



U.S. Citizenship
and Immigration
Services

Administrative, and related to
the case of [redacted]
[redacted]

134

[redacted]

FILE:

[redacted]

Office: CALIFORNIA SERVICE CENTER

Date: SEP 14 2005

WAC 03 161 52798

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, 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 claims it is a corporation organized in the State of California in March 2000. It installs and repairs mufflers. It seeks to employ the beneficiary as its general manager. 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 petitioner.

On appeal, counsel for the petitioner asserts Citizenship and Immigration Services (CIS) erred in its determination. Counsel submits a brief and documents 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 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 primarily executive or managerial 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.

The petitioner indicated on the Form I-140, Immigrant Petition for Alien Worker, that the beneficiary would perform all executive and managerial duties and responsibilities. The petitioner attached its organizational chart showing the beneficiary in the position of general manager reporting to the petitioner's president. The chart also depicted an administrative/accounting officer immediately subordinate to the beneficiary's position. The chart further depicted a part-time office clerk, a head mechanic, a part-time mechanic, and a mechanic/welder subordinate to the administrative/accounting officer position.

The petitioner stated that its president performs "executive duties" and included position descriptions for the accounting/administrative officer, the mechanics, and office clerk. The petitioner indicated that the accounting/administrative officer was in charge of the company's finances with regard to loans, credit, and other budgetary concerns and also input data and invoices, received checks and other payments, prepared bank deposits, monitored and recorded accounts receivable and payable, reconciled bank statements, trial balances, and other accounts, prepared and remitted state and federal taxes, prepared company payroll, and prepared and submitted other required reports. The petitioner indicated the three mechanics performed mechanic duties. The petitioner indicated the office clerk was in charge of research and organizational matters, set up accounts and organized liaison and communication between the company and vendors/providers, conducted research to acquire quotes for the marketing and advertising efforts of the company, and checked office and shop supplies.

On July 22, 2004, the director requested further evidence on the issue of the beneficiary's managerial or executive capacity. The director requested a more detailed description of the beneficiary's duties including a detailed "typical day" job description. The director also requested the petitioner's California Forms DE-6, Employer's Quarterly Wage Report, for the second, third, and fourth quarters of 2003 and the first quarter of 2004.

In an October 8, 2004 response, counsel for the petitioner asserted that the beneficiary's job duties met the definitions of both executive and managerial capacity. Counsel provided a September 21, 2004 letter from the vice-president of the petitioner's claimed parent company that specified the beneficiary's job duties as:

- Coordinate improvement procedures regarding service reliability and quality of work in regard to bringing up production and at the same time coordinate with the Head Mechanic/Service Manager to ensure that work is done on a regular basis. Time spent weekly: 6-7 hours weekly.
- Synchronize service quality strategies with parent company management to increase quality output. Time spent weekly: 3-4 hours weekly.
- Implement cost control by solidifying the best terms from suppliers so that [the petitioner] will fall within targeted profit margin. This includes checking and verifying with the Administrative Officer price comparisons and analyzing suppliers' turnaround time in delivery of parts. Time spent weekly: 8-10 hours weekly.
- Provide leadership during management decision making and review meetings. Review meeting of Head Mechanic with the Mechanic regarding labor time, coordination of parts ordering and delivery of vehicles to customers. Time spent weekly: 2 hours weekly.

- Review and make decisions regarding expenditures and negotiate bank credits and loans. Time spent weekly: 7-8 hours weekly.
- Making personnel decisions including hiring and termination of employees, quarterly review of employees' performance and implementation of benefits. Time spent weekly: 1-2 hours weekly.
- Directing and supervising marketing and advertising efforts including searching for new marketing avenues to improve production. A big chunk of the business comes from customer referrals. Review the effectiveness of existing advertising media. Time spent weekly: 10 hours weekly.
- Review and report to the parent company President regarding budgets, cost saving activities, operation cost improvements and management systems. Time spent weekly: 6 hours weekly. Reports to parent company on a regular basis.

The petitioner's second quarter 2003 California Form DE-6, confirmed the full-time employment of the president, the beneficiary as general manager, the administrative/accounting officer, and two mechanics, as well as the part-time employment of the office clerk and a third mechanic.

