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U.S. Department of Justice  
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536

[Redacted]

File: [Redacted] Office: VERMONT SERVICE CENTER Date: NOV 18 2002

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)

IN BEHALF OF PETITIONER:  
[Redacted]

**PUBLIC COPY**

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director of the Vermont Service Center initially approved the employment -based preference visa. Upon further review, the director found that the beneficiary was not eligible for the benefit sought, and he ultimately revoked approval of the petition on January 22, 2001 after proper notice. The Associate Commissioner for Examinations dismissed the subsequent appeal, and now reopens the matter on Service motion. The previous decisions of the director and the Associate Commissioner will be affirmed.

The petitioner is a New York corporation that is engaged in the cigar accessories trade. It seeks to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C). The director ultimately revoked his approval of the petition because review of the record revealed that the petitioner had not established that the beneficiary was engaged in a primarily managerial or executive position. The Associate Commissioner affirmed the director's decision on appeal.

The Associate Commissioner now reopens these proceedings so that the petitioner may submit evidence that, according to counsel, was never considered by the director or the Associate Commissioner in these proceedings because it was not made part of the record. This evidence consists of copies of the following documents<sup>1</sup>:

1. Form I-797C, evidencing the approval of an L-1A petition in the beneficiary's behalf. Valid from April 10, 1998 to April 9, 2000.
2. Form I-797, Request for Evidence, dated June 22, 1998.
3. September 15, 1998 letter from counsel to the director in response to the director's request for evidence.
4. Petitioner's Articles of Incorporation and its stock ledger.
5. Petitioner's 1997 U.S. Federal Income Tax Return.
6. Petitioner's financial statement for the first six months of 1998.
7. Petitioner's Form 941 for the last quarter of 1997 and first two quarters of 1998, and a report of contributions for the state insurance fund.

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<sup>1</sup> The documents are listed in order of their appearance in the two bound volumes that are titled "Supplemental Administrative Record." It is noted that many of the documents are already part of the record.

8. Description of the beneficiary's duties for both the overseas and the United States entities.
9. Description of the employees' duties in the petitioner's operations.
10. Evidence of the beneficiary's communications with the overseas entity (Letters between the beneficiary and the overseas entity and AT&T phone bills (two copies)).
11. April 6, 1998 letter from the petitioner's former counsel to the Service regarding an L-1A extension of stay petition that the petitioner filed in the beneficiary's behalf.
12. L-1A petition with attached letter in the support of the petition from the petitioner.
13. The beneficiary's Certificate of Diploma, with translation. (two copies)
14. The beneficiary's Certificate of Appointment, with translation.
15. Power of Attorney letter from the overseas entity, which authorizes the beneficiary to act as the president of the petitioner.
16. Certificate of the beneficiary's work experience at the overseas entity.
17. Overseas entity's license to operate.
18. Description of the overseas entity.
19. Organizational chart of the overseas entity.
20. Certificate of Award for the overseas entity, with translated newspaper article. (two copies)
21. Purchase orders for the overseas entity.
22. Organizational chart of the petitioner.
23. Petitioner's lease.
24. Express mail return receipt, dated November 25, 2000.
25. November 25, 2000 letter from counsel regarding the director's Notice of Intent to Revoke the approval of the I-140 petition.
26. December 20, 2001 letter from counsel to the Administrative

Appeals Office (AAO) regarding the appeal.

27. December 21, 2001 letter from counsel to the director requesting a reversal of the petition's revocation.
28. I-290B, Notice of Appeal with accompanying brief.
29. January 14, 2002 letter from the director to counsel, notifying him that he cannot reverse the revocation because it is before the AAO.
30. Counsel's motion to expedite the adjudication of the appeal.
31. W-2, Wage and Tax Statement, forms for the 1997 and 1998 calendar years.
32. Lease between the petitioner and "The Office Park."
33. Petitioner's bank statements from Citibank.
34. UPS delivery service bills from the petitioner.
35. Hundreds of the petitioner's invoices.

The disputed issue between the director and the petitioner is whether the proffered position involves primarily executive or managerial duties. Counsel has stated that the beneficiary's employment in a primarily executive or managerial capacity has already been favorably adjudicated by the Service in its approval of an L-1A nonimmigrant petition in the beneficiary's behalf. According to counsel, Service policy prohibits the Service from reviewing the issue again in this immigrant petition unless it can establish that it committed a gross error by approving the L-1A petition.

