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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: MAR 07 2007  
WAC 00 143 51303

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 initially approved. Pursuant to subsequent review, the director determined that the petitioner failed to establish eligibility at the time of filing and properly issued a notice of intent to revoke (NOIR) the approval of the visa petition. The approval was ultimately revoked in a decision issued by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a California corporation operating as a fast-food facility specializing in Chinese food. It seeks to employ the beneficiary as its vice 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's decision to revoke the approval of the petition was based on two independent grounds of ineligibility: 1) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity; and 2) the petitioner failed to establish that the beneficiary was employed abroad in a managerial or executive capacity.

On appeal, counsel submits a brief disputing the director's findings and presents arguments in support of the petitioner's claims of eligibility.

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 primary issues in this proceeding involve an analysis of the beneficiary's employment capacity. The first issue is whether the beneficiary would be employed by the U.S. petitioner in a qualifying managerial or

executive capacity. The second issue is whether the beneficiary was employed abroad in a qualifying 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.

The petitioner did not initially provide any information regarding the beneficiary's proposed duties in the United States. Part 6 of the petitioner's Form I-140 states only that the beneficiary would perform duties within an executive capacity. Accordingly, a request for additional evidence (RFE) was issued by the Citizenship and Immigration Services (CIS) on September 8, 2000. The petitioner was instructed to provide the following documentation: 1) detailed descriptions of the duties the beneficiary would perform during his

employment for the U.S. petitioner as well as the duties performed during his employment abroad; 2) a percentage of time assigned to each of the listed duties for the beneficiary's respective positions; 3) the petitioner's organizational chart illustrating the company's management and staffing structures.

In response, counsel submitted a letter dated November 28, 2000 in which the beneficiary's proposed position was described as follows:

In his executive position as [v]ice [p]resident, [the beneficiary] will be responsible for managing and directing all development activities planned for our company. He will develop and implement an expansion and centralization plan for the company. Initially, he will develop a consistent operations method in the existing location[,] which can then be implemented in additional locations on an ownership of franchise basis. [The beneficiary] will be in charge of developing this plan and putting it into effect through the on-site managers. **Then the company will expand into Orange and San Diego Counties.** [The beneficiary] will direct this expansion in terms of locating and installing sites. The company plans to add employees at its existing restaurant and add up to 25 full[-] and part-time employees in the next increment of development. [The beneficiary] will direct and oversee this expansion through new-hire managers. Following this development, he will develop and implement plans for the purchase of commercial property for a central corporate office, including a central kitchen and distribution center for regional restaurants. He will be in charge of the reorganization of the company to meet the challenges of this growth.

In his position of [v]ice [p]resident, [the beneficiary] will have wide latitude and discretionary decision-making authority in determining the most advantageous courses of action to take throughout the upcoming period of company expansion and development.

With regard to the beneficiary's position abroad, counsel provided the following statements:

[The beneficiary] has been the [g]eneral [m]anager of Jiann Rong Construction Co., Ltd. . . . since [February 15, 1979]. In this position, he has overseen all company development programs, product development and standardization programs through his management team. In the previous year of employment with the parent company, the beneficiary's job duties included expanding [the] sales market; enhancing business reputation; gaining more clients; promoting the business. The beneficiary was also responsible for guiding the business personnels [sic] to contact with clients for business relationship; strengthen in sales of [the] company's products for new clients; research & create new product[s], promote consultation services and provide [sic] the demand of new/old clients.

The percentage of time the beneficiary spends in each of the listed duties are as follows:

- A. Company operation 55%
- B. **Engineering rate of progress/cost control 20%**
- C. Engineering of appraise price 15%
- D. Personnel administration 10%

The petitioner did not provide a percentage breakdown to show the beneficiary's time distribution among the job responsibilities that would be carried out in the United States. The petitioner did, however, provide its organizational chart and a separate list of employees identifying 23 employees.

On February 1, 2005, four years after approval of the petitioner's Form I-140, the director issued an NOIR citing a number of adverse findings. First the director suggested that the beneficiary cannot refrain from engaging in the petitioner's daily operational tasks and maintain hiring and firing authority over the employees who perform those tasks. The director further stated that the job descriptions provided by the petitioner were vague and failed to provide sufficient information about the job duties the beneficiary performed abroad and would perform within the petitioner's organization on a daily basis. Additionally, the director stated that the beneficiary's proposed employment would not involve overseeing the work of professional employees.