On November 24, 2004, the director denied the petition determining that the beneficiary's job description was vague and did not establish what the beneficiary would do on a daily basis. The director observed that the petitioner did not clarify who would actually perform the marketing, budgeting, finance, accounting, advertising, and personnel functions. The director determined that it was reasonable to believe that with the petitioner's organizational structure the beneficiary would be assisting with day-to-day non-supervisory duties and that the performance of menial tasks precluded the beneficiary from being considered an executive. The director also found that the positions subordinate to the beneficiary's position were not professional positions. The director further determined that the beneficiary would not be performing the duties of a functional manager. The director concluded that the record did not contain sufficient evidence to demonstrate that the beneficiary had been or would be employed in a primarily executive or managerial capacity.

On appeal, counsel for the petitioner asserts that the direction and management of the operations of the company are entirely the beneficiary's responsibility. Counsel disputes the director's determination that the beneficiary's job description is vague and nonspecific and attaches the petitioner's president's version¹ of the beneficiary's duties. Counsel contends that the petitioner employs sufficient personnel to perform all non-executive functions and again provides the petitioner's organizational chart and job descriptions for the beneficiary's subordinates. Counsel alleges that the beneficiary will not carry out non-supervisory duties.

¹ The petitioner's president claims that the beneficiary spends: (1) 20 percent of his time reviewing financial statements, activity reports, and other performance data to measure productivity and to determine program improvement, assisted by the accounting/administrative officer; (2) 40 percent of his time managing the credit and financing of the company including negotiating contracts, bank credits, and loans and new leases for equipment, assisted by the accounting/administrative officer and office clerk; (3) 20 percent of his time reviewing advertising and marketing proposals, assisted by the office clerk; and (4) 20 percent of his time reviewing policies regarding employees including wages, benefits, problems, and whether to hire or fire employees.

Counsel claims that the petitioner requires an executive to make decisions on advertising proposals. Counsel also references CIS' previous three approvals of the beneficiary as an executive in L-1A intracompany transferee petitions.

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). Counsel and the petitioner do 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. The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity. In this matter, counsel for the petitioner asserted that the beneficiary's job duties met the definitions of both executive and managerial capacity in his October 8, 2004 response to the director's request for further evidence. On appeal, counsel seems to argue that the beneficiary's position is primarily executive. However, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities 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). In this matter, the descriptions of the beneficiary's duties are general. The portions of the descriptions that are more specific depict an individual performing the petitioner's day-to-day operations including budgeting, advertising, and supervising the employees in the petitioner's muffler shop. 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).

Counsel claims that the accounting/administrative officer and the office clerk carry out the petitioner's non-executive functions. The petitioner's president, whose duties are undefined, indicates that the accounting/administrative officer and office clerk assist the beneficiary. However, the record does not demonstrate that the petitioner's reasonable needs require the petitioner's president,² general manager, accounting/administrative officer, and part-time office clerk to all provide the administrative and operational services necessary to support the activities of two full-time mechanics and one part-time mechanic. The petitioner, without providing specifics, would have CIS believe that three individuals working full-time and one part-time employee are required to research advertising, perform cost and pricing analysis, and supervise the performance of two mechanics. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp.*

² The AAO observes that the petitioner has not adequately disclosed the president's role in the organization, instead only indicating his duties were "executive." As such, it appears that the petitioner is claiming that it requires two executives to direct and manage the services of three to four employees.

v. *INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The descriptions of the petitioner's employees' job duties do not correspond with the petitioner's organizational structure and the claimed role of each of the employees in that organizational structure. The petitioner has not established that the reasonable needs of the organization justify the beneficiary's role as a manager or an executive.

