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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **SEP 30 2005**
WAC 03 234 54039

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 preference visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was incorporated in the Territory of Guam and is engaged in the construction business. 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.¹ The director determined that the beneficiary would not be employed in a managerial or executive capacity and denied the petition.

On appeal, counsel disputes the director's conclusions and submits a brief in support of his arguments.

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 a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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 issue in this proceeding is whether the beneficiary would be employed in a managerial or executive capacity.

¹ In the first paragraph on the second page of the denial, the director stated that the petitioner filed Form I-129 to classify the beneficiary as an L-1A intracompany transferee. The AAO acknowledges that this statement was made in error, as the subject of this proceeding is a Form I-140, which the petitioner filed on August 7, 2003. However, the director clearly acknowledges the subject of this proceeding and refers to the relevant documentation submitted in support of the filed Form I-140. Therefore, the director's error will not alter the outcome of the AAO's decision.

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 support of the petition, the petitioner submitted a general overview of the beneficiary's responsibilities and assigned a percentage of time the beneficiary would spend on each responsibility.² As the director has repeated this list in the denial, the AAO need not restate the list in its decision.

² On the fourth page of the denial, the director discusses the list of responsibilities attributed to the beneficiary and indicates that this list was submitted with the petitioner's October 14, 2004 response to the director's request for evidence (RFE). Contrary to the director's understanding, the list of the beneficiary's responsibilities was included in a statement

On July 23, 2004, the director issued a request for additional evidence (RFE) instructing the petitioner to submit its organizational chart describing the company's managerial hierarchy and staffing levels as of the date the petition was filed in August 2003. The petitioner was instructed to list the names and job titles of all of the beneficiary's subordinates and to provide brief job duties and educational levels for each employee directly under the beneficiary's control. The petitioner was also asked to provide a more detailed description of the beneficiary's job duties with an indication as to the percentage of time that would be spent performing each of the listed duties. The director reiterated the need for the petitioner to provide the job titles and position descriptions of the beneficiary's prospective subordinate employees.

Although the petitioner provided an organizational chart in response to the director's request, the date on the chart was August 31, 2004, therefore indicating that the chart was an illustration of the petitioner's hierarchy one year after the filing of the Form I-140.

The petitioner also provided a copy of its wage report for the third quarter of 2003, the quarter during which the petition was filed. However, the wage report was not accompanied with the job titles, descriptions of job duties, educational levels, and each employee's respective place within the petitioner's hierarchy at the time the petition was filed.

In response to the request for a detailed description of the beneficiary's job duties, the petitioner provided the following statement:

Manages all aspects of business engaged in construction and the related services. Directly supervises [the] business manager. Primarily directs, supervises and controls the work of all subordinate supervisory, managerial and professional employees.

Exercises discretion in day-to-day operations of [the] Guam [o]ffice. Has the power to hire and fire employees or to recommend those as well as the other personnel actions for the [sic] all employees of [the] business.

On November 30, 2004, the director denied the petition noting that the petitioner failed to provide a detailed description of the beneficiary's proposed duties and, therefore, failed to establish that the beneficiary's proposed position would be in a qualifying managerial or executive capacity.

On appeal, counsel restates the statutory definitions of managerial and executive capacity and asserts that the previously submitted organizational chart for the U.S. petitioner establishes the beneficiary's top-level position within the organizational hierarchy. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B). However, counsel fails to acknowledge that the director specifically requested an organizational chart that illustrates the petitioner's organizational hierarchy at the time the petition was filed. In the instant matter, the petition was filed in August of 2003. As such, an August 2004 organizational chart, fails to provide the necessary information regarding the petitioner's personnel structure during the relevant time period. Furthermore, precedent case law states that a petitioner must establish eligibility at the time of

dated July 18, 2003, which was submitted in support of the Form I-140. The director issued the RFE on July 23, 2004, one year after the petitioner filed the Form I-140 along with the supporting information. While the AAO acknowledges the director's error, the outcome in this proceeding will remain undisturbed.

