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U.S. Citizenship and Immigration Services

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[redacted]

JAN 11 2005

FILE: [redacted] Office: TEXAS SERVICE CENTER Date:
SRC 03 026 50612

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, Texas 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 limited liability company organized in the State of Texas in November 1998. It exports oil and gas supplies, automotive products, and furniture, primarily to African countries. It seeks to employ the beneficiary as its president and chief executive officer. 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 employed in a managerial or executive capacity for the foreign entity or would be employed in a managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner asserts the director erred in her determination 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 petitioner has established that the beneficiary's assignment for the petitioner would be in a 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
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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;
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> 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 an October 24, 2002 letter appended to the petition, the petitioner stated that in the beneficiary's position of chief executive officer, the beneficiary "directs the management of all export including the general management of the company, establishes all goals that the U.S. Company will pursue and other clients and contracts that the U.S. Company plans to target." The petitioner noted on the Form I-140, Immigrant Petition for Alien Worker, that it currently employed one to two employees.

On September 8, 2003, the director requested a definitive statement from the petitioner describing the beneficiary's proposed job duties. The director specifically requested that the statement include the beneficiary's position title, a list of all duties, the percentage of time spent on each duty, the number of subordinate employees who would report directly to the beneficiary, and a brief description of their job titles, duties, and educational levels. The director also requested evidence of the staffing level in the United States and the petitioner's Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement, issued in 2002.

In an October 28, 2003 response, the petitioner listed the beneficiary's duties and the percentage of time allocated to those duties (accounting for a total of 105% of his time):

(a) As the President and Chief Executive Officer, he maintains overall administrative responsibility for the entire organization. 35 percent.
(b) He ensures that the company's policies (as enunciated at the Board level) are strictly followed and set objectives are achieved. 10 percent.
(c) He directs the management of the organization and establishes the goals and policies of the organization, components or functions. 10 percent.
(d) He is the major factor in the decision-making process of the organization because he coordinates the business and therefore understands the 'market place' more than any other person in the company. 25 percent.
(e) He directly oversees the finance department to ensure that funds are invested where necessary and investments made are properly managed for optimum results. 10 percent.
(f) He directs and coordinates the internal working of the company in line with its objectives and goals. 15 percent.

The petitioner added in a staffing report that the manager of the company would "maintain the products, people, finance and furniture of the company as well as be involved in recruitment, training, deployment, innovation and discipline of the company's staff." The petitioner also included the beneficiary's affidavit indicating that the petitioner contracted with two U.S. intermediary companies to purchase and package products with the petitioner's label for export to Africa.

The petitioner also stated that it employed an export manager, a secretary, and an accountant, all of whom reported directly to the beneficiary. The petitioner indicated that the export manager would oversee the preparation of invoices, negotiate freight charges, and head the export department; and that the secretary would be the image maker of the company and would oversee hospitality of visitors as well as handling all other secretarial duties.

The petitioner also provided IRS Forms W-2 issued to the beneficiary and to the individuals identified as export manager and secretary for 2002. The 2002 IRS Form W-2 issued to the export manager was for the sum of $7,865 and the 2002 IRS Form W-2 issued to the secretary was for the sum of $3,850. The petitioner provided one 2002 IRS Form W-2 issued to an individual whose position was not identified.

The director determined that the beneficiary's duties were described in broad and general terms. The director also noted that the beneficiary's duties included overseeing the finance department but there were no employees identified that would perform financial duties. The director observes that the accountant is an independent contractor. The director concluded that the petitioner's limited number of employees would require the beneficiary to perform a wide range of daily functions associated with running a business rather than perform primarily managerial or executive duties.

On appeal, counsel for the beneficiary asserts that the evidence in the record, including the beneficiary's sworn affidavit explaining the export business and copies of numerous invoices and receipts, serves as evidence of the beneficiary's managerial duties. Counsel claims that the beneficiary supervises professional employees and indicates that the petitioner's secretary and accountant have professional degrees. Counsel notes that even if the accountant is an independent contractor, the accountant is responsible for the petitioner's day-to-day financial activities and that the beneficiary supervises the accountant in his bookkeeping. Counsel asserts that the director incorrectly concludes that two or even four employees are not sufficient to classify the beneficiary in a managerial or executive capacity. Counsel contends that the petitioner has employed the necessary and cost-effective number of employees to make its business profitable.

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. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* A beneficiary may not claim 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.[1]

The petitioner has provided a vague and nonspecific description of the beneficiary's duties. For example, the petitioner states that the beneficiary's duties include: "maintain[ing] overall administrative responsibility for the entire organization," and "ensur[ing] that the company's policies (as enunciated at the Board level) are strictly followed and set objectives are achieved," and " direct[ing] and coordinate[ing] the internal working of the company in line with its objectives and goals." These statements do not convey an understanding of the beneficiary's daily duties. Moreover, such broad statements can encompass a wide range of duties that are both managerial and executive duties or non-managerial and non-executive. Specifics are clearly an

[1] Counsel for the petitioner states that the petitioner will require the beneficiary to engage in strictly managerial duties; however, the petitioner's description of the beneficiary's duties paraphrases elements of the statutory definition of executive capacity. The record does not establish whether the petitioner is claiming that the beneficiary is primarily a manager or is primarily an executive.

