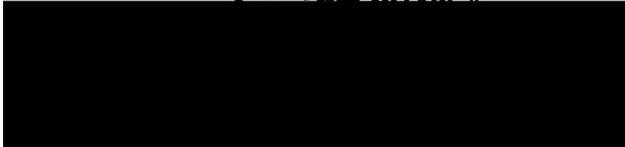




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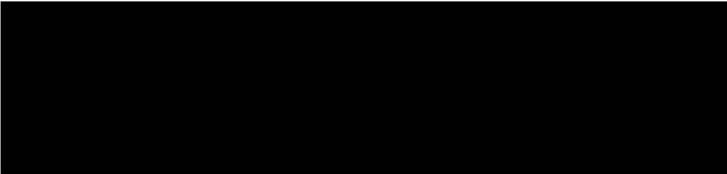
BA

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **DEC 06 2006**
SRC 04 205 52513

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a limited liability company organized in the State of Florida. It is engaged in technical consulting in the telecommunications and electronics industries. The petitioner 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 denied the petition on two independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary would be employed in a managerial or executive capacity; and 2) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive position.

On appeal, counsel disputes the director's conclusions and resubmits documentation submitted previously in response to the director's various requests.

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 a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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 two issues in this proceeding call for an analysis of the beneficiary's employment capacity. The first issue is whether the petitioner established at the time it filed the Form I-140 that the beneficiary would be primarily employed in a managerial or executive capacity, and the second issue is whether the beneficiary was employed abroad 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) 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 support of the Form I-140, the petitioner provided a letter dated July 12, 2004, which contained the following list of the beneficiary's proposed responsibilities in the United States:

Establishing and formulating the goals and policies of our corporation, hiring and firing employees, evaluating the work performance of employees, setting their salaries, and in general overseeing all business activity of our corporation.

It is noted that the petitioner did not provide a description of the duties performed by the beneficiary during his employment abroad. Accordingly, a request for additional evidence (RFE) was issued on March 25, 2005. The petitioner was instructed to provide evidence and information to establish that the beneficiary would be employed in the United States and was employed abroad in a qualifying managerial or executive capacity.

With regard to the beneficiary's employment abroad, the petitioner submitted a letter dated May 20, 2005 from the general manager of the foreign entity, who stated that the beneficiary's subordinates included three supervisory employees. The foreign entity's organizational chart, which was also part of the petitioner's response to the RFE, showed that each of the beneficiary's three subordinates had a subordinate staff. Additionally, the general manager provided a description of the beneficiary's job responsibilities abroad:

Establish the business and financial goals and policies of our corporation together with overseeing the achievement of these business and financial goals an[d] policies, establish new markets for the sale of our products, supervise and evaluate the work performance of our [t]echnical [s]upport [m]anager, [a]dministrator and [s]ales [m]anager, and hire and fire employees and set salaries.

With regard to the beneficiary's proposed employment in the United States, the petitioner provided a letter dated May 17, 2005 from the U.S. entity's sales manager, who stated that he would be the beneficiary's subordinate and that he, in turn, would supervise the U.S. entity's sales person. The sales manager provided the following description of the beneficiary's proposed responsibilities:

[E]stablishing the business and financial goals and policies of our corporation together with overseeing the achievement of these business and financial goals and policies, establish new markets for the sale of our telecommunications products throughout South America, supervise and evaluate the work performance of our [s]ales [m]anager and hire and fire employees and set salaries.

After reviewing the information provided in response to the RFE, the director determined that the petition did not warrant approval. Accordingly, in a notice of intent to deny (NOID) dated December 10, 2005, the director instructed the petitioner to provide detailed descriptions of the job duties to be performed by the beneficiary in his proposed position and those performed during his employment abroad. Specifically, the director asked that the list of specific duties be accompanied by a percentage breakdown of time to be spent on each duty as well as the job titles, job duties, and educational levels of the beneficiary's subordinates.

In response, the petitioner provided a letter from counsel dated January 6, 2006, which was accompanied by exhibits addressing the issue of the beneficiary's job duties. With regard to the beneficiary's proposed job duties in the United States, the petitioner provided a letter dated January 4, 2006, which contained the following information:

Approximately twenty percent of [the beneficiary]'s work week involves establishing the business and financial goals and policies of our corporation together with overseeing the achievement of these business and financial goals and policies which include reviewing budget reports, financial statements and business activities reports, approximately forty percent of [the beneficiary]'s work week involves establishing and developing new markets for the sale of our products, approximately thirty percent of his work week involves

supervising and evaluating the work performance of our [s]ales [m]anager together with hiring and firing employees and setting salaries. The balance of [the beneficiary]'s work week is administrative in nature.

