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FILE: EAC 04 061 51780 Office: VERMONT SERVICE CENTER Date: **SEP 07 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, Vermont 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 instant 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 a limited liability company organized under the laws of the Commonwealth of Pennsylvania that provides information technology and electronic data management services. The petitioner seeks to employ the beneficiary as its director.

The director denied the petition concluding that the petitioner had not established that the beneficiary has been employed abroad or would be employed in the United States in a primarily managerial or executive capacity. In addition, the director concluded "as [the petitioner] [has] not established the United States entity is a qualifying multinational organization, [the petitioner] failed to show the beneficiary has been continuously employed for one year within the last three years preceding his entry into the United States as a nonimmigrant." The director noted the petitioner's failure to submit requested documentary evidence relating to the staffing of the United States organization.

Counsel subsequently filed an appeal. The director declined to treat the appeal as a motion, and forwarded it to the AAO for review. On appeal, counsel claims that the director's denial of the petition was based on his failure to thoroughly review the evidence submitted. Counsel challenges the director's statement that the petitioner failed to provide requested evidence, specifically outlining the submitted evidence and resubmitting the documents on appeal. Counsel asserts in her brief on appeal that the petitioner had demonstrated that the beneficiary qualifies as a multinational executive.

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 AAO will first consider whether the beneficiary was employed abroad in a primarily managerial or executive capacity for at least one year during the three years prior to his transfer to the United States as a nonimmigrant.

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

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

- (i) Manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (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 December 30, 2003. In an attached letter, dated December 29, 2003, counsel provided the following description of the beneficiary's employment abroad in a managerial capacity:

During [the beneficiary's] employ with [the foreign entity], as Director, [the beneficiary] was responsible for: (1) overall operations, human resource – development, production and management, (2) implementation and management of projects from U.S. in [the] areas of data conversion, electronic book publishing and medical transcriptions, (3) international business development, negotiator, contractual signator, (4) studying systems and managing project deliverables, (5) coordinating U.S. and Indian operations in areas of client support and market growth.

In an appended letter from the petitioning entity, dated October 25, 2003, the company's chief executive outlined the same job responsibilities performed by the beneficiary while employed overseas. The beneficiary's resume, which the petitioner included with the petition, also noted essentially the same job responsibilities. As evidence of the beneficiary's employment, the petitioner submitted payroll slips dated January 2002 through September 2003 identifying the beneficiary as the company's director.

In a request for evidence, dated May 5, 2004, the director requested that the petitioner provide the following documentary evidence demonstrating the beneficiary's overseas employment in a qualifying capacity: (1) a detailed description of the beneficiary's managerial or executive job duties, including the number of hours per week the beneficiary spent on qualifying and non-qualifying job duties; (2) an explanation of the amount of discretionary authority the beneficiary held in the company's day-to-day operations; (3) documents that demonstrate the managerial decisions made by the beneficiary on the company's behalf; (4) an organizational chart of the company's personnel levels identifying the employees subordinate to the beneficiary and their job titles; (5) a description of the job duties performed by each employee, and the managerial, executive, or technical skills required to perform in the overseas positions; (6) payroll records reflecting the beneficiary's period of employment; and (7) the beneficiary's last annual tax return.

Counsel responded in a letter dated July 19, 2004. In an attached description of the beneficiary's "roles and responsibilities" in the foreign entity, the beneficiary was described as wearing "multiple hats and manag[ing] multiple functions" while performing tasks related to the following: (1) client-interaction and coordination; (2) operations and production management; (3) business development; (4) human-resources management; (5) technology and infrastructure development; (6) report evaluation and documentation; (7) process and workflow management; (8) finance; and (9) corporate affairs. As the beneficiary's job description is part of the record, it will not be entirely repeated herein. Counsel provided an organization chart of the foreign entity reflecting the beneficiary as the director overseeing three subordinate levels of management, and identifying lower-level "teams" for processing, technical support, editors and proofreaders. The petitioner noted on an accompanying document that the company was comprised of 337 employees. Counsel also submitted a brief description of both the job responsibilities held by each lower-level manager and the work performed by the company's "teams."

