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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 08 2007

SRC 04 223 50062

IN RE: Petitioner:
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:

[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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of Texas that is operating a gas and convenience store. The petitioner seeks to employ the beneficiary as its vice-president.

The director denied the petition concluding that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, the petitioner's current counsel contends that CIS denied the petition based on the erroneous conclusion that the beneficiary must supervise professional employees in order to qualify as a manager or executive. Counsel further claims that CIS made an erroneous "conclusory determination" that the beneficiary's position as vice-president would encompass primarily day-to-day activities of the petitioner's business. Counsel submits a brief and additional documentary evidence in support of the appeal.

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 or 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, 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 issue in this proceeding is whether the beneficiary would be employed in the United States entity in a primarily 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;
>
> (iii) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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 filed the instant petition on August 16, 2004, requesting employment of the beneficiary as its vice-president. In a statement attached to the petition, the beneficiary's proposed job duties were noted as:

> [H]iring and firing managers; supervising subordinate employees; overseeing preparation of marketing reports; reviewing an[d] analyzing sales data; establishing and implementing marketing policies to manage and achieve marketing goals; managing the company; and overseeing [the] marketing campaign developed by subordinate managers.

The petitioner noted that the beneficiary would "exercise wide discretion and latitude in the performance of his duties."

The petitioner submitted copies of its quarterly tax return and wage report for the quarter ending March 31, 2004, both of which identified the employment of seven workers, three of which appear to have been employed on a part-time basis. The AAO notes that the record does not contain quarterly reports pertaining to the period during which the instant petition was filed.

On March 26, 2005, the director issued a request for evidence noting that the record suggests the beneficiary's employment as a first-line manager who is "actively engaged in the day[-]to[-]day work of the company." The director asked that the petitioner identify the beneficiary's daily job duties and explain how his management of the petitioner's convenience store constitutes employment that is primarily managerial or executive in nature. The director further requested copies of the Internal Revenue Services (IRS) Forms W-2, Wage and Tax Statement, issued by the petitioner in the year 2003.

The petitioner responded in a letter dated April 11, 2005, listing the same job duties of the beneficiary as those previously provided with its initial filing. The petitioner noted the additional responsibility of "locating additional retail locations for the [p]etitioner." The petitioner indicated that the beneficiary would oversee two managerial employees, who would occupy the positions of operations-purchase manager and store manager, and would manage "several functions" of the petitioning entity. The petitioner disputed the director's suggestion that the beneficiary would be employed as a first-line supervisor.

The petitioner provided a list of personnel purportedly employed subordinate to the beneficiary, which, in addition to the two managers, included an assistant manager-cashier and three additional cashiers. The petitioner also submitted copies of its Form W-2 issued in 2003.

In a decision dated May 5, 2005, the director denied the petition concluding that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director questioned the petitioner's staffing levels, stating that "a convenience store does not normally require a president, vice president, and two store managers," and emphasized that the year 2003 salaries of the subordinate employees "do not indicate that the employees the beneficiary is supervising are professionals." The director also stated that the record demonstrates that the beneficiary would spend the majority of his time performing the day-to-day activities of the petitioner's business. The director, recognizing that the beneficiary "may make decisions about the general operation of the company," concluded that the beneficiary would primarily perform the company's "lower-level productive tasks." Consequently, the director denied the petition.

Counsel for the petitioner filed an appeal on June 7, 2005. In a July 5, 2005 appellate brief, counsel contends that in its denial, CIS "erroneously place[d] undue weight on the particulars of the employees being supervised in making the determination that the [b]eneficiary will not be employed in a primarily managerial or executive capacity." Counsel states that the director's finding is based on an incorrect interpretation of the statutory definitions of "managerial capacity" and "executive capacity," which, counsel states, resulted in the suggestion that the beneficiary must supervise professionals in order to be considered a manager or executive. Counsel emphasizes that the statutory definition of "managerial capacity" allows for the management of an essential function of the organization.

