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U.S. Citizenship and Immigration Services

PUBLIC COPY

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MAN 11 2005

FILE: WAC 02 044 50189 Office: CALIFORNIA SERVICE CENTER Date:

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:

[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.

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 appeal will be dismissed.

The petitioner is a corporation organized in the State of California in April 1999. It is engaged in website development and consulting. It 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 would be employed in a primarily managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner submits a brief in response to the director's decision.

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 issue in this proceeding is whether the beneficiary will be employed in a managerial or executive capacity for the United States entity.

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
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> 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;
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> 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
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> i. directs the management of the organization or a major component or function of the organization;
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> ii. establishes the goals and policies of the organization, component, or function;
>
> iii. exercises wide latitude in discretionary decision making; and
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> iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a November 1, 2001 letter appended to the petition, the petitioner asserted that the beneficiary "meets all precedent requirements for approval under the Employment Based classification for a Multinational Manager." The petitioner also provided a general description of the beneficiary's duties. The director, in his decision, and counsel on appeal, recite the beneficiary's job description in full. For the convenience of the reader, the AAO will again recite the job description.

> While in the United States, [the beneficiary] has been fully responsible for the company, including overall policy, strategy and business development. Conferring with hired employees, he has established the goals of U.S. business operations, identifying and developing business relationships with at least 97 companies for the distribution of their proprietary web-based content. [The beneficiary] achieved considerable success in the first year of operation in the U.S. solidifying the relationships between our company and our business partners. His duties include directing the management of the company, conferring with Internet entertainment production companies and assisting the company's distributors in marketing [the petitioner's] products. [The beneficiary] retains sole responsibility for monitoring the financial status of U.S. business operations, as well as maintaining and overseeing business relationships throughout Europe. Therefore, it is clear that [the beneficiary's] daily activities in the U.S. have been, and will continue to be executive in nature.

On March 1, 2002, the director requested a copy of the petitioner's organizational chart describing its managerial hierarchy and staffing levels. The director requested that the chart include the names of all executives, managers, supervisors, and number of employees within each department or subdivision. The director also requested a brief description of job duties, educational levels, salaries/wages for all employees under the beneficiary's supervision. The director further requested the petitioner's California Forms DE-6, Employer's Quarterly Wage Report, for 2000 and 2001.

In a March 22, 2002 response, counsel for the petitioner claimed that the beneficiary's position "is clearly executive in nature." The petitioner stated that the beneficiary had been responsible for the legal, marketing, development, administrative, and accounting functions and managed numerous professional-level employees, including computer programmers, webmasters, HTML designers, graphic designers, and marketing and sales staff. The petitioner acknowledged that the beneficiary occasionally performed some of the actual programming tasks but asserted that the beneficiary primarily supervised employees and directed their actions. The petitioner further noted that the beneficiary established the long-term goals of the company and delegated tasks to his employees and outside contractors to see that they were implemented. The petitioner referenced the use of accountants, attorneys, and a marketing consultant as professional outside contractors.

The petitioner also provided its organizational chart showing the beneficiary as president, and the current employment of individuals in the positions of vice-president, "visual production," lead programmer, and two HTML designers. The petitioner provided brief job descriptions for each of the positions. The petitioner also provided its quarterly payroll reports, including the report for the quarter in which the petition was filed. The petitioner's quarterly payroll report for December 31, 2001 confirmed the employment of the beneficiary, and

the individuals in the positions of vice-president, "visual production," lead programmer, one HTML designer, and a graphic designer.

The director determined that: (1) the petitioner did not have a reasonable need for an executive, and that it was contrary to common business practice and defied standard business logic for the petitioner to have an executive; (2) the description of the beneficiary's job duties did not establish that the beneficiary met the criteria outlined in the definition of executive or managerial capacity; (3) the petitioner's acknowledgement that the beneficiary rarely or occasionally performed actual tasks precluded the beneficiary from being considered an executive; and (4) that the beneficiary did not qualify as a functional manager as he would be involved in performing routine operational activities rather than managing a function. The director also observed that the previous approvals of the beneficiary's L-1A intracompany transferee classification were in error.