As evidence of employment, counsel again submitted the beneficiary's payroll slips, and provided statements reflecting the beneficiary's salary, income and the taxes deducted for the years 2001, 2002, and 2003.

The director concluded in his August 26, 2004 decision that the petitioner had not demonstrated that the beneficiary had been employed in a primarily managerial or executive capacity prior to his transfer to the United States. The director noted that the petitioner failed to submit the requested evidence establishing the beneficiary's qualifying employment abroad. The director further stated "it seems probable [the beneficiary] has been . . . engaged in the performance of nonqualifying duties for E13 purposes." Consequently, the director denied the petition.

In an appeal filed on September 23, 2004, counsel claims that "each and every requested item detailed in the [director's] Request for Evidence" was submitted by the petitioner, and challenges the director's conclusion that the beneficiary was not employed overseas in a primarily managerial or executive capacity. Counsel again addresses the responsibilities of the beneficiary as director, which counsel asserts requires the beneficiary to exercise "managerial and executive skills and decision making authority." Counsel also outlines the additional evidence provided in support of the beneficiary's qualifying overseas employment including, the description of the responsibilities held by other employees in the organization, the certificate from the auditors of the foreign entity confirming the beneficiary's position as director, copies of the beneficiary's payroll slips, documentation related to the beneficiary's salary and income tax deductions, a copy of the beneficiary's 2002 bank statements reflecting his earnings, and copies of the minutes from board meetings chaired by the beneficiary, during which resolutions were adopted.

Upon review, the director's decision with regard to this issue only will be withdrawn. The petitioner has demonstrated that the beneficiary was employed abroad in a primarily managerial or executive capacity for at least one year in the three years prior to entering the United States.

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). As the director correctly noted, the beneficiary appears to have been performing some non-qualifying job duties while employed as the director of the foreign organization. However, a thorough review of the beneficiary's daily tasks and the amount of time allocated to each indicates that the beneficiary primarily performed managerial and executive job duties as the director of the organization and did not devote the majority of his time to non-qualifying operational or administrative functions of the company. In accordance with *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991), the petitioner has established that the beneficiary performed the high level responsibilities that are specified in the definitions of "managerial capacity" and "executive capacity," and has proven that the beneficiary *primarily* performs these specified responsibilities.

Additionally, the record demonstrates that the beneficiary was employed in this qualifying capacity for at least one year in the three years prior to entering the United States as a nonimmigrant. The beneficiary entered the United States as a nonimmigrant on January 26, 2003. The record contains payroll slips confirming the beneficiary's employment as the director of the overseas organization from January 2002 until September 2003. Therefore, the director's decision on this issue will be withdrawn.

The AAO will next address the issue of whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

The petitioner filed the immigrant petition noting that the beneficiary would be employed as the director of the company, which employed five workers. In the appended December 29, 2003 letter, counsel provided the following job description for the beneficiary:

At [the petitioning entity], [the beneficiary] is employed in the position of Director. In such position, he is responsible for directing and developing the newly formed U.S. office via establishing and building business associations, interacting with clients, implementing business development opportunities, and expanding the human resource pool. He will direct, contribute to, and oversee the essential operations of business development, strategic marketing, client interface and support, project implementation with the offshore production facility, project and process study, and development/improvement/effective cost project management. He will be responsible for supervising and creating the requisite sales force to achieve the planned business module. He will also provide day-to-day discretionary authority in coordinating and directing services to ensure that project deliverables as well as company financial growth are achieved.

In the petitioner's attached October 25, 2003 letter, the company's chief executive officer provided essentially the same job description. As evidence of the beneficiary's qualifications to perform as the petitioner's director, counsel provided a statement from an associate professor at the business school at Seton Hall University. In his four-page statement, the associate professor stated that following a review of the beneficiary's educational credentials and employment history, it was his opinion that the beneficiary had completed the United States equivalent of a master's-level educational program in business administration. Counsel submitted the beneficiary's records from the Institute for Social Sciences and Research in Vellore, India confirming his completion of a Master of Business Administration in India.

