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FILE: WAC 03 111 54427 Office: CALIFORNIA SERVICE CENTER Date: JUN 16 2005

IN RE: Petitioner: [REDACTED]
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:

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 AAO will dismiss the appeal.

The petitioner filed the immigrant petition seeking 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 operating a retail grocery store and fast food hamburger restaurant. It filed this immigrant petition requesting employment of the beneficiary as its president.

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

On appeal, counsel contends that the director "arbitrarily and capriciously denied the petition" when determining the beneficiary would not be employed by the United States entity in a qualifying capacity. Counsel claims that the beneficiary, as president of the organization, "clearly qualifies as an 'executive' if not as a 'manager' as well," noting that the beneficiary is responsible for planning, developing, and establishing the policies and objectives of the business. Counsel also challenges the director's finding that the beneficiary would perform a portion of the daily activities of the business, stating that the twenty-seven workers employed by the petitioner provide the services of the organization. Counsel submits a brief 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. 8 C.F.R. § 204.5(j)(5).

The issue in the instant matter is whether the beneficiary would be employed by 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-

- (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 immigrant petition on February 25, 2003, noting that the beneficiary would be employed by the petitioning organization as its president. The petitioner also indicated on the petition that in this capacity, the beneficiary would be responsible for making the business decisions for the company, and for establishing its policies and objectives. Counsel for the petitioner submitted with the petition the petitioner's organizational chart identifying fifteen employees, including the beneficiary as president. The beneficiary was identified on the chart as overseeing the company's supervisor, who in turn supervised two managers.

The director issued a request for evidence, dated November 1, 2003, asking that the petitioner submit the following documentary evidence with regard to the beneficiary's employment capacity: (1) an organizational chart of the petitioner's staffing levels at the time of filing the petition, clearly identifying all employees under the beneficiary's supervision and briefly describing the job titles and duties performed by each; (2) a detailed description of the job duties performed by the beneficiary on a "typical day"; and (3) copies of the state quarterly wage reports submitted by the petitioner for all workers employed during the fourth quarter of 2002.

Counsel responded in a letter dated January 22, 2004, and submitted an additional letter, dated January 14, 2004 and signed by the beneficiary, wherein the petitioner provided the following job description for the beneficiary:

Duties in the U.S. – [The beneficiary] is employed as [the petitioner's] president. In this capacity, he is responsible for the overall performance and productivity of our company which is currently engaged in a restaurant business. He is involved with every aspect of the company. Specifically, he establishes goals, policies and procedures to be used by all company employees. He directs the organization of the company by appointing, overseeing and supervising his subordinates in various managerial positions.

Every morning at 9:00 am [the beneficiary] holds meeting[s] with his manager who reports to him with daily operations of the company including financial conditions, day to day problems, employee relations, and other matters. Based on the manager's reports, [the beneficiary] makes decisions and instructs the manager to execute the decisions. [The beneficiary] may inform the manager of company goals and directions. [The beneficiary] may throughout the day inspect the business operation to make sure his instructions are being carried out. [The beneficiary] may spend part of the day meeting with business contacts for new business and opportunities.

The manager who reports to [the beneficiary] in turn oversees the general business operations through two supervisors who report to the manager. One supervisor oversees the overall operations of the kitchen including cooking, menu development, and purchasing of necessary supplies. The other supervisor oversees the operations outside [the] kitchen including scheduling of the employees, customer relations, and general maintenance. [The beneficiary], through direct and indirect supervision, is in control of overall operations. Many duties are delegated to [the] subordinate manager and supervisors who in turn have more director supervision over some of the employees. [The beneficiary] meets on a regular [sic] interval with the manager and the two supervisors to discuss company policies and direction.

[The beneficiary] also reviews all accounting and financial reports that are prepared. Based on the reports from the subordinates, [the beneficiary] makes decisions regarding the addition of new food items in the menu, changes in the menu, the discontinuation [sic] of a food item, and setting of food prices in the menu. As dictated by time and events, [the beneficiary] may explore the feasibility [sic] for expansion into other locations throughout the United States.