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).

In addition, the petitioner indicates that the beneficiary: "is direct[ing] the management of the organization and establish[ing] the goals and policies of the organization, components or functions." The petitioner does not, however, further define the goals and policies, procedures, strategies, and objectives. The petitioner also does not clarify who carries out or implements the petitioner's goals and policies, if not the beneficiary. 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). This statement and the petitioner's indication that the beneficiary is "involved in recruitment, training, deployment, innovation and discipline of the company's staff," paraphrase elements of the definitions of managerial and executive capacity without detailing the beneficiary's daily tasks. 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. at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Further, the petitioner has not provided evidence that it actually employed individuals to carry out the petitioner's sales and marketing duties or the daily accounting, administrative, or export duties. The petitioner indicated on the Form I-140 that it employed one to two employees. The petitioner stated that it employed an export manager and a secretary but the IRS Forms W-2 show that these two individuals were either intermittently employed or employed part-time. Additionally, the petitioner did not identify the individual allegedly employed as its accountant, or provide evidence that this individual was employed full-time or was used as an independent contractor. As stated above, 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 at 190. Furthermore, 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).

Counsel's claim that the beneficiary supervises professional employees is also not persuasive. The petitioner has not shown that it employs any individual full time other than the beneficiary. In addition, the petitioner has not provided evidence that any of the beneficiary's subordinate positions are professional positions. Citizenship and Immigration Services (CIS) focuses on the level of education required by the position, rather than the degree held by an employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an individual is employed in a professional capacity. In the instant matter, the petitioner has not, in fact, established that a degree is actually necessary to perform the petitioner's secretarial, administrative, export, and bookkeeping functions. Moreover, the petitioner does not indicate that the beneficiary's tasks are primarily supervisory tasks, but rather seems to limit the beneficiary's specific oversight of others to 10 percent.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size

of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* In this matter, the petitioner has not provided sufficient evidence that its staff on hand when the petition was filed was sufficient to relieve the beneficiary from performing primarily the petitioner's operational and administrative 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).

Finally, counsel's assertion that the beneficiary's affidavit and the petitioner's invoices and receipts serve as evidence of the beneficiary's managerial and executive capacity is not persuasive. First, counsel does not explain how the petitioner's invoices and receipts, many of which are addressed to the beneficiary as "salesperson," and the beneficiary's explanation that intermediary companies label and ship the petitioner's purchased product demonstrate the beneficiary's managerial or executive capacity. Second, 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).

In sum, the petitioner has not established that the beneficiary's primary assignment for the petitioner will be in a qualifying managerial or executive capacity. The petitioner has not submitted evidence to overcome the director's decision on this issue.

The second issue in this proceeding is whether the beneficiary's assignment for the foreign entity was in a managerial or executive capacity.

In an October 24, 2002 letter appended to the petition, the petitioner indicated that the beneficiary had been continuously employed by the foreign entity since March 1993 as its managing director. The petitioner provided a broad statement of the beneficiary's duties.

On September 8, 2003, the director requested a definitive statement from the foreign entity describing the beneficiary's job duties. The director specifically requested the number of subordinate managers, supervisors, or other employees who reported directly to the beneficiary. The director also requested evidence of the staffing level at the foreign company including position titles, duties, and educational levels of all employees.

In a November 3, 2003 response, the foreign entity provided a statement of the beneficiary's duties similar to the general statement used to describe the beneficiary's duties for the petitioner. The foreign entity also identified four individuals who reported directly to the beneficiary. The four individuals held the positions of general manager, finance manager, personnel manager, and sales manager.

The director again determined that the foreign entity's description of the beneficiary's duties lacked sufficient detail to establish the beneficiary's eligibility. The director observed that the foreign entity had only described

four positions subordinate to the beneficiary. The director concluded that the record did not establish that the beneficiary's duties for the foreign entity were primarily managerial or executive.

On appeal, counsel for the petitioner asserts that the foreign entity, in addition to employing the beneficiary and four of the beneficiary's direct subordinates full-time, the foreign entity also employed drivers, stock keepers, receptionists, and sales agents. Counsel submits an affidavit from the foreign entity's general manager confirming that the foreign entity's employees are full-time employees. Counsel again asserts that the director has improperly used the foreign entity's staffing levels when concluding that the beneficiary had not been a manager or executive for the foreign entity.

For the same reasons listed above, the foreign entity's description of the beneficiary's duties is not sufficient. Further, counsel's assertion and the affidavit of the foreign entity's general manager that the foreign entity employed individuals other than those listed in the foreign entity's response to the director's request for evidence, will not be considered on appeal. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Finally, as stated above, it is appropriate for CIS to consider the size of a company in conjunction with other relevant factors, when the company has not provided evidence of employees who would perform the non-managerial or non-executive operations of the company. *See, e.g. Systronics Corp. v. INS,* 153 at 15. In this matter, the petitioner did not provide the director with requested information regarding the foreign entity's staffing levels. The evidence offered for the first time on appeal in not sufficient to overcome the director's decision on this issue.

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.