In his May 5, 2004 request for evidence, the director asked that the petitioner submit the following documentary evidence in support of the beneficiary's proposed position in a primarily managerial or executive capacity: (1) a detailed description of the beneficiary's managerial or executive job duties, including the number of hours per week the beneficiary would spend on qualifying and non-qualifying job duties; (2) an explanation of the amount of discretionary authority the beneficiary held in the company's day-to-day operations; (3) an organizational chart of the company's personnel levels identifying the employees subordinate to the beneficiary and their job titles; (4) a description of the job duties performed by each employee, and the managerial, executive, or technical skills required to perform in their designated positions; (5) copies of the petitioner's Form W-2, Wage and Tax Statement, Form W-3, Transmittal of Wage and Tax Statements, Form 941 for the organization's third and fourth quarters of 2003, and Form 1120, U.S. Corporation Income Tax Return, for the years 2002 and 2003; and (6) if applicable, evidence of the petitioner's use of contract workers.

In her July 19, 2004 response, counsel restated the above-outlined proposed job responsibilities of the beneficiary as director of the petitioning organization. Counsel stated that since the filing of the petition, the beneficiary "has been elevated to President." In an attached statement describing the beneficiary's "roles and responsibilities" as president, the petitioner noted that the beneficiary would perform job duties associated with the following functions: (1) business development; (2) client service management; (3) human resource management; (4) marketing and sales management; (5) finance; (6) production coordination; (7) information technology coordination; (8) corporate affairs; and (9) general administration.

Counsel submitted the petitioner's organizational chart identifying the beneficiary as president, overseeing the following positions: senior director of business development, director of publishing services, director of business development, technology director, senior accounts executive, and administrative assistant. Counsel provided a brief description of each of the named positions, as well as that of the chief executive officer and

vice-president of operations. In an attached quarterly report for the fourth quarter of 2003, the time period during which the instant petition was filed, the petitioner identified five workers in the positions of chief executive officer, president, director of publishing services, senior account executive, and administrative assistant.

In his August 26, 2004 decision, the director determined that the petitioner had not demonstrated that the United States company would employ the beneficiary in a primarily managerial or executive capacity. The director noted that the petitioner had failed to submit evidence requested by the director, including descriptions of both the positions held and the job duties performed by employees subordinate to the beneficiary, or the amount of compensation paid to each. The director noted that the description of the beneficiary's job duties is vague and generalized, and restates portions of the regulations defining "managerial capacity" and "executive capacity." The director concluded that the beneficiary would likely be primarily performing non-qualifying job duties of the petitioning entity. The director stated despite his job titles of director and president, the beneficiary would not be employed in a primarily qualifying capacity. Consequently, the director denied the petition.

In her brief submitted with the September 23, 2004 appeal, counsel claims that the director's failure to properly review and consider the evidence resulted in an improper denial of the petition. Counsel addresses evidence submitted by the petitioner in response to the director's request that counsel claims was overlooked by the director, specifically noting that the petitioner provided a statement defining the staff of the organization, including their job titles, job duties and wages. Counsel challenges the director's finding that the beneficiary would not be employed in a primarily managerial or executive capacity, stating that the petitioner presented evidence documenting the managerial work performed by the beneficiary. Counsel stated that the petitioner had also previously provided verification of the beneficiary's authority to operate the petitioner's corporate account, and submitted such evidence as the petitioner's years 2002 and 2003 income tax returns, Forms W-2, and Form 941 for the third and fourth quarter of 2003. As additional evidence of the beneficiary's managerial authority, counsel referenced the previously submitted employee service agreements authorized and executed by the beneficiary, sales and performance reports submitted by subordinate employees to the beneficiary, minutes from the board of directors' meetings chaired by the beneficiary, and non-disclosure and confidentiality agreements executed by the beneficiary on behalf of the company. Counsel claims that the petitioner had previously submitted the documentation overlooked by the director, and provides it again on appeal.