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 evidence that the petitioner submits on motion contains a March 14, 1997 letter that the petitioner submitted to the Service in support of its L-1A petition in behalf of the beneficiary. At that time, the beneficiary's responsibilities as the president were stated as follows:

His mainly [sic] duties are including but not limiting as the followings: to make the commercial negotiations on behalf of the authorizing unit and to check up and sign the contracts and agreements with the American companies and overseas Chinese companies; to make managing and operation plan and policy-decision for the subsidiary in the US, including making annual fiscal budget, allocating the fund and inspecting expenses, having power in hiring and firing local qualified personnel, administrate [sic] the day-to-day operations; to make investigations and researches, submit reports to the parent company about the international market information and the business and managing status of the subsidiary in the US.

In a November 20, 2000 letter, the petitioner's vice-president refined the petitioner's description of the beneficiary's duties. The vice president described the beneficiary's duties as president, his own duties, and the duties of the petitioner's third employee (sales assistant). The descriptions of these three positions follow:

[The beneficiary] oversees the development and expansion of our U.S. cigar accessories company. He plans and establishes company policies and business procedures. He presides over all corporate activity and develops policies toward customers and public, including public relations. He coordinates with our parent company in China. He currently presides over the company and myself, [the vice-president], and I report to him on business activity, including finances and opportunities. Under [the beneficiary's] leadership, we plan to continually expand over the coming year and hire additional workers to relieve [the beneficiary] and myself from some nonmanagement [sic] duties that are necessary to perform while launching and nurturing a company.

[The beneficiary's] duties, if broken down on a weekly

basis, include studying, analyzing & setting company objectives and policy for 10-15 hours weekly including reviewing finances and deciding on company expenditures and investments, reviewing sales figures and client information to decide on product line development strategies, meeting with me to review company progress, problems & steps to take; analyzing promotional strategy & weighing the merits of existing & potential products the company will carry. [The beneficiary] spends another 4 hours preparing weekly and monthly reports and communicating with the Board of Directors of our parent company in China, reviewing the state of our company with the Board and its future development; 3 to 4 hours meeting with corporate clients and possible suppliers of new cigar products which we are interesting [sic] in merchandising; 1 to 2 hours per week attending industry conferences and promotional events; reviewing business proposals and contracts and entering into agreements as President of the company, which if broken down on a weekly basis, are approximately 3 to 5 hours per week. He also spends approximately 2-4 hours per week giving me instructions & guidance and reviewing my work.

[The vice president] sees to daily operations of the business - from leasing space to receiving quotes and keeping company and operational costs to a minimum. He spends more time in the office than [the beneficiary] and answers most questions of interested buyers and sellers who are attracted by our advertising, [the beneficiary's] marketing, or by word-of-mouth. He is on the telephone at least 2-3 hours a day, or 10-15 per week. He meets with [the beneficiary] everyday that [the beneficiary] is in the office for instruction and guidance on how to deal with specific situations that may arise on the day on an average of 2-4 hours per week - gives training, instruction, work assignments and guidance to our sales/office assistant . . . for approximately 6 hours per weeks [sic] broken into 20 minutes to think up and map out assignments, 15 minutes to give out the assignments at the beginning of the day for [the office/sales assistant], a further 15-20 minutes during the course of the day to answer questions by [the office/sales assistant] on the assignments, 20 minutes at the end of the day to review the work assignments and to okay them for copying and eventual signature by [the beneficiary] or [the vice-president]. As the company expands and hires additional workers, [the vice president] will supervise the other employees and assign projects and tasks daily. The total amount of time that he will spend in overseeing the work of employees will correspondingly

increase. [The vice president] further tracks and follows-up on sales, imports, leads and agreements including coordinating supplier production speed and taking responsibility for our company's shipments to customs. This takes him about 5-7 hours per week, which includes communicating with exporters and suppliers overseas via telephone and fax for 6 to 8 hours weekly. [The vice president] also fulfills customs requirements and deals with brokers for approximately 2 hours per week; forecasts company growth and assets for 2 to 3 hours weekly before meeting with [the beneficiary]; gauging sales figures, customer reaction and cash flow; analyzes company operations reports for [the beneficiary] - sometimes written and sometimes verbal before meetings for an average of 3 hours per week; prepares all banking transactions for I [sic] hour weekly, assists [the beneficiary] in promoting the company and with public relations for an average of 2 hours per week, manages all billing and receiving, as well as customer orders and specifications for 4 to 6 hours weekly. [The vice president] has authority to recommend personnel decisions and, when [the beneficiary] travels to China on business, [the vice president] temporarily assumes most of [the beneficiary's] responsibilities and powers.