On appeal, counsel for the petitioner asserts that: (1) the director should not subject immigrant petitions to a higher standard then nonimmigrant petitions; (2) the director's opinions regarding common business practice and standard business logic are unsubstantiated; (3) the non-precedential decision in Irish Dairy Board allowed a sole employee to be classified as an executive provided the beneficiary's primary function is to plan, organize, direct, and control an organization's major functions through other employees; (4) as long as the beneficiary primarily performs executive tasks, he may also perform some operational tasks; and (5) the petitioner's number of employees is irrelevant as long as there is sufficient staff to relieve the beneficiary of non-executive duties.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. A petitioner may not claim a beneficiary is to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

In this matter, the petitioner indicates that the beneficiary is eligible for a multinational managerial position, primarily supervises employees, and "manage[s] numerous professional-level employees, including computer programmers, webmasters, HTML designers, graphic designers, and marketing and sales staff." The petitioner also indicates that the beneficiary's "daily activities in the U.S. have been, and will continue to be executive in nature," and the "beneficiary establishes the long-term goals of the company and delegates tasks to his employees and outside contractors to see that they were implemented." The petitioner paraphrases portions of both the statutory definition of managerial and executive capacity to establish that the beneficiary meets the criteria of this visa classification. However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Moreover on review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary "has been fully responsible for the company, including overall policy, strategy and business development," and "[h]is duties include directing the management of the company," and "he has established the goals of U.S. business operations." These general statements do not define the goals, policies, or overall strategy or convey an understanding of the beneficiary's actual daily duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Further, any detail the petitioner provides regarding the beneficiary's overall duties is more indicative of an individual involved in the petitioner's operational tasks. For example, the petitioner states that the beneficiary identifies, confers with, and develops relationships with other companies, as well as, assists the company's distributors in marketing the petitioner's products. The petitioner also indicates that the beneficiary is responsible for the petitioner's legal, marketing, development, administrative, and accounting functions. The petitioner provides evidence that it employs individuals to relieve the beneficiary from the operational tasks of producing the petitioner's product but does not provide evidence that it employed individuals to market or sell the petitioner's product or services when the petition was filed. 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). 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). Furthermore, although the petitioner references the use of outside contractors to perform marketing consulting services and legal and accounting services, the petitioner does not provide evidence of its continuing payment for the services of these individuals. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N at 190.

Counsel correctly observes: (1) that as long as the beneficiary primarily performs executive tasks, he may also perform some operational tasks; and (2) that the petitioner's number of employees must be sufficient to relive the beneficiary of non-executive duties. The petitioner fails, however, to document what proportion of the beneficiary's duties would be managerial or executive functions and what proportion would be non-managerial and non-executive. The petitioner lists the beneficiary's duties as both managerial and executive, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because the record shows that several of the beneficiary's tasks, such as, marketing and selling the petitioner's services and assisting with programming, relate to the petitioner's operational tasks. For this reason, the AAO cannot conclude that the beneficiary is primarily performing the duties of a manager or an executive. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Finally, as required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, Citizenship and Immigration Services (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. The petitioner has not adequately explained and detailed the beneficiary's role within the petitioning organization. Providing a general description of the beneficiary's duties is not sufficient. 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. at 1103.

Although the appeal will be dismissed, the AAO notes that the director based his decision, in part, on an improper standard. The director should not hold a petitioner to his undefined and unsupported view of "common business practice" or "standard business logic." The director should instead focus on applying the statute and regulations to the facts presented by the record of proceeding. Although CIS must consider the reasonable needs of the petitioning business if staffing levels are considered as a factor, the director must articulate some rational basis for finding a petitioner's staff or structure to be unreasonable. *See* section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). The fact that a petitioner is a small business or engaged in a particular industry will not preclude the beneficiary from qualifying for classification under section 203(b)(1)(C) of the Act. The director's comments in this regard are inappropriate. For this reason, the director's decision will be withdrawn, in part, as it relates to the reasonable needs of the petitioning business. However, to reiterate, the petitioner has failed to identify the beneficiary's daily job duties with specificity, has failed to adequately support the claim that the beneficiary is relieved from performing certain non-qualifying duties, and has failed to articulate the petitioner's reasonable needs in light of its overall purpose and stage of development.

Of note, counsel's reference to an unpublished decision involving an employee of the Irish Dairy Board is not relevant to this proceeding. In the unpublished decision, the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has not furnished evidence to establish that the facts of the instant petition are analogous to those in the Irish Dairy Board matter. 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.

On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the petitioner will include primarily executive or managerial duties.

Of further note, 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 at 22; *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. at 1103. 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 L1-A petitions, as noted by the director, 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). Moreover, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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.