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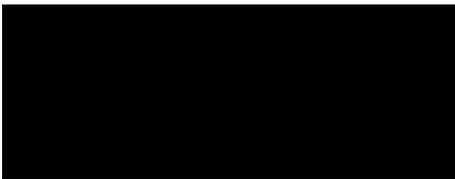
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U.S. Citizenship
and Immigration
Services

B4



FILE: WAC 03 235 52987 Office: CALIFORNIA SERVICE CENTER Date: 007 06 2008

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:
[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 California limited partnership organized in August 1998. It distributes software. It seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner asserts that the denial is based on an inaccurate characterization of the executive duties of the position of President of the company. Counsel submits a brief and letters from businessmen in the petitioner's field of business.

Section 203(b) of the Act states in pertinent part:

- (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. See 8 C.F.R. § 204.5(j)(5).

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

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily

- 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. 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

- 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.

In an August 11, 2003 letter appended to the petition, the petitioner described the beneficiary's position as an executive position. The petitioner stated:

As the President of [the petitioner], [the beneficiary] will continue to be responsible for the establishment and development of the company's internal operations and its commercial activities. The President will continue to manage and direct the overall operations of the company. [The beneficiary] will continue to direct and supervise business planning, financial management and all negotiations on behalf of the partnership. The President of [the petitioner] must exercise supervisory authority over all employees, including managerial and professional personnel, and must exercise discretionary authority over all operating funds of the partnership.

On July 23, 2004, the director requested: (1) a more detailed description of the beneficiary's duties in the United States, including a "typical day" description; (2) a copy of the petitioner's organizational chart describing its managerial hierarchy and staffing levels, as of the date of filing the petition, which should include the names of all executives, managers, supervisors, and number of employees within each department or subdivision, and a brief description of job duties, educational levels, salaries/wages for all employees under the beneficiary's supervision; and, (3) the petitioner's California Forms DE-6 for the third and fourth quarter of 2003 and the first quarter of 2004 that were accepted by the State of California.

In an October 15, 2004 response to the director's request for further evidence, counsel for the petitioner listed the beneficiary's daily duties as the highest-ranking official of the company as:

1. Planning, establishing and implementing policies and objectives of the company;
2. Conferring with subordinates to ensure that functions and operations are being carried out in accordance with business objectives;
3. Reviewing activity reports and financial statements to determine progress and status in attaining objectives and revising objectives and plans;
4. Directing the formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity;
5. Planning and developing industrial, labor, and public relations policies designed to improve company's image and relations with customers; and
6. Evaluating performance of employees for compliance with established policies and objectives of the organization.

Counsel also noted that the beneficiary would directly and indirectly supervise the petitioner's employees and as the most senior official of the business entity, over 90 percent of the beneficiary's duties would be managerial and/or executive.

The petitioner provided an organizational chart showing the beneficiary as president and directly supervising three salespersons. The chart also identified an individual in the position of office manager over a training department and a technical department. The petitioner further provided a list of six employees identifying their positions as sales (2), a senior technician, a junior technician, a network technician, and an office

manager. The petitioner's third quarter California Form DE-6, the quarter in which the petition was filed, showed that the petitioner employed the individuals in the positions of office manager, senior technician, junior technician, and one individual in sales. The California Form DE-6 confirmed the employment of a fifth individual but neither the organizational chart, nor the list of employees revealed this individual's position.

On December 7, 2004, the director again requested further evidence. The director noted that the petitioner had not provided job descriptions for the beneficiary's subordinate employees as had been requested and requested among other things that the petitioner provide the job descriptions. On February 28, 2005, the petitioner provided a list of eight employees; however only three of the employees were listed on the petitioner's California Form DE-6 for the quarter in which the petition was filed. These three held the positions of: operations manager, previously identified as office manager, responsible for overseeing the day-to-day business operations and reporting directly to the beneficiary as president; senior technician responsible for hardware/software installations and network installations; and, junior technician responsible for hardware component building and installation.

On March 10, 2005, the director determined that: (1) the description of the beneficiary's job duties was vague and nonspecific and did not provide sufficient detail regarding the beneficiary's daily duties; (2) the petitioner did not clarify who performed the marketing, budgeting, finance and accounting, advertising, and personnel functions; (3) although the petitioner asserted that the beneficiary managed a subordinate staff, the record did not establish that the subordinate staff is composed of supervisory, professional, or managerial employees; (4) with the organizational structure provided it was reasonable to believe that the beneficiary would assist with the day-to-day non-supervisory duties and the performance of those duties precluded the beneficiary from consideration as an executive; and, (5) the petitioner had not shown that the beneficiary would manage a function of the business but rather would perform the routine operational activities of the entity. The director denied the petition concluding that the record did not establish that the beneficiary would be employed in a qualifying managerial or executive capacity.

On appeal, counsel for the petitioner asserts that Citizenship and Immigration Services (CIS) slights the fact that the beneficiary is the highest-ranking official of a multinational business organization who directs the entire business operations for the petitioner and its affiliates in the United States. Counsel contends that when there are no other persons holding similar or even subordinate executive positions within the company, the duties of such position will necessarily be comprehensive and wide in its discretionary authorities. Counsel claims that because of the complex business that the petitioner operates on a day-to-day basis, a chief executive function is essential to provide direction and purpose.