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).

The petitioner also submitted a list of employees reflecting its personnel structure as of June 2003. However, 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 petitioner's organizational chart, though a more accurate response to the director's request, is not supported by documentary evidence. The petitioner's third quarterly wage report for 2003, which includes the petitioner's employees for August 2003, lists a total of 13 individuals. However, only six of those individuals appear on the petitioner's June 2003 employee list, which includes a total of 19 individuals. There is no indication as to the position titles or educational levels of the remaining seven employees named in the petitioner's 2003 third quarterly wage report. Furthermore, the only job description submitted by the petitioner was for the beneficiary's proposed position. The petitioner did not provide any position descriptions either for the employees named in its quarterly wage report or for those named in the June 2003 list of employees. Thus, while counsel indicates that the beneficiary supervises employees who possess managerial titles, position titles and educational levels are not sufficient to warrant the conclusion that the beneficiary's subordinates would be managerial employees. An organizational chart and job descriptions are required to make the necessary determination. 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).

Additionally, counsel claims that the beneficiary's executive function includes seeking out new business, which includes negotiating and signing contracts. However, counsel also indicates that the beneficiary "handles the administrative matters of [the petitioner]," which suggests that the beneficiary performs nonqualifying tasks. It is noted that 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). Thus, while a multinational manager or executive may perform a certain number of nonqualifying duties, precedent case law requires that the beneficiary's duties be *primarily* of a qualifying nature.

In examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). In the instant matter, the petitioner has failed to provide a description to adequately convey an understanding of exactly what the beneficiary would be doing on a daily basis. For instance, the petitioner failed to identify the specific duties involved in managing all aspects of the business and supervising his subordinates, which combined consume a claimed 70% of the beneficiary's day. 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. *Id.* The petitioner has failed to answer a critical question in this case: What would 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). The director stressed the significance of a detailed job description in the RFE by specifically instructing the petitioner to be specific as to the beneficiary's subordinates and by requesting that the petitioner assign a percentage of time the beneficiary would spend on each of the listed duties. The director's request for this information was a strong implication that the previously submitted broad list of responsibilities was not sufficient to make a

determination as to the petitioner's eligibility. However, the petitioner failed to comply with the director's specific request and instead submitted another insufficient job description in which the petitioner merely repeated the language of the statute or regulations and, therefore, failed to meet its burden of proof. *Id.* For this reason, this petition cannot be approved.

Beyond the decision of the director, the petitioner has not submitted sufficient information regarding the beneficiary's duties during his employment abroad. The regulation at 8 C.F.R. § 204.5(j)(3)(B) requires the petitioner to submit a statement establishing that the beneficiary's duties for at least one out of the three years prior to the beneficiary's nonimmigrant entry to the United States were within a qualifying managerial or executive capacity. In the instant matter, the petitioner merely recited the definition of managerial capacity and assured CIS that the beneficiary's employment abroad fit the definition. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). However, as previously stated, 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.

Additionally, the petitioner failed to disclose its prior filing of a Form I-140 on August 10, 2001. The record shows that on May 15, 2002 the director issued a denial to the I-140 petition with receipt no. WAC0127757739. Although Part 4 of Form I-140 instructs the petitioner to disclose any prior petitions filed on behalf of the same beneficiary, the petitioner indicated that no such petitions were filed. Based on the previously filed petition and the director's denial of that petition, both of which are contained within the petitioner's record of proceeding, the AAO concludes that the petitioner misrepresented the facts pertaining to the beneficiary's filing history with CIS. It is noted that doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The record lacks any independent objective evidence to resolve this considerable inconsistency. *Id.* As such, the petitioner has given rise to doubt the credibility of its claims.

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). Therefore, based on the additional issues discussed in the paragraphs above, this petition cannot be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.