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

The AAO notes that following the director's request for evidence, the petitioner changed the title of the beneficiary's proposed position from that of director to president. 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). 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). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's

request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new duties associated with the beneficiary's "elevated" position of president. Therefore, the analysis of this issue will be based on the job description submitted with the initial petition.

The petitioner does not clarify whether the beneficiary would 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 indicate whether a beneficiary's job duties are either in an executive or managerial capacity, and must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity. Here, the petitioner has merely claimed to employ the beneficiary in the proposed position of director, but does not specify whether the position to be occupied by the beneficiary would be primarily managerial or executive.

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 petitioner's limited job description fails to establish the beneficiary's employment in a primarily qualifying capacity. The petitioner fails to identify the specific job duties associated with the beneficiary's responsibility of directing "the essential operations of business development, strategic marketing, client interface and support, project implementation . . . , project and process study, and development/improvement/effective cost project management." Nor does the petitioner describe the managerial or executive job duties related to the beneficiary's "authority in coordinating and directing services to ensure that project deliverables as well as company financial growth are achieved." 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).

Also, the record prevents a finding that the beneficiary would not be performing non-qualifying daily functions of the business, such as sales, marketing, and customer support. The petitioner noted that the beneficiary would be responsible for interacting with clients, overseeing strategic marketing, and supervising the sales force. However, the petitioner's 2003 fourth quarter report, the period during which the instant petition was filed, identifies five employees, none of whom is responsible for carrying out the sales of the company or market research, or maintaining the company's client coordination and technology development support. The AAO acknowledges that one of the petitioner's employees, the senior accounts executive, possesses the limited responsibility of selling and marketing the company's litigation support services. Yet, the senior director of business development, the director of business development, and the technology director, all identified by the petitioner in its July 19, 2003 response as carrying out the above-mentioned non-qualifying job duties, were not employed until 2004, after the filing of the petition. 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. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, it is reasonable to conclude that at the time of filing the petition the beneficiary would have been personally responsible for the business' sales, marketing and customer support activities, rather than primarily directing these non-managerial and non-executive functions. The February 20, 2004 confirmation letter from the beneficiary to the petitioner's customer confirming a project service order supports the finding that the beneficiary has personally performed non-qualifying administrative functions of the business. 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).

Based on the foregoing analysis, 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.

It is unclear from the director's August 26, 2004 decision whether this proceeding contains the additional issue of the existence of a qualifying relationship between the petitioner and the foreign entity. Specifically, the director stated that the petitioner "[has] not established the United States entity is a qualifying multinational organization." As counsel addressed this issue in her brief on appeal, the AAO will consider whether a qualifying relationship exists between the two organizations.

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 595; *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.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, *supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

Here, counsel claims that an affiliate relationship exists between the foreign and United States entities as a result of the following ownership interests in each organization:

Foreign Entity:



60%
28%
12%

Petitioning Entity:



58%
26%
11%

 05%

The record contains the following documentation confirming the foreign entity's shareholders: (1) certification of incorporation; (2) share certificates; (3) Schedule V, Part II of its annual return; (4) declaration of compliance with registration of a company; and (5) "Return of Allotment." As evidence of the shareholders of the petitioning entity, the petitioner submitted the following documents: (1) operating agreement; (2) an August 1, 2003 written consent of the company's members; (3) stock certificates; and (4) stock transfer ledger. As properly stated by counsel on appeal, if one individual owns a majority interest in a petitioner and a foreign entity, and controls those companies, then the companies will be deemed to be affiliates under the definition even if there are multiple owners. Accordingly, the petitioner has demonstrated that a qualifying affiliate relationship exists between the two entities.

Despite the existence of a qualifying relationship and the beneficiary's employment overseas in a qualifying capacity, the petition will be denied based on the petitioner's failure to establish that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The AAO notes that the petitioner is not barred from filing a new immigrant petition based on the beneficiary's purported current employment as president of the organization.

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.