In response, counsel submitted a letter dated February 28, 2005 addressing the adverse findings cited in the NOIR. Counsel stated that the reasoning behind the director's findings was flawed. Namely, counsel asserted that the beneficiary can maintain hiring and firing authority while primarily focusing on qualifying executive tasks. Counsel also restated portions of the petitioner's description of the beneficiary's foreign and U.S. responsibilities and expressed his dismay at the director's conclusion that sufficient detail was lacking. Counsel claimed that the petitioner's description was adequate and provided sufficient information to allow CIS to conclude that the beneficiary would primarily perform duties of a qualifying executive nature. Counsel further disputed the director's statement regarding the beneficiary's management of non-professional personnel. Counsel stated that the management of professional employees is not required of an executive employee and added that the lower level managers are the beneficiary's direct subordinates, not the non-professional employees discussed in the NOIR.

After considering the petitioner's response, the director issued a decision dated June 3, 2006 revoking the approval of the petition. The director found that the petitioner failed to provide a detailed job description establishing the tasks the beneficiary would perform on a daily basis during his employment with the U.S. entity. The director stated that while the beneficiary's responsibilities include oversight over various administrative functions, the record lacks evidence to show that the petitioner has employees to actually perform such functions as accounting, advertising, marketing, and budgeting. The director also noted that the layout of the petitioner's business premises suggests that space has not been allotted for the beneficiary to perform his executive tasks. With regard to the beneficiary's employment with the foreign entity, the director similarly found that the petitioner failed to provide a detailed description of the beneficiary's day-to-day duties. The director further found that based on the vague information provided regarding the beneficiary's position abroad, the beneficiary was actually performing the daily operational tasks of the foreign entity.

On appeal, counsel disputes the director's conclusion and underlying findings claiming that the conclusion was based, in part, on the petitioner's quarterly wage reports. The director states that the wage reports show a significant number of employees who perform the kitchen and counter duties on a daily basis. However, counsel does not address the director's comments, which specifically question who within the petitioner's organization performs the non-qualifying administrative office tasks the beneficiary purportedly directs. Based on the petitioner's organizational chart, the only lower level employees within the organization are those that perform kitchen and counter-related tasks. The record does not contain information suggesting that the petitioner employed someone other than the beneficiary to perform the necessary administrative tasks of the business. The mere fact that the beneficiary does not work in the kitchen or at the counter does not

automatically suggest that his tasks would be primarily executive within the petitioner's restaurant. Accordingly, in order to avoid speculation as to the beneficiary's actual daily tasks, the petitioner was instructed on numerous occasions to provide a detailed account of what the beneficiary would be doing on a daily basis. Despite counsel's claim that the petitioner has provided an adequate response to the director's requests, the record supports the director's findings that the beneficiary's tasks are described using broad terminology, which only conveys a level of discretionary authority without specifically stating what the beneficiary would be doing on a daily basis. The actual duties themselves 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).

The information provided thus far does not convey a comprehensive understanding of the beneficiary's typical day of work. Such information is particularly necessary in the present matter where the petitioner has been described by counsel as a business in its initial stages of operation. The AAO notes that regulations pertaining to the permanent employment of a multinational manager or executive make no exceptions for a business that has not been in operation for an extended period of time. Regardless of the amount of time a petitioner has been doing business, it 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). As such, the AAO also questions the beneficiary's job description that was provided in response to the RFE. The description focused on the beneficiary's role and responsibilities in expanding the petitioner's business into a franchise, which would include finding new business locations and overseeing the development of those sites in an effort to ensure commencement of business. The petitioner has not adequately defined the beneficiary's specific duties within the organization that was in existence as of the time the Form I-140 was filed.