[The sales/office assistant] [a]nswers telephones, opens mail, take [sic] phone orders and performs other general administrative functions such as writing routine letters, typing, filing and filling out forms, maintaining office supplies, making copies and maintaining office equipment and taking on other tasks as assigned by [the beneficiary] and [the vice president], for 20 hours each week.

Pursuant to 8 C.F.R. 204.5(j)(2):

*Executive capacity* means an assignment within an organization in which the employee primarily:

- (A) Directs the management of the organization or a major component or function of the organization;
- (B) Establishes the goals and policies of the organization, component, or function;
- (C) Exercises wide latitude in discretionary decision-making; and
- (D) Receives only general supervision or direction from higher level executives, the board of

directors, or stockholders of the organization.

*Managerial capacity* means an assignment within an organization in which the employee primarily:

- (A) Manages the organization, or a department, subdivision, function, or component of the organization;
- (B) 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;
- (C) 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
- (D) Exercises direction over the day-to-day operations of the activity or function for which the employee has authority.

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. I.N.S., 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir.(Wash.) July 30, 1991) (emphasis in original).

The evidence in the record does not support a finding that the beneficiary primarily performs the responsibilities that are specified in the definition of executive capacity or in the definition of managerial capacity. As shall be discussed, the evidence indicates that the beneficiary spends the majority of his time on the petitioner's marketing and sales functions. 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 (Comm. 1988).

The petitioner's vice president has described the beneficiary's job duties in a November 20, 2000 letter to the Service. He notes that the beneficiary spends 10-15 hours each week

performing such tasks as reviewing sales figures and client information, and analyzing promotional strategies. The vice president further notes that the beneficiary spends three to four hours meeting with clients and suppliers, one to two hours attending industry conferences and three to five hours reviewing business proposals and entering into contracts. It is clear that none of these duties involves directing the management of the organization or function, or managing an organization or function. These duties, which consume the majority of the beneficiary's time, are related to sales and marketing; they are not related to any executive or managerial responsibilities.

The beneficiary's role in providing the petitioner's marketing and sales services is further evidenced by documents in the record. For example, when describing his duties, the vice president states that he spends time answering phone calls from individuals who "are attracted by . . . [the beneficiary's] marketing." Such a statement lends credence to the conclusion that the beneficiary's primary role with the petitioner is to market its products. Furthermore, in a January 4, 1998 letter that was submitted as part of the petitioner's motion, the beneficiary informs the overseas entity that he "left for Europe in order to handle a lady's wallet business transaction and to purchase [a] Crystal Cigar ashtray and hand carved cigar humidors from Poland." In a January 21, 1998 letter, the beneficiary informs the overseas entity that he drew the dimensions of a packaging box that he would like the overseas entity to produce.

These letters between the beneficiary and the overseas entity show that in addition to marketing duties, the beneficiary also performs sales duties. Certainly, an individual whose primary responsibilities included high-level management duties would not purchase products.

It must be noted that the beneficiary's eligibility as a multinational executive or manager has been based upon the petitioner's organizational structure at the time the petition was filed on August 3, 1999. The Service is limited to looking at the petitioner's organizational structure at the time of filing because a petitioner must establish eligibility at the time of filing the immigrant petition; the beneficiary must have been fully qualified for the visa classification on the date of filing. Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). At the time of filing, the petitioner had been in business for over two years, claimed to have a 1998 gross annual income of approximately \$447,500, and employed three individuals.

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. Systronics Corp. v. I.N.S., 153 F.Supp.2d 7 (D.D.C. 2001). If staffing levels are used as a factor in determining whether an individual is an executive or manager, section 101(a)(44)(C) of the Act

requires the Service to consider the reasonable needs of the organization in light of its overall purpose and stage of development.

