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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

JAN 11 2005

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:
WAC 03 075 55794

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 May 1999. It offers electrical services. 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: (1) the beneficiary had been employed for the foreign entity in a managerial or executive capacity; or (2) the beneficiary would be employed in a primarily managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner asserts the director erred in his decision and 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 first issue in this proceeding is whether the beneficiary had been employed in a managerial or executive capacity for the foreign entity prior to entering the United States as a nonimmigrant.

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;
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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 December 23, 2002 letter appended to the petition, the petitioner stated that the beneficiary had experience developing and establishing the operations of its parent company and that the beneficiary had an engineering background and field experience.

On April 22, 2003, the director requested: (1) the foreign company's organizational chart describing its managerial hierarchy and staffing levels, identifying the beneficiary's position on the chart and all employees under the beneficiary's supervision by name, job title, and job duties; (2) a more detailed description of the beneficiary's duties with the foreign entity including the percentage of time the beneficiary spent on the listed duties; and (3) the foreign entity's payroll records pertaining to the beneficiary.

In a July 10, 2003 response, the petitioner indicated that the beneficiary was not on the foreign entity's payroll, but as the sole proprietor of the foreign company the beneficiary received business profits as his compensation. The petitioner stated that the beneficiary had been and "continues to be directly responsible for guiding the business towards the objectives, which he sets, through planning and developing of business strategies." The petitioner indicated:

> The beneficiary spent 35 to 40 percent of his time reviewing and assessing market research and consulting with horticulturalists about expanding lines of flowers and plants.
>
> The beneficiary spent 15 percent of his time on personnel matters, including staffing levels, compensation, and promotion of full-time permanent employees as well as the numerous contractors hired seasonally to assist in cultivating, harvesting and shipping the business's product line.
>
> The beneficiary spent 10 percent of his time negotiating lines of credit with banking institutions.
>
> The beneficiary spent 35 percent of his time overseeing the development of domestic and foreign retail and wholesale customers that includes meetings, final contract negotiations, which includes price setting.
>
> The beneficiary spent the remaining portion of his time reviewing horticultural reports needed to negotiate with suppliers of seeds and saplings.

The foreign entity's organizational chart identified the beneficiary as the sole proprietor. The chart also identified a general manager who it claimed ensured that the foremen and their crews planted, harvested, and shipped on time and budget and who also oversaw the day-to-day office management. The petitioner claimed the foreign entity's two foremen supervised three to five agricultural workers and oversaw completion of contracts. The organizational chart also indicated that independent horticulturalists prepared reports on plants and flowers including recommendations for planting, cultivating, and harvesting.

The director determined, based on the foreign entity's organizational chart, that the foreign entity employed three permanent employees and up to ten temporary workers. The director questioned whether the

beneficiary participated in the management of the foreign entity as he received business profits rather than a salary. The director determined that the petitioner had only shown that the beneficiary had financial involvement in the foreign entity but had not established that the beneficiary had been employed in a managerial or executive capacity for the foreign entity.

On appeal, counsel asserts that the director failed to consider the description of the beneficiary's job duties for the foreign entity that had been submitted in response to the request for evidence. Counsel claims that the description of the beneficiary's executive and managerial responsibilities is supported by the foreign entity's organizational chart. Counsel questions the director's conclusion that the beneficiary was simply the owner of the company and did not participate in the day-to-day management of the foreign entity. Counsel concludes that the beneficiary "manages and directs" the foreign entity by overseeing a general manager, two foremen, and numerous independent contractors.

Counsel also submits letters from two of the foreign entity's employees, the foreign entity's accountant, and a customer. The individual identified as the foreign entity's general manager stated in his December 16, 2001 letter that he had been employed for the foreign entity between 1997 and 1999 as a foreman. He also noted that the beneficiary "was coming and going during the day, while managing his business, purchasing supplies and conducting sales negotiations." He also noted that the beneficiary chose suppliers, distributors, and did all the hiring. An individual not identified on the foreign entity's organizational chart stated in a December 12, 2001 letter that the foreign entity employed him in the year 1997 and that the beneficiary was his supervisor. The writer also observed that the beneficiary decided where and how many flowers would be shipped, took care of supplies, and took care of delivering flowers to the warehouse. A third letter, dated December 18, 2001, indicated that the beneficiary had purchased flower plants from the writer's company to the date of the letter and noted that the beneficiary made the orders, negotiated prices and paid for the plants purchased. A fourth letter dated May 1999, indicated that the beneficiary was a flower grower and had a signed contract to export flowers from the exporting season in "1991-92 and 1989-9 and forward."