Counsel also disputes the accuracy of several of the director's comments, pointing out that the beneficiary's second job description was included in a letter dated May 15, 2001, not in the petitioner's response to the NOIR as noted by the director. However, the error pointed out by counsel is not a matter of material fact and does not provide insight as to the tasks assigned to the beneficiary on a daily basis. Thus, regardless of the support staff that was in place at the time of the Form I-140's filing, the petitioner must define the beneficiary's role within its organization in terms of actual job duties. *See* 8 C.F.R. § 204.5(j)(5). Despite counsel's insistence, the assertion that developing and implementing the petitioner's expansion plan is a reference to specific duties is not persuasive. The record contains no information as to the actual duties the beneficiary would employ in executing these responsibilities. While the beneficiary may occupy one of the top-most positions within the petitioner's organizational hierarchy, the AAO cannot determine whether the beneficiary would be employed in a managerial or executive capacity without full disclosure of the specific duties. Contrary to counsel's argument, the need for this crucial information is clearly conveyed in 8 C.F.R. § 204.5(j)(5).

Furthermore, counsel's assertion that the precedent case law cited by the director must have a fact pattern similar to that of the petitioner is incorrect unless the specific facts of a case are material to the legal principal established. In the present matter, the director cited *Fedin Bros.* for the general legal principal established in the court's ruling, which stressed the need for a definitive set of job duties. 724 F. Supp. 1103. Contrary to counsel's apparent misconception, the general legal principal cited by the director can be applied to a variety of fact patterns and is consistent with the requirements specified in the regulations at 8 C.F.R. § 204.5(j)(5). In the present matter, the record does not include a detailed description of the beneficiary's proposed day-to-day job duties, which is germane to a determination regarding the beneficiary's job capacity in the United

States. As such, the AAO cannot conclude that the petitioner established at the time of filing the Form I-140 that it would employ the beneficiary in a managerial or executive capacity.

With regard to the beneficiary's position abroad, counsel disagrees with the director's comment suggesting that the beneficiary performed the function of the foreign entity. Rather he asserts that the beneficiary directed the foreign entity's staff. In a separate submission, the petitioner provided the following additional information in support of the appeal:

1. Make decisions for public construction project biddings[.]
2. Approve and sign contracts to authorized auction bidders with cost control and business reputation considerations[.]
3. Appoint construction site managers . . . [.]
4. Company division's proposal evaluation; inspect and compromise with mangers[.]
5. Funding intercourse and transfer approval[.]
6. Construction site progress management[.]
7. Administrate quality control[.]
8. Administrative safety control and risk assessment[.]
9. Set annual gross income goal[s.]

While the above list provides further information regarding the beneficiary's position abroad, it is a broad illustration of the beneficiary's overall responsibilities rather than a comprehensive representation of the specific tasks that comprised his daily employment abroad. The list fails to explain which specific duties represent the beneficiary's overall responsibility of staff direction and does not expand on previously cited responsibilities that suggest the performance of non-qualifying tasks. For example, in the November 28, 2000 letter provided in response to the RFE, the petitioner stated that the beneficiary was responsible for expanding the sales market, providing new clients, and promoting the business. Without further explanation, these responsibilities imply the performance of sales and marketing tasks. 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). Thus, not only must the petitioner specify the beneficiary's actual involvement in the non-qualifying portions of the overseas employment, but the petitioner must also specifically assign the portion of time attributed to the non-qualifying tasks. While counsel vehemently asserts that the petitioner has provided the necessary information, the record does not support his claims. The only percentage breakdown regarding the beneficiary's foreign position was submitted in response to the RFE. However, contrary to counsel's insistence, the percentage breakdown provided applies to a broad list of four general types of responsibilities: 55% was attributed to company operation; 20% was attributed to engineering rate of progress and cost control; 15% was attributed to engineering of appraised price; and 10% was attributed to personnel administration. The record contains no percentage breakdown that applies to the beneficiary's

specific duties. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary was employed abroad or would be employed in the United States in a primarily managerial or executive capacity. With regard to both positions, the record lacks a comprehensive description of duties, which precludes the AAO from determining that the beneficiary's duties abroad and his prospective duties with the U.S. petitioner at the time of filing primarily fall within the definition of managerial or executive capacity. While the AAO acknowledges the petitioner's progress since the date of filing, eligibility must be established at the time of filing. *Matter of Katigbak*, 14 I&N Dec. at 49. Based on the petitioner's stage of development at the time of filing, the AAO cannot conclude that the petitioner was able to support the beneficiary in a primarily managerial or executive capacity. For these reasons, the petition may not be approved.

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.