Although the petitioner has provided descriptions of the beneficiary and his subordinates job duties, upon review of the totality of the record the job descriptions provided are not credible. For example, the petitioner described the duties of the accounting/administrative officer as those of essentially a bookkeeper who was also charged with the company's finances including loans, credit, and other budgetary concerns. The AAO notes that the petitioner subsequently indicated the beneficiary spent seven to eight hours weekly on concerns relating to expenditures and bank credits and loans. The petitioner does not adequately distinguish between the administrative officer and the beneficiary's role in performing the petitioner's financial services. The petitioner described the duties of the part-time office clerk as an administrator who communicated with vendors/suppliers and conducted research to acquire marketing and advertising quotes. The petitioner subsequently indicated that the beneficiary spent ten hours a week directing and supervising marketing and advertising efforts while also acknowledging that the petitioner's business resulted primarily from customer referrals. The petitioner's description of the part-time office clerk's conduct in relation to the petitioner's marketing and advertising and the amount of time the beneficiary spent "[d]irecting and supervising marketing and advertising efforts including searching for new marketing avenues to improve production," is not credible in light of the petitioner's statement that the petitioner's business comes from customer referrals. The overlap between the beneficiary's and administrative officer's duties and the inexact role the beneficiary plays in the petitioner's marketing strategy are but two examples of the petitioner's failure to sufficiently disclose the beneficiary's actual daily duties, but to instead rely on generalities in an attempt to conform the beneficiary's duties to those of an executive.

The AAO observes that the director specifically requested a description of the beneficiary's "typical daily duties" but received only a general and broadly-cast job description that overlapped with the duties of lower-level employees. 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). Moreover, 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).

The record does not establish that the beneficiary will operate primarily in a managerial or executive capacity. For this reason the petition will not be approved and the director's decision will be affirmed.

Counsel for the petitioner noted that CIS approved other petitions that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. However, if the previous nonimmigrant petitions were approved based on the same unsupported evidence contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has

not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. at 597. It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Moreover, there are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant 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. Further, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Counsel's

Beyond the decision of the director, the petitioner has not established a qualifying relationship with the beneficiary's foreign 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. *See* section 203(b)(1)(C) of the Act.

The petitioner has provided four stock certificates and its stock certificate ledger showing that the petitioner issued stock in April 2000 in the following proportions and for the following amounts:

Stock Certificate 1 to [REDACTED]	- 520 shares for \$2,600
Stock Certificate 2 to [REDACTED]	- 160 shares for \$800
Stock Certificate 3 to [REDACTED]	- 160 shares for \$800
Stock Certificate 4 to [REDACTED]	- 160 shares for \$800

The petitioner's 2000 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, shows on Schedule L, Line 22(b) that the petitioner began the year with common stock valued at \$5,000. The petitioner's 2001 IRS Form 1120 on Schedule L, Line 22(b) shows that the petitioner began the year with common stock valued at \$5,000 and ending the year with stock valued at \$5,000. The petitioner's 2002 IRS Form 1120 on Schedule L, Line 22(b) shows that the petitioner began the year with common stock valued at \$5,000 and ending with stock valued at \$23,342. The petitioner's 2003 IRS Form 1120 on Schedule L, Line 22(b) shows that the petitioner began the year with common stock valued at \$28,342 and ended with stock valued at \$5,000. 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). The petitioner has not supplied sufficient consistent evidence to substantiate that the beneficiary's foreign employer owns and controls a majority of the petitioner's outstanding shares.

Moreover, the record does not contain documentation showing Petrochem Carriers Corporation paid for its purported 52 percent interest in the petitioner. In response to the director's request for evidence, counsel provided secondary evidence in the form of a statement from the foreign entity's vice-president indicating that one of the foreign entity's directors carried the funds to purchase the petitioner's stock into the United States. Counsel notes that there are no bank statements showing the foreign entity transferred funds to the petitioner. In light of the inconsistencies observed in the petitioner's IRS Forms 1120 and the lack of actual documentary evidence to establish the foreign entity's contribution, the AAO does not accept the petitioner's secondary evidence. For this additional reason, the petition will not be approved.

Also beyond the decision of the director, the petitioner has not established that the beneficiary's duties for the foreign entity were primarily managerial or executive. The foreign entity's vice-president states that the beneficiary "was responsible for several executive duties, such as marketing policies and practices accounting procedures and making financial decisions regarding the well-being of the business entity." The vice-president also notes that the beneficiary had responsibility for hiring and firing employees and choosing which professionals, such as accountants, for the foreign entity to use. However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108; *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The petitioner also provides a copy of the foreign entity's organizational chart. The chart does not designate a general manager position. The record does not contain supporting evidence showing the beneficiary's position for the foreign entity was in a managerial or executive position. 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)). The record lacks sufficient evidence establishing the beneficiary's managerial or executive capacity for the foreign entity. 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). For these additional reasons, the petition will not be approved.

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 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.