Counsel also claims that the director "[made] arbitrary determinations about the staffing needs of the [p]etitioner," and incorrectly concluded that the beneficiary would perform the day-to-day activities of the business. To "clarify" the beneficiary's purported responsibilities, counsel submitted copies of four letters from banks and distributors, dated at various times throughout June 2005, who attest to communications with the beneficiary, as well as a list of the beneficiary's job responsibilities. The list of job duties, while essentially the same as that previously provided, allocates the beneficiary's time in the following manner:

10% Hiring and firing managers and supervising subordinate managers.

15% Overseeing preparation of sales and inventory reports, and reviewing and analyzing sales data.

25% Establishing and implementing policies to manage and achieve marketing goals; overseeing marketing campaigns developed by subordinate managers.

15% Reviewing financial reports, and reviewing budgets and expense reports prepared by subordinates.

35% Locating additional retail locations for the future expansion of the company.

Counsel states that while the petitioning entity may be "small, . . . it is necessary for the [b]eneficiary to devote a majority of his time to executive tasks rather than daily productive activities."

Upon review, the petitioner has not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

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. In its statement appended to the Form I-140, the petitioner noted that the beneficiary would render to the United States company "the services of an executive/manager." Counsel also failed to clarify the beneficiary's proposed employment capacity, stating on appeal that the beneficiary is engaged in the managerial task of "overs[eeing] [ ] supervisors and managers *as well as executive tasks*." (Emphasis added). The AAO also notes that despite counsel's discussion on appeal of the statutory definitions of "managerial capacity" and "executive capacity," he failed to specifically identify the beneficiary's qualification for either. The record does not demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5).

The AAO notes that the petitioner submitted essentially the same job description for the beneficiary on three occasions , yet following its initial filing, included the additional task of locating business sites for future expansion. When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary

when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8).

The beneficiary's additional responsibility of locating business sites for the petitioner alters the petitioner's original representations for the proposed position given that it would purportedly occupy the largest proportion of the beneficiary's time. According to the job description submitted on appeal, the beneficiary would devote 35 percent of his time to locating new retail locations, while the remaining 65 percent of his time would be allocated among four other job duties. As a result, the analysis of the beneficiary's employment capacity will be based on the job description submitted with the initial petition.

In addition, the letters submitted by counsel on appeal, two of which address business relationships with the beneficiary during the year 2005, and one that discussed the beneficiary's ongoing communications with the petitioner's landlord, are not probative of the beneficiary's employment capacity during August 2004, the time during which the Form I-140 was filed. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971) (finding that a petitioner 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). Accordingly, the instant analysis will be limited to the evidence submitted with the Form I-140 petition.

The job description offered by the petitioner is not sufficiently detailed to establish the beneficiary's employment in a primarily managerial or executive capacity. The beneficiary's job description encompasses such vague job responsibilities as hire, fire, and supervise employees, oversee the preparation of the company's marketing reports and campaigns, implement marketing policies, review sales data, and manage the company. Despite the director's request for "daily duties" of the beneficiary, the petitioner submitted the same general claims. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will 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 AAO notes that a petitioner's failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

A critical review of the job responsibilities assigned to the beneficiary and his subordinates fails to corroborate the claim that the beneficiary would occupy a primarily managerial or executive position. For example, the beneficiary is represented as "overseeing marketing campaigns developed by subordinate managers." The petitioner, however, does not identify either of its two managers as being responsible for developing its marketing plans. Also, many of the job duties assigned to the store manager and assistant manager are the same, therefore calling into question the true responsibilities held by each of the petitioner's employees, including the beneficiary. 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).