With regard to the beneficiary's employment abroad, the petitioner provided a letter dated January 2, 2006 from the administrator of the foreign entity. The letter provided the following information:

Approximately twenty percent of [the beneficiary]'s work week involves establishing the business and financial goals and policies of our corporation together with overseeing the achievement of these business and financial goals and policies which include reviewing budget reports, financial statements and business activity reports, approximately twenty percent of his work week involves coordinating all activities between administration, sales and technical support, approximately thirty percent of his work week involves establishing new markets for the sale of our telecommunication products and approximately thirty percent of his work week involves overseeing and evaluating the work performance of our [a]dministrator, [s]ales [m]anager and [t]echnical [s]upport [m]anager together with hiring and firing employees and setting salaries.

On January 13, 2006, the director denied the petition noting that the petitioner's response to the NOID did not include a clear definition of the beneficiary's job duties. By contrast, the director also found that the beneficiary's proposed duties include business marketing, staff recruitment, and supervision and concluded that such duties are non-qualifying. While the AAO concurs with the overall conclusion regarding the petitioner's eligibility, the two findings underlying that conclusion are inconsistent with one another. Namely, the finding that the beneficiary would primarily perform non-qualifying duties necessarily implies that the petitioner has provided a sufficiently detailed description of duties as required by 8 C.F.R. § 204.5(j)(5). However, the descriptions provided by the petitioner with regard to the beneficiary's proposed job duties consist of a compilation of broad job responsibilities. In order to accurately illustrate how those responsibilities would be executed, the petitioner must describe the actual duties to be performed. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990). Merely stating that 50% of the beneficiary's time would be spent setting goals and supervising a single subordinate employee does not identify the actual duties the beneficiary would actually perform on a daily basis. Nor did the petitioner state how the beneficiary plans to develop markets in which to sell the petitioner's products, a responsibility to which the beneficiary would allot another 40% of his time. Thus, the record lacks the detailed description of duties which would have enabled the director to render an affirmative finding as to the nature of the duties that the beneficiary would primarily perform. As such, the AAO withdraws one of the director's erroneous findings and affirms the finding that the record lacks sufficient evidence and information to determine what duties the beneficiary would perform on a daily basis.

Furthermore, the indication that the petitioner would sell products rather than services contradicts the petitioner's prior claim with regard to the nature of its operations. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

While counsel is correct in stating that the size of a beneficiary's subordinate staff is not the only factor used to determine the petitioner's eligibility, this factor can and should be considered along with others in order to gauge the petitioner's ability to relieve the beneficiary from having to primarily perform non-qualifying operational tasks. In the instant matter, the petitioner's organizational chart shows that the U.S. entity is comprised of three employees and that each employee represents one tier within the organization's hierarchy. However, the fact that one of those employees possesses a managerial title and is depicted as an employee with a subordinate does not lead to the conclusion that the beneficiary would primarily perform qualifying managerial tasks, none of which have been specifically identified. Thus, the petitioner's claim to eligibility rests in large part on general statements and an organizational structure that is suggestive of an organization in its primary stage of development. As such, it cannot be found that the petitioner has met its burden of establishing that the beneficiary will be primarily employed in a managerial or executive capacity.

With regard to the beneficiary's employment abroad, the director properly concluded that the petitioner failed to provide a detailed description of job duties, thereby precluding Citizenship and Immigration Services (CIS) from finding that the beneficiary primarily performed duties of a qualifying nature.

On appeal, counsel discusses the foreign entity's organizational structure, which is considerably more complex than that of the petitioner itself. Counsel points out the supervisory personnel that comprised the list of the beneficiary's subordinates. However, despite the staffing hierarchy which has been illustrated in the foreign entity's organizational chart, the record does not identify any specific duties performed. The AAO cannot make assumptions regarding the beneficiary's employment capacity merely based on the foreign organization's hierarchy, which illustrates staffing levels that can potentially relieve the beneficiary from having to perform non-qualifying tasks. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. A beneficiary may not be found to be acting in a managerial or executive capacity merely on the basis of the number of employees he or she has supervised or directed. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C).

Accordingly, the petitioner's failure to provide a detailed description of duties that would be performed in the United States and those performed during the beneficiary's employment abroad, preclude the AAO from concluding that the beneficiary has been and would be employed in a qualifying managerial or executive capacity.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. 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).

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.