Counsel also provided a revised organizational chart for the petitioning entity, noting the employment of sixteen workers: the beneficiary, as president, a subordinate manager, two supervisors, two cashiers, four

waitresses, four cooks and two assistant cooks. Also noted on the organizational chart were the following job responsibilities of the beneficiary: (1) business planning; (2) oversee and direct the business operations; (3) make decisions; (4) research business opportunities; (5) interact with the parent company; and (6) perform financial planning. In addition, counsel submitted the petitioner's quarterly federal tax return for the quarter ending December 31, 2002 and its accompanying pages, which identified a total of twenty-eight employees of the petitioning entity during this period.

In a decision dated March 12, 2004, the director determined that the petitioner had not demonstrated that the beneficiary would be employed as the president of the petitioning organization. The director outlined the employees identified on the petitioner's organizational chart compared to those listed on the quarterly tax return and concluded that the workers were all employed on a part-time basis except for the beneficiary. The director stated "[i]t is unreasonable to believe that the beneficiary as 'President,' with the organizational chart submitted, would not be assisting with the day to day non-supervisory duties," and further noted "the petitioner has not established that the nature of the petitioner's business would require 1 president to oversee 27 part time employees." The director also concluded that despite the petitioner's claim that the beneficiary would oversee a manager, the subordinate employees are not managers or supervisors, as they are not managing professional employees. The director stated "[i]n actuality, [the beneficiary] is only a first-line manager who is not supervising professional employees." The director also concluded that the beneficiary would perform the "routine operational activities" of the business rather than managing an essential function of the business. Consequently, the director denied the petition.

Counsel filed an appeal on April 8, 2004, claiming that the director's denial of the petition is arbitrary and capricious. In a brief subsequently submitted by counsel, counsel claims that "the beneficiary clearly qualifies as an 'executive' if not as a 'manager' as well." Counsel contends that the evidence submitted by the petitioner, including documentation of "twenty-seven (27) employees who perform the tasks necessary to providing the services of the organization as well as copies of its 2002 tax returns indicating gross receipts in excess of \$826,000.00 and 2003 tax returns indicating gross receipts in excess of \$716,000.00" demonstrates that the petitioning organization is able to support the beneficiary in a managerial or executive position. Counsel further states that the beneficiary's responsibilities of planning and developing the company and establishing the objectives and policies of the corporation "are completely consistent with the duties of a president of any company." Counsel notes "[t]o require any further specificity would be redundant and mere surplusage." Counsel challenges the director's decision stating that it is without foundation, and contends that the beneficiary is eligible for the classification sought "in that he is employed by the petitioner in either a managerial or executive capacity."

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

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). While the petitioner provided a description of the "typical" daily job responsibilities of the beneficiary, 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. On appeal, counsel states that the beneficiary, as president of the company, would be employed as an executive, yet also repeatedly claims that the beneficiary may be considered to be both an executive and a manager. Despite counsel's assertion that the beneficiary is employed in both capacities, counsel does not outline how the beneficiary meets each of the

four regulatory requirements of managerial capacity and executive capacity. Additionally, the petitioner stated in its job description that the beneficiary performs the executive duties of establishing the company's goals and policies and directs the organization, yet also claimed that the beneficiary supervises managerial employees, which may be deemed to be a managerial responsibility. 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. Moreover, a petitioner may not claim to employ a beneficiary as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. Here, the record is inconsistent in establishing whether the beneficiary should be considered to be employed primarily as a manager or primarily as an executive.

Also, although the petitioner's organizational chart identifies four tiers of managerial and supervisory employees, the additional evidence in the record undermines the claim that the beneficiary directs the company through his subordinate manager and the remaining twenty-five employees. The two employees identified as managers on the petitioner's first organizational chart submitted with the petition vary from those indicated on the organizational chart subsequently submitted in response to the director's request for evidence. The petitioner does not explain why the former managers were demoted to lower-level positions and replaced with employees who were once subordinate to these managers. Additionally, only twelve of the sixteen workers identified on the second organizational chart are also noted as employees on the petitioner's December 2002 quarterly tax return. Counsel also claims on appeal that the petitioner employs twenty-eight workers, yet neglects to reconcile this number with the sixteen workers listed on the petitioner's organizational chart. It is also questionable why the manager, who is claimed to report directly to the beneficiary, earns a wage that is equivalent to a lower-level cook, and why the lower-level cook earns more than an employee in a supervisory position.

