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U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 01 275 54863 Office: CALIFORNIA SERVICE CENTER Date: JUN 21 2004

IN RE: Petitioner: [redacted]
Beneficiary:

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:

SELF-REPRESENTED

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, California Service Center denied the employment-based visa petition. The director's decision to deny the petition was affirmed by the Administrate Appeals Office (AAO) on appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in February 1987. It is a specialized drilling contractor. 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 had been or would be employed in a primarily managerial or executive capacity. The AAO affirmed the director's decision.

On motion, the petitioner submits a grant deed showing its purchase of a new business property in February 2003. The petitioner also submits a new organizational chart and a June 4, 2004 letter from a third party company attesting to the beneficiary's skills. The petitioner also lists the president's duties and elaborates on the programs written and implemented by the beneficiary. The petitioner states that the beneficiary supervises the organization's operations manager and asserts that the operations manager performs supervisory duties. The petitioner contends that the beneficiary's duties are not duties of a staff officer, but are duties that encompass managing the corporation. The petitioner argues that the beneficiary's assignment is primarily managerial and that her managerial duties are not ancillary to her position. The petitioner presents *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988) and asserts that the beneficiary in this matter and the beneficiary in *Matter of Church Scientology International* are distinguishable.

The regulation at 8 C.F.R. § 103.5(a)(2) states in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding. The petitioner's grant deed and current organizational chart, while new, are not relevant to this proceeding. The grant deed shows a purchase of property more than a year subsequent to the petition's filing date. The organizational chart incorporates employees hired subsequent to the petition's filing date. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The president's list of duties and the description of programs written and implemented by the beneficiary are informative but do not comprise new evidence.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part:

> A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [CIS] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

In this matter, the petitioner has submitted argument that the AAO decision was based on an incorrect application of law. The matter will be reopened for reconsideration.

In a response to a request for evidence, as referenced in the AAO decision, the petitioner indicated the beneficiary regularly performed certain duties. A summary of those duties and the beneficiary's time spent on those duties are:

> Procuring projects including reviewing solicitations, reviewing documents, preparing bids, completing contractual documents, and determining start dates – 20 percent
>
> Managing projects including assigning personnel and equipment, arranging government permits, creating safety plans, briefing employees, hiring or subcontracting additional personnel, daily meeting with the crew, handling problems, meeting with client, supervising completion of reports, and arranging for the demobilization of crew – 30 percent
>
> Other duties associated with projects are reporting to the president, observing and supervising crew if the work is local, monitoring safety, taking disciplinary action if necessary – 10 percent
>
> Administrative and financial duties including handling insurance, individual retirement plans, bookkeeping, banking, authorizing employee expenditures and payroll, handling correspondence and telephone calls, facilitate tax planning, monitoring operations to control costs and increase profit, assist with budgets, and facilitate acquisition of new assets – 20 percent
>
> Special tasks including responsibility for safety programs, keeping abreast of government requirements, providing education, training, meetings, inspecting premises, and maintaining material safety data sheets; responsibility for human resource management including recruiting employees, reviewing personnel policies, and conducting employee performance reviews; responsibility for business development including generating new business through networking, advertisement and referrals; strengthening client relations; providing information to clients about specialized drilling equipments – 20 percent

The AAO determined based on the beneficiary's list of tasks and other evidence in the record, that the beneficiary would perform tasks that enable the petitioner to provide its services to clients. The AAO determined, "[a]lthough the beneficiary also creates and implements policies, and hires and fire[s] employees, her managerial duties are ancillary to her primar[y] job responsibilities, which are to perform tasks that enable the petitioner to provide its services to the general public."

On motion, the petitioner contends that the beneficiary's authority to bind the corporation in contract, meet deadlines, comply with government requirements, and to authorize the operations manager to schedule a crew elevates the beneficiary to a managerial position, and not that of a staff officer or specialist position.

The petitioner's contention is not persuasive. Although the beneficiary has discretionary authority to sign contracts on behalf of the corporation, according to the petitioner's allocation of her time, this is not her primary task. The petitioner confirms that, at times, its president performs these duties. Moreover, the petitioner's allocation of the beneficiary's time shows that she spends the majority of her time preparing bids and completing the contractual documents, assigning and briefing crews, arranging government permits, monitoring safety, handling correspondence, bookkeeping, banking, and insurance, and assisting with the budget. These are duties that are the duties of a staff specialist providing operational and administrative services to the organization. The beneficiary's responsibility for safety programs, training, inspecting premises, and monitoring government

requirements are also more indicative of an individual performing the duties of a staff specialist. The beneficiary is not working through other employees to accomplish these necessary operational and administrative duties, but rather is performing these duties herself.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that the duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to acknowledge that a portion of the beneficiary's duties is non-managerial. This failure is important because many of the beneficiary's daily tasks, such as handling correspondence, bookkeeping, banking, scheduling, inspections, and payroll do not fall directly under traditional managerial duties as defined in the statute. The AAO cannot determine that the beneficiary is primarily performing the duties of a manager. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991); *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

CIS long held policy is to require that a majority of the beneficiary's duties relate to operational or policy management, not to the supervision of lower level employees, performance of the duties of another type of position, like that of a staff specialist, or other involvement in the operational activities of the organization. The petitioner has not established that the beneficiary primarily performs the high level responsibilities associated with operational or policy management and not the day-to-day operational and administrative functions. *See Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

The petitioner also asserts that the beneficiary supervises a professional and supervisory employee. However, the petitioner's operations manager, the employee the petitioner claims is both a professional and a supervisor, was employed by the petitioner in January 2002, five months subsequent to filing the petition. As referenced above, the petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak, supra.*

Finally, the petitioner claims that the beneficiary's primary duty "is to manage the corporation, an essential function within [the petitioner]." However, the term "essential function" generally applies when a beneficiary does not supervise or control a petitioner's staff but instead is primarily responsible for managing a function. To allow the broad application of the term "essential function" to include all individuals who head organizations would render the term meaningless. If the petitioner claims that the beneficiary is managing an essential function, it must identify the function with specificity, articulate the essential nature of the function, as well as, establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive description of the beneficiary's duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

The petitioner has not provided sufficient evidence to distinguish the beneficiary's primary duties from those of a staff officer or specialist. The petitioner has not provided sufficient evidence to conclude that the beneficiary works primarily through others to perform the organization's operational and administrative tasks. The petitioner has not provided evidence to conclude that the beneficiary's assignment comprises duties that are primarily managerial as defined by the regulations, instead of duties that are traditionally non-managerial duties. The petitioner has not provided sufficient evidence to overcome the AAO decision.

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.