Counsel correctly observes on appeal 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* § 101(a)(44)(C) of the Act, 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.*

Here, the petitioner claims to employ the beneficiary as vice-president, as well as an operations-purchase manager, a store manager, an assistant manager-cashier, and three additional cashiers. The AAO notes that the petitioner has not submitted evidence to establish the employment of the six lower-level employees at the time of filing. The most recent quarterly wage report offered by the petitioner for review, ending March 31, 2004, is not sufficient for purposes of identifying the specific workers employed by the petitioner on the filing date. *See Matter of Katigbak*, 14 I&N Dec. at 49 (stating that a petitioner must establish eligibility at the time of filing). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Regardless, even if the claimed seven-person staff were recognized as employees on the filing date, the record does not demonstrate that the petitioner's reasonable needs would be met through the services of the noted personnel. As noted previously, based on the wages reflected on the petitioner's March 31, 2004 quarterly wage report, and the fact that the petitioner has not submitted documentary evidence relative to the filing date to establish otherwise, the petitioner's three cashiers appear to have been employed on a less than full-time basis at the time of filing. The fourth cashier is claimed to be functioning in the dual role of assistant manager-cashier. The petitioner has not recognized what appears to be a deficiency in the performance of the day-to-day routine tasks associated with its sales and financial functions and the convenience store's daily maintenance. It is questionable how the petitioner could operate a gas and convenience store without requiring that the purported managerial employees, including the beneficiary, perform at least a portion of the associated non-qualifying tasks, such as processing cash and credit card sales, cash reconciliation, stocking and maintaining inventory, and maintaining the business premises. Also, but for the beneficiary, it is not clear who would accomplish the petitioner's "marketing goals," including developing its claimed marketing campaigns. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the purported seven-person staff, three of which are part-time employees.

Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Counsel correctly states on appeal that the beneficiary need not supervise professionals in order to be considered a manager. *See* 101(a)(44)(A)(ii) of the Act (allowing for the supervision of supervisory, professional, *or* managerial employees, *or* the management of an essential function within the organization, or the organization's department or subdivision) (emphasis added). However, counsel cannot merely allege the beneficiary's supervision of managerial employees to establish his employment in a primarily managerial capacity. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the

petitioner's burden of proof. The unsupported 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).

The definitions of executive and managerial capacity require that the petitioner satisfy each of the four criteria. In addition, the petitioner must show that the beneficiary *primarily* performs the high level responsibilities that are specified in the definitions, and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Here, the petitioner has not satisfied these essential requirements.

Based on the foregoing discussion, the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal is dismissed.

Beyond the decision of the director, an additional issue is whether the petitioner demonstrated that the foreign and United States entities enjoyed a qualifying relationship at the time the petition was filed.

To establish a qualifying relationship under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed United States employer are the same employer (i.e. a United States entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The petitioner represents the United States company as an affiliate of the foreign entity, claiming that each company is owned by the beneficiary. As evidence of the ownership of the United States corporation, the record contains a canceled March 6, 2002 stock certificate numbered one, and a number three stock certificate conveying ownership of 490 shares of the petitioner's 1,000 authorized shares of stock to [redacted] The petitioner has not presented stock certificate number two for review by CIS.

The record does not establish the beneficiary's purported ownership and control of the petitioning entity. Although the petitioner's year 2003 federal income tax return identified the beneficiary as the owner of 51 percent of the organization, there is no documentary evidence, such as a stock certificate, stock certificate ledger, or minutes from corporate meetings, corroborating the claimed ownership. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Absent documentary evidence confirming the beneficiary as the petitioner's majority stockholder, the AAO cannot conclude the existence of a qualifying relationship between the foreign and United States entities. Accordingly, the petition will be denied for this additional reason.

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).

The AAO recognizes that CIS previously approved an L-1A nonimmigrant petition filed by the petitioner on behalf of the beneficiary. It must be noted that 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 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). 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 L-1A petitions 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). Furthermore, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. Based on the lack of evidence of eligibility in the current record, the director was justified in departing from the prior nonimmigrant petition approval and denying the immigrant petition.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the 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.