While none of these inconsistencies entirely disprove the claim that the beneficiary is employed in a qualifying capacity, the AAO is left to question the validity of the petitioner's claims that it maintains a four-tier organizational hierarchy, that the beneficiary oversees the work of managerial and supervisory employees, and that the beneficiary is relieved from performing the daily functions of the business by lower-level employees. 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). Although provided with an opportunity to clarify these inconsistencies on appeal, counsel merely stated that the petitioner's twenty-seven employees are capable of performing the day-to-day operations of the business themselves. Counsel's blanket statement is insufficient to establish that the beneficiary is relieved of performing operations of the business in order to function in a primarily managerial or executive capacity. Moreover, the petitioner's menu indicates that it is open for business 17 hours a day or 119 hours per week. The three workers who the petitioner claims are employed in a managerial or supervisory position work no more than 16 hours per week each. This raises the question of who is supervising the petitioner's lower-level employees during the majority of the operating hours if not the beneficiary. 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. at 591-92.

The beneficiary's actual job duties in the United States entity are also questionable. The record contains documentation, including the petitioner's 2002 corporate tax return and a "Wilshire State Bank" business checking account statement, that the petitioning organization is operating as both a fast food hamburger restaurant

and a "retail-grocery" store, yet the petitioner outlined the beneficiary's job responsibilities in relation to the restaurant only. It is unclear from the record whether the petitioner is still operating what is identified on the bank statement as "J & J Mini Market." If, in fact, the grocery market is still in operation, the petitioner has not identified the beneficiary's responsibilities in the retail store or noted any workers employed in the market. The petitioner's failure to clarify the operations of the petitioning organization casts doubt on the claim that the beneficiary would devote the majority of his time to high-level managerial or executive job responsibilities in the operation of the petitioner's restaurant. Again, 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. *Id.* at 591.

The AAO recognizes counsel's assertion on appeal that the beneficiary is the highest employee in the petitioning organization, thereby implying that the beneficiary is employed as either a manager or an executive. However, the sole fact that "[t]here are no 'higher' personnel" does not itself establish employment in a qualifying capacity. As discussed above, because counsel alleges employment in both a managerial and executive capacity, the petitioner is obligated to meet *each* of the four criteria set forth in the statutory definitions. The AAO is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title or because the beneficiary is claimed to be the highest employee of the organization.

Based on the foregoing discussion, the petitioner has failed to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, an additional issue in this proceeding is whether the petitioning organization has been doing business in the United States for one year as required in the regulation at 8 C.F.R. § 204.5(j)(3)(D). Documentation in the record, including the "Closing Statement" related to the petitioner's purchase of a fast food restaurant and the Bill of Sale for inventory, indicates that the petitioner purchased the restaurant and its inventory on September 16, 2002, or five months prior to the filing of the immigrant petition. Additionally, the petitioner's license to commence doing business as a restaurant was not issued until September 1, 2002. As discussed above, it is unclear whether prior to this time the petitioner was operating a grocery market in the United States. The record, therefore, supports a finding that the petitioning entity was doing business in the United States for only five months prior to filing the employment-base petition. The petitioner has failed to satisfy the regulatory requirement at 8 C.F.R. § 204.5(j)(3)(D). Consequently, the petition may not be approved for this additional reason.

An additional issue not addressed by the director is the conflicting evidence in the record pertaining to the petitioner's qualifying relationship with the beneficiary's overseas employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity. The petitioner states it is a wholly owned subsidiary of a foreign corporation and provides its stock certificate and stock transfer ledger in support of this statement. However, the petitioner's Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for 2001 indicates in a statement accompanying the petitioner's responses to Schedule K questions that an individual owns the petitioning company. 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). For this additional reason, the petition may not be approved.

Lastly, the petitioner has failed to provide a detailed description of the beneficiary's job duties while employed overseas. The information contained in the record is insufficient to determine that the beneficiary's job duties for the foreign employer were primarily managerial or executive. See section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); 8 C.F.R. § 204.5(j)(3)(i). The actual duties themselves 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). Again, the petition may not be approved 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).

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.