Counsel asserts that the beneficiary's discretionary decision-making authority includes approving or disapproving major business contract terms, major expenditures, and personnel decisions, identifying and establishing marketing plans for a specific region or a specific market segment, identifying and forming strategic business alliances and joint ventures, and authority over the operating budget. Counsel attaches a list of the beneficiary's duties. Counsel also includes letters from two of the beneficiary's associates who indicate they deal with the beneficiary directly when negotiating their company's contracts with the petitioner. Finally, counsel notes that the beneficiary signs million dollar contracts on behalf of the petitioner.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner provides a general description of the beneficiary's duties, initially paraphrasing elements of the definition of both managerial and executive capacity. *See* sections 101(a)(44)(A)(i) and (iii) and sections 101(a)(44)(B)(i) and (ii) of the Act. First, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. Second, indicating that the beneficiary's duties include planning and developing public relations policies and establishing goals and policies do not sufficiently define the beneficiary's actual duties. 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 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In response to the director's request for evidence, counsel for the petitioner provided a general description of the beneficiary's duties again paraphrasing elements of the definitions of executive and managerial capacity. For example, counsel stated that the beneficiary would be responsible for "[p]lanning, establishing and implementing policies and objectives of the company," and "[e]valuating [the] performance of employees for compliance with established policies and objectives of the organization." These statements paraphrase section 101(a)(44)(A)(iii) and section 101(a)(44)(B)(ii) of the Act and were not responsive to the director's request for a description of the actual duties performed by the beneficiary on a "typical day." Moreover the general statements regarding the formulation of financial programs and planning and developing industrial, labor and public relations policies contain components that are more directly related to operational tasks rather than performing primarily managerial or executive duties related to those 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).

The record also contains confusing evidence relating to the petitioner's number and positions of its employees. For example, the petitioner has consistently confirmed the employment of one individual but has identified her position as either the office manager or the operations manager. The petitioner describes her duties as overseeing the petitioner's day-to-day operations and reporting to the director. This description is insufficient to establish whether this individual is primarily involved in office administration, or is involved in performing operational tasks, or is involved in primarily supervising others who perform operational tasks. Further, the petitioner has claimed to employ three salespersons but the evidence submitted confirms the employment of only one salesperson. 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 assertions on appeal do not aid in understanding the beneficiary's daily duties. Although counsel provides a revised list of the beneficiary's duties, the AAO again observes that the director had requested a detailed description of the beneficiary's duties including a "typical day" description prior to entering his

decision. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The 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). 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). Moreover, a review of counsel's revised description of the beneficiary's duties, in light of the petitioner's staffing, suggests that the beneficiary is involved primarily in promoting and marketing the petitioner's services.

Counsel's implication that any business requires the services of an executive is not persuasive. The record contains evidence demonstrating that the petitioner is the distributor of software and provides repair and training solutions. However, the petitioner has provided evidence of only one salesperson, an office manager/operations manager and two technicians. In addition, the petitioner and counsel have described the beneficiary's job responsibilities in broadly-cast terms relying on statements of the petitioner's business objectives as the description for the beneficiary's duties. Such descriptions are not sufficient when 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. at 1108.

The AAO acknowledges that the beneficiary is the individual responsible for negotiating terms for the petitioner's contracts, marketing, establishing business relationships, controlling the operating budget, and making personnel decisions. However these duties, coupled with the petitioner's staff and their job duties, do not establish that the beneficiary performs primarily the managerial or executive functions associated with these tasks rather than the basic operational tasks necessary to continue the organization's existence. The letters from business associates and the beneficiary's signature on the petitioner's contracts only emphasizes that the beneficiary is performing operational tasks. Again, 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.

To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. 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).

The AAO acknowledges 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, when considering staffing levels, the AAO observes that the petitioner has not clarified how the beneficiary's subordinate employees carry out the

majority of the operational and administrative tasks necessary to establish and operate the petitioner's business.

On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the United States petitioner comprise primarily executive or managerial duties. For this reason, the petition will not be approved.

Beyond the decision of the director, the petitioner has submitted a myriad number of documents purportedly establishing the petitioner's qualifying relationship with the beneficiary's Canadian employer. Upon review of the record, the petitioner has indicated that the beneficiary indirectly owns two-thirds of the petitioner and two thirds of the Canadian entity. *See* the August 11, 2003 letter in support of the petition. The petitioner has also indicated that a Canadian corporation, 2019153 Ontario Inc. ultimately owns the petitioner, which is a general partnership, as well as the beneficiary's Canadian employer. The record suggests that the transfer of the beneficiary's interest in the general partnership and the Canadian entity to 2019153 Ontario Inc. took place prior to filing the petition on August 14, 2003. *See* the petitioner's October 15, 2004 and February 28, 2005 response to the director's request for additional evidence. The petitioner does not explain why the petitioner's actual ownership was not disclosed when the petition was filed. The petitioner's 2003 Internal Revenue Service (IRS) Form 1065, U.S. Return of Partnership Income, Schedule K-1 shows that 2019153 Ontario Inc. owns one-third of the petitioner and the beneficiary's wholly-owned subsidiary owns two-thirds of the petitioner.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. at 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595. Although the AAO recognizes that the beneficiary may ultimately control both the petitioner and the Canadian entity, the AAO cautions that the ease with which the corporate and partnership organizational structures have been manipulated raises concern regarding the permanence of a qualifying relationship between the petitioner and the foreign entity as defined in immigration regulations. *See* 8 C.F.R. § 204.5(j)(2). The petitioner had not consistently demonstrated the beneficiary's ownership or the foreign entity's (2019153 Ontario Inc.) ownership of both the petitioner and the beneficiary's foreign employer. For this additional reason, the petition will not be approved.

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 petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit

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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.