Counsel's assertions are not persuasive. The petitioner's description of the beneficiary's duties for the foreign entity is general. 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, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The petitioner indicated that the beneficiary spent 35 to 40 percent of his time reviewing and assessing market research and consulting with horticulturalists and another 35 percent of his time overseeing the development of domestic and foreign retail and wholesale customers. These statements are too general to determine whether the beneficiary's duties were primarily managerial or executive. However, the foreign entity's prior employees and individuals associated with third party companies indicated that the beneficiary actually spent his time purchasing supplies and flower plants, conducting sales negotiations, delivering flowers to the warehouse and taking care of shipping. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. These duties are indicative of the beneficiary primarily performing the foreign entity's operational and administrative services. 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). The petitioner has provided evidence that indicated the beneficiary was a "hands

on" owner who performed the foreign entity's operational tasks, except for the actual labor of growing flowers. The petitioner has not established that the beneficiary was employed in a qualifying managerial or executive capacity for the foreign company.

The second issue in this proceeding is whether the petitioner established that the beneficiary would be employed in an executive or managerial capacity for the petitioner.

In the December 23, 2002 letter appended to the petition, the petitioner stated: "At our company, we feel it is imperative to have a person physically present in the United States to explore new markets, enter into sales contracts, service old and new customers, and to oversee and maintain quality control, maintain personalized services for total customer satisfaction, and quick decisions for the ever changing electronic contracting service industry." The petitioner described the beneficiary's job duties as:

> [The beneficiary] is responsible for the effective coordination of the office activities. His job duties in the company are planning, developing and establishing policies and objectives of the business organization, building up the cost effective business model, reviewing the financial statements and formulating different monetary programs for funding the company operations and maximize investment returns. He has set up an internal administrative network for smooth operations of the daily affairs, in which is [sic] attention is not needed. He is placing the systems to attain the best efficiencies and productivity of the resources. He exercises total authority to engage in all personnel matters including hiring, firing and promoting of our professional staff.
>
> In addition, [the beneficiary] makes all key decisions like supervising the office lease, implementing marketing strategies, evaluation of the customer business profile to determine risks involved and hiring additional professionals per the growing business requirements. [The beneficiary] oversees our team of electricians, our estimating team and our service departments. Due to the complex nature of the job duties assigned to each group leader under the guidance of [the beneficiary], our company aims to meet the long-term goals within the defined financial and operational parameters, delivering quality and long lasting benefits to our customers.

The petitioner also described the company's future business plans and its expectation to hire personnel as the company grew.

On April 22, 2003, the director requested a more detailed description of the beneficiary's duties including the percentage of time the beneficiary spends in the listed duties. The director also requested the petitioner's organizational chart describing its managerial hierarchy and staffing levels and the beneficiary's position on the chart and all employees under the beneficiary's supervision by name, job title, and description of job duties. The director further requested the petitioner's California Forms DE-6, Employer's Quarterly Report, for the last eight quarters.

In response, the petitioner provided its organizational chart listing the beneficiary as president/manager. The petitioner indicated the beneficiary had final authority over purchasing, major customer relations and sales, and reviewing reports and authorizations. The chart depicted an office manager and a project supervisor directly under the beneficiary's supervision. The chart also showed a project manager under the supervision of the project supervisor, two foremen under the supervision of the project manager, and two electrical technicians reporting to the foremen. The petitioner stated that the project supervisor provides daily needs and certain customer relations, the project manager assigns projects and oversees work orders, the foremen are responsible for their work and their helpers, and the electrical technicians work was self-explanatory.

The petitioner provided its California Forms DE-6 in its response to the director's request for evidence. The California Form DE-6 for the first quarter of 2003 confirmed the employment of the individuals identified on the organizational chart as the petitioner's project supervisor, project manager, one of the foremen, and an electrical technician. The California Form DE-6 also listed two individuals who were not identified on the petitioner's organizational chart. One of the two unidentified individuals apparently worked for the petitioner temporarily.

The director, in an inarticulate decision containing numerous grammatical errors, determined that the petitioner's description of the beneficiary's duties paraphrased portions of the statutory definitions of managerial and executive capacity. The director noted that the petitioner had not provided detail regarding the beneficiary's actual duties and the percentage of time devoted to those duties. The director compared the organizational chart and the petitioner's California Form DE-6 and determined that the petitioner had only identified four employees and that the beneficiary would at best be employed as a first-line supervisor of non-professional employees. The director determined that the record did not contain sufficient information to demonstrate that the beneficiary would be employed in a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that: (1) the petition was filed in the fourth quarter of 2002[1] and that the petitioner's California Form DE-6 for that period reflects the employment of seven individuals; (2) the definitions of managerial and executive capacity focus on the employee's primary activities but do not preclude the beneficiary from performing other activities; (3) even if the beneficiary performed some non-qualifying activities, the activities were only incidental to the beneficiary's performance of his executive and/or managerial duties; and (4) although the number of employees supervised should not be determinative, the petitioner employs sufficient staff to free the beneficiary to engage in executive and managerial duties. Counsel also cites and mistakenly characterizes two AAO decisions as precedent decisions in support of her assertions.

