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U.S. Citizenship and Immigration Services

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FILE: EAC 04 186 53897 Office: VERMONT SERVICE CENTER Date: SEP 16 2005

IN RE: Petitioner:
Beneficiary:

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 appeal will be dismissed.

The petitioner is a corporation organized in the District of Columbia in March 2002. It claims it is engaged in international and domestic trade. 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 managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner asserts that the director's decision was erroneous and contrary to the evidence submitted.

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 petitioner has established that 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
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> i. manages the organization, or a department, subdivision, function, or component of the organization;
>
> ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
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> 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
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> i. directs the management of the organization or a major component or function of the organization;
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> ii. establishes the goals and policies of the organization, component, or function;
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> iii. exercises wide latitude in discretionary decision making; and
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> iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a June 4, 2004 letter appended to the petition, the petitioner indicated that the beneficiary's main executive responsibilities included:

- Direct development of the structure, policies and objectives of the company in accordance with the business plan (10-12 hours per week);
- Direct marker [sic] research and analysis to fulfill parent company's initial objectives (6-8 hours per week);
- Develop financial plans and strategies, including attracting continued investment from the parent company to assure sufficient capital to implement the business plan, as well as direct overall financial and accounting policies and controls (8-10 hours per week);
- Negotiate and ratify contracts on behalf of the company, including final determination of products quantity, price and payment terms (12-13 hours per week); and
- Continue directing the business cooperation between the parent company and its U.S. subsidiary; confer with the Board of Directors of the parent company to establish joint financial strategies; oversee the development of joint projects between the U.S. subsidiary and its parent company (4-6 hours per week).

The petitioner added that the beneficiary would supervise and control the work of an executive manager, a director, and an administrative assistant. The petitioner concluded by stating that the beneficiary would be employed in a managerial capacity.

The petitioner also provided its Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement issued to the beneficiary in 2003 for $55,000 and a 2003 W-2 issued to the beneficiary's wife, as the executive manager, in the amount of $21,000.

On October 21, 2004, the director denied the petition, observing that the petitioner had substantiated the employment of only two employees, the beneficiary and his wife, and that the petitioner had not provided a comprehensive description of the beneficiary's duties. The director determined: that the petitioner had not established that the beneficiary would be involved in the supervision and control of the work of other supervisory, professional, or managerial employees who would relieve him from performing the services of the corporation; that restating sections of the Citizenship and Immigration Service's (CIS) definitions of executive and managerial capacity did not demonstrate that the beneficiary's duties would be managerial or executive; and that the petitioner had not established that it's organization could currently support a managerial or executive position. The director also determined that the petitioner had not established that the beneficiary managed a function.

On appeal, counsel for the petitioner asserts that the beneficiary's past experience and education qualify him for a managerial and executive position. Counsel contends that the beneficiary has been working for the U.S. entity and that the job description provided "exactly fit the definition of executive/manager [u]nder 8 U.S. C. § 1101(a)(44)(A),(B) and (C)." Counsel notes that the petitioner now employs six individuals and provides an organizational chart to demonstrate the petitioner's organizational hierarchy. Counsel asserts that even when

the petitioner had only three employees, the beneficiary did not spend his time on day-to-day functions. Counsel claims that the director improperly considered the petitioner's size without considering the petitioner's reasonable needs. Counsel attaches the petitioner's bank statement and contends that the funds in the petitioner's bank account demonstrate that the petitioner can support an executive or managerial position. Counsel also attaches undated information allegedly listing the petitioner's six employees and their salaries.

Counsel's assertions and claims 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 description of the beneficiary's duties does not demonstrate that the beneficiary will perform primarily managerial or executive duties. The petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include "[d]irecting marker [sic] research and analysis to fulfill parent company's initial objectives," "direct[ing] overall financial and accounting policies and controls," and "[d]evelop[ing] financial plans and strategies. However, the petitioner does not clarify who performs the petitioner's market research or the financial planning and accounting. In addition, the petitioner indicates that the beneficiary "[d]irect[s] development of the structure, policies and objectives of the company in accordance with the business plan," however, the petitioner does not further define the organization's policies and objectives. 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)). 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).

Moreover, the petitioner indicates that the beneficiary will "[n]egotiate and ratify contracts on behalf of the company." These duties are more indicative of an individual performing the daily tasks associated with operating the company. 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). As counsel noted, the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Although the beneficiary's past experience and education may qualify him for a managerial or executive position, the petitioner has not demonstrated it is sufficiently complex to require the services of an individual who performs in a primarily managerial or executive capacity. Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees

who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

Moreover, as the director determined, the record does not substantiate the employment of anyone other than the beneficiary and his wife when the petition was filed. 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). When the petition was filed, the petitioner employed the beneficiary and one other individual. Counsel's assertion that the beneficiary would not be involved in performing the petitioner's daily functions is unsubstantiated. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). The petitioner has not explained how the day-to-day tasks of the organization were carried out, if not for the beneficiary's (and that of his wife, the executive manager's) performance of the petitioner's daily operational and administrative tasks.

Counsel's reference to the petitioner's current employment of six individuals is not relevant to the matter at hand. As noted above, 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. at 49. Similarly, the petitioner's funds in its bank account are not relevant to establishing that the beneficiary's tasks are primarily managerial or executive. The director in this matter determined that the petitioner's organizational hierarchy, specifically, its number of employees, could not support the necessity of a managerial or executive position.

Counsel's contention that the beneficiary's work for the U.S. entity and that the job description provided "exactly fit the definition of executive/manager [u]nder 8 U.S. C. § 1101(a)(44)(A),(B) and (C)," is not persuasive. Again, the unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya,* 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez,* 17 I&N Dec. at 503. Furthermore, 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; *Avyr Associates, Inc. v. Meissner,* 1997 WL 188942 at *5 (S.D.N.Y.).

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 petitioner has not demonstrated that the beneficiary performs the high level responsibilities specified in the definitions and likewise, has not shown that the beneficiary spends the majority of his time on qualifying duties.

Beyond the decision of the director, the petitioner has not established that it was doing business for one year prior to filing the petition on June 9, 2004. The regulation at 8 C.F.R. 204.5(j)(3)(i)(D) requires that the petitioner demonstrate that it has been doing business of one year when filing the petition. The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part: "*Doing Business* means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

In this matter, although the petitioner was incorporated on March 22, 2002 it has not provided evidence it actually engaged in the production of a product or the provision of services until July 2003 when it entered into a contract to purchase a service station. Moreover, the record does not establish that the purchase of the service station was completed. In addition, the record contains invoices for the purchase of goods beginning in September 2003, only nine months prior to filing the petition. Thus, the evidence in the record does not establish that the petitioner began actually conducting business regularly, systematically, or continuously one year prior to filing the petition.

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 this additional reason, 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.