capacity (Section 101(a)(44)(A) and section 101(a)(44)(B) of the Act), and properly determined that the beneficiary spent the majority of his time preparing the petitioner's product and providing its services.

Counsel for the beneficiary on appeal, acknowledges that the petitioner is a small business but argues that the beneficiary is the president, owner, and sole shareholder of both the United States and foreign entities and that the beneficiary manages the various components, functions, and operations of the entities as well as

supervising and controlling every function component, operation, and activity of the businesses. Counsel cites several unpublished decisions in support of his argument.

The AAO emphasizes that an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). In this matter, the description of the beneficiary's duties includes the general oversight exercised by an owner of a business but does not include evidence that the beneficiary will perform primarily managerial or executive duties for the petitioner. The statute requires that an individual "primarily" perform managerial or executive duties in order to qualify as a managerial or executive employee under the Act. The word "primarily" is defined as "at first," "principally," or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service, that individual cannot also "principally" or "chiefly" perform managerial or executive duties.

In addition, the AAO observes that the petitioner does not clarify whether it is claiming that the beneficiary primarily manages the organization or primarily directs the management of the organization. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

However, if the petitioner is claiming that the beneficiary performs primarily in an executive capacity, the petitioner should note that the statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee.

If the petitioner is claiming that the beneficiary performs primarily in a managerial capacity, the petitioner must provide evidence that the beneficiary supervises subordinate employees who are supervisory, professional, or managerial, or in the alternative performs the duties of a function manager. *See* § 101(a)(44)(A) of the Act. In this matter there is no evidence in the record that the beneficiary supervises professional, managerial, or supervisory employees or that the beneficiary is primarily responsible for *managing* an "essential function" within the organization. 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)). Moreover, to establish 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, 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. at 604. In this matter, the petitioner has not provided evidence that the beneficiary manages professional, supervisory, or managerial subordinate employees or manages an essential function.

The petitioner should also note that 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).

Also of note, beneficiary's counsel's reference to unpublished decisions 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 the beneficiary was the sole employee or one of two employees is not probative. First the evidence does not establish that the facts of the instant petition are analogous to those in the unpublished decisions. Furthermore, 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.

Of further note, the director in this matter correctly determined that the petitioner had not provided sufficient evidence to establish that the beneficiary's duties for the foreign entity comprised primarily managerial or executive duties.

As the director observed, the petitioner did not provide a definitive statement of the beneficiary's duties for the petitioner while employed at the foreign entity. The petitioner provided information regarding the foreign entity's current employees in response to the director's request for evidence but did not discuss the beneficiary's previous position with the foreign entity, except as the individual who continued to monitor and make decisions regarding some aspects of the foreign entity's bakery business. The AAO acknowledges that the beneficiary is the foreign entity's owner and sole shareholder, but as observed above, an individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. Further, the record does not contain evidence of the beneficiary's supervision or management of professional, managerial, or supervisory employees or the management of an "essential function" for the foreign entity.

On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the foreign entity comprised primarily executive or managerial duties or that the beneficiary's duties for the petitioner will comprise primarily executive or managerial reasons. For these reasons, even if the appeal had not been rejected, the appeal would be dismissed.

**ORDER:** The appeal is rejected.