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[1] Counsel submitted a letter in support of the petition dated December 23, 2002, however the petition was not received and date-stamped at the service center until January 2, 2003. 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. For calculating the date of filing, the petition shall be regarded as properly filed on the date that it is so stamped by the service center or district office.

Counsel's assertions are not persuasive. Again, 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 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 that the beneficiary is both an executive and a manager.

On review of the petitioner's description of the beneficiary's duties, the AAO agrees with the director's determination that the description is not comprehensive and paraphrases portions of the definitions of managerial and executive capacity. For example, the petitioner states the beneficiary's job duties in the company are "planning, developing and establishing policies and objectives of the business organization, building up the cost effective business model, reviewing the financial statements and formulating different monetary programs for funding the company operations and maximize investment returns," and "placing the systems to attain the best efficiencies and productivity of the resources," and that he "exercises total authority to engage in all personnel matters including hiring, firing and promoting of our professional staff." The petitioner does not, however, further define the day-to-day requirements of the beneficiary's electrical company or explain the beneficiary's actual daily tasks within the company. 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.

The beneficiary's responsibilities for "effective coordination of the office activities," and "supervising the office lease, implementing marketing strategies, evaluation of the customer business profile to determine risks involved" are more indicative of an individual performing basic administrative functions. Similarly, the beneficiary's responsibilities to explore new markets, enter into sales contracts, service old and new customers, and oversee and maintain quality control are indicative of an individual involved in the petitioner's daily 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. at 604. Overseeing the petitioner's electricians and estimating teams are the duties of a first-line supervisor supervising skilled technicians. 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. *See* 101(a)(44)(A)(iv) of the Act.

The petitioner's description of the beneficiary's duties is not comprehensive and the few details regarding the beneficiary's actual daily duties are more akin to an individual performing the petitioner's administrative and operational tasks. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Counsel correctly observes that a beneficiary's incidental operational and administrative tasks do not necessarily preclude a beneficiary from being considered a manager or an executive. However, in this matter, the director requested that the petitioner provide a more detailed description of the beneficiary's duties and

allocate the percentage of time allotted to those duties. The petitioner failed to provide this information. This failure of documentation is important because, as observed above, several of the beneficiary's tasks do not fall directly under traditional managerial duties as defined in the statute. Counsel's assertion that the beneficiary's performance of non-qualifying duties, if any, is incidental to the beneficiary's executive or managerial duties is not supported in the record. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel's claim that the petitioner employs a sufficient number of employees to relieve the beneficiary from performing non-qualifying duties, likewise, has not been established. The petitioner's description of the beneficiary's subordinates' duties does not establish that the individuals in the roles of project supervisor and project manager are directly and primarily responsible for supervising the petitioner's technicians. Moreover, the petitioner's tendency to embellish the roles of the beneficiary's subordinates as observed in the discussion of the beneficiary's duties for the foreign sole proprietorship, casts doubt on the actual duties of the beneficiary's subordinates for the petitioner. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Further, a petitioner may not create artificial layers of employees to suggest that an organization is sufficiently complex to support an executive or manager; instead the petitioner must substantiate that the duties of a beneficiary's subordinates correspond to their placement in an organization's structural hierarchy. Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business, when examining the managerial or executive capacity of a beneficiary. The petitioner has not provided an organizational structure substantiated by the record sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisory role.

Counsel's citation to prior unpublished AAO decisions is not probative in this matter. The decisions cited are not precedent decisions and counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those of the unpublished cases. Moreover, unpublished decisions are not binding on CIS in its administration of the Act. *See* 8 C.F.R. § 103.3(c).

Finally, the petitioner's reference to expanding its business in the future is not relevant to this proceeding. 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).

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

Beyond the decision of the director, the petitioner has not established that it has maintained its multinational character as required by this visa classification. The record does not demonstrate that the foreign entity

continues to do business. The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part: "*Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States." The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part: "*Doing Business* means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office." The petitioner has not submitted any evidence to establish that the foreign sole proprietorship continues to do business, as required at 8 C.F.R. § 204.5(j)(2). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *Matter of United Investment Group*, 19 I&N Dec. 248 (Comm. 1984). A sole proprietorship is a business in which one person owns all of the assets and operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Edition). As the beneficiary claims to be the owner and sole proprietor of the foreign business, the presence of the beneficiary in the United States raises the question of whether the foreign business continues to do business abroad. The lack of current evidence leads the AAO to conclude that the foreign sole proprietorship is no longer doing business.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *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); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.