In his November 20, 2000 letter, the vice-president stated that the company's plan was to expand and hire additional workers to relieve the beneficiary and himself from some non-management duties. Based on this statement and the description of duties provided for the three employees, the petitioner has not established its need for the services of two purported executive employees and a part-time clerk. It is evident from a view of the documents in the record that, at the time of filing, the reasonable needs of the petitioner required its two purported executives to engage in non-qualifying duties. The court in 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) noted that "[t]he actual duties themselves reveal the true nature of the employment." Here, it is apparent that the beneficiary's actual duties relate to the petitioner's marketing and sales functions rather than to executive or managerial responsibilities. Although an individual who works in an executive or managerial capacity may perform duties that would not generally be classified as executive-level or managerial-level tasks, the petitioner bears the burden of establishing that the beneficiary primarily executes executive or managerial duties and any non-executive or non-managerial duties are merely incidental to the position. Here, the petitioner has not met that burden.

Counsel has claimed that the Service's evaluation of the beneficiary's duties in this immigrant petition violates Service policy. Specifically, counsel states that unless the Service has made a gross error, it should not reevaluate issues that had been favorably decided. Counsel maintains that no gross error occurred in finding that the beneficiary was engaged in primarily executive or managerial duties when the Service adjudicated the L-1A petition that was filed in the beneficiary's behalf.

The Service 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, supra. It would be absurd to suggest that the Service 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). In this proceeding, the director acknowledged that gross error resulted in the approval of an L-1A petition in the beneficiary's behalf, and a review of the petitioner's original description of the proffered position reveals why the director made such a determination. The petitioner initially described the proffered position in a March 14, 1997 letter to the director, which was reproduced earlier in this decision. The petitioner merely provided a generalized description of the

proffered position; the petitioner did not provide any insight into the beneficiary's daily activities. The description also included duties that would not be considered to be at the executive or managerial level, such as conducting research and signing contracts. "Specifics are clearly an important indication of whether an applicant'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, supra. The petitioner did not provide any specific examples of the beneficiary's daily activities in its description of the beneficiary's position. In the absence of a comprehensive description of the beneficiary's duties, the approval of the L-1A petition in the beneficiary's behalf could be considered gross error on the part of the Service. In addition, the Associate Commissioner is not bound by the rulings of the service centers. Louisiana Philharmonic Orchestra v. INS, 2000 WL 282785 (E.D.La. 2000), aff'd, 248 F.3d 1139 (5<sup>th</sup> Cir. 2001), cert. denied, 122 S. Ct. 51 (U.S. 2001). The Associate Commissioner is not required to approve a petition where eligibility has not been established despite the prior approval of an L-1A petition in the beneficiary's behalf.

Finally, counsel claims that the director did not have "good and substantial cause" to revoke approval of the instant petition. Section 205 of the Act, 8 U.S.C. 1155, states that "[t]he Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204 [of the Act]." By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the revocation of a petition's approval, provided the director's revised opinion is supported by the record. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988). Here, the director issued to the petitioner a notice of his intent to revoke the petition and provided the petitioner an opportunity to respond to the issues he raised therein. The petitioner did not submit sufficient evidence to overcome the grounds for revocation.

It is noted that the Associate Commissioner reopened these proceedings in response to counsel's claims that neither the director nor the Associate Commissioner considered evidence that the petitioner had submitted because it was lost by the Service. After a careful review of the evidence that counsel has provided on motion, however, neither the director's nor the Associate Commissioner's decision would have been different; the evidence is of little persuasive value.

The majority of the documents that counsel submits on motion have no bearing on whether the beneficiary has been employed and will continue to be employed in a primarily executive or managerial capacity. These documents, which include, but are not limited to,

AT&T phone bills, invoices, leases, bank statements, articles of incorporation, stock certificates, federal income tax returns, and financial statements, relate to whether the petitioner is a viable business entity and whether it has been doing business. Neither the director nor the Associate Commissioner raised either of these two issues in this proceeding. More importantly, the evidence that is relevant to the question of whether the proffered position is in an executive or managerial capacity is already included in the record. It includes, but is not limited to, a description of the beneficiary's job duties and the job duties of the petitioner's other employees, counsel's appeal brief, and the initial L-1A petition filing. This evidence was thoroughly considered by the director and the Associate Commissioner and it was determined that the beneficiary did not merit classification as a multinational executive or manager. No evidence that has been submitted in conjunction with this motion alters the prior decisions of the Service.

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, the petitioner has not met that burden.

**ORDER:** The previous decision of the Associate Commissioner, dated June 21, 2002, is affirmed.