



U.S. Citizenship  
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[REDACTED]

FILE:

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SRC 04 089 52532

Office: TEXAS SERVICE CENTER

Date:

**DEC 14 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:

[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, Texas 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 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 State of Georgia that is engaged in the import and export of retail clothing items. The petitioner seeks to employ the beneficiary as its president.

The director denied the petition concluding that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

The petitioner 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 for the petitioner contends that the beneficiary would be employed in both a managerial and executive position, during which she would exercise "ultimate authority" over the corporation and its policies, objectives, and employees. Counsel submits a brief 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 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 issue in the instant matter is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

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 February 6, 2004, noting that the beneficiary would be employed as its president, with the responsibility for supervising a salesperson. In an appended letter, dated December 17, 2003, the petitioner provided the following description of the beneficiary's proposed position:

In the position of President, [the beneficiary] ensures that the day-to-day U.S. operations run efficiently, economically, and safely. She manages the training of U.S. personnel in the correct proprietary methodology needed for acquiring clients or merchandise to sell under the company's name. She also manages the hiring and training of U.S. personnel, who will

in turn be responsible for the marketing, sales, and development of the company's products. She establishes business contacts, is responsible for inventory build-up and maintenance and also handles customer service activities. Furthermore, [the beneficiary] is responsible for the advertising and marketing of our products and services. She acts as [a] liaison between [the petitioning entity] and our customers here in the United States and with our parent company . . . in Venezuela.

The performance of these duties requires someone with an in-depth understanding of [the foreign entity's] and [the petitioner's] products, proprietary marketing procedures and import/export procedures. [The beneficiary's] prior experience and job responsibilities make her uniquely qualified to assume this specialized managerial position.

The director issued a request for evidence, dated February 16, 2005, asking that the petitioner provide a "definitive statement" of the beneficiary's proposed position, including: (1) the beneficiary's title and dates of employment; (2) a list of all job duties and the percentage of time to be spent on each; (3) the subordinate managers, supervisors, and employees who would report directly to the beneficiary, including a description of their job titles, duties and educational level; (4) the qualifications required for the beneficiary's position; (5) the beneficiary's level of authority; (6) an explanation of whether the beneficiary functions at a senior level within the organization; and (7) a description of who provides the product sales and services for the corporation or who produces the petitioner's products. The director also requested a description of the petitioner's staffing levels, and Internal Revenue Service (IRS) Forms W-2 for all employees in the years 2002, 2003, and 2004.

In his May 9, 2005 response, counsel attached a letter from the petitioner, dated May 2, 2005, in which the petitioner noted the following job description for the beneficiary:

In the position of President, [the beneficiary] ensures that the day-to-day U.S. operations run efficiently, economically, and safely. She manages sales (30-40% of the time), establishes business contracts (20-30% of the time), is responsible for inventory build-up and maintenance (5% of the time), oversees productivity and quality (10% of the time), and handles customer service activities (20-30% of the time). She also reviewed the financial statements and reports to determine profitability and efficiency (30-40% of the time). Furthermore, [the beneficiary] is responsible for the advertising and marketing of our products and services. . . . She holds the ultimate authority for all decision making at [the petitioning entity].

The beneficiary's job description also included the job duties previously outlined in the petitioner's December 17, 2003 letter. The petitioner noted that the beneficiary would supervise a salesperson, and provided the following description of the sales position:

This individual is responsible for offering and marketing the company's products; maintaining customer satisfaction; developing strategies to improve sales; distribut[ing] and sell[ing] products locally and abroad; follow[ing] business directions to improve sales; participat[ing] with President to increase productivity; and follow[ing] sales proves from beginning to end with efficiency.

The petitioner submitted years 2003 and 2004 IRS Form W-2, Wage and Tax Statement, for the beneficiary and the salesperson, who was hired in 2004.

In a decision dated June 9, 2005, the director concluded that the beneficiary would not be employed by the petitioning entity in a primarily managerial or executive capacity. The director referenced the petitioner's two-person staff, stating "[w]ith only two employees, it must be assumed that the beneficiary was performing most of the day-to-day duties during this time." The director also concluded that it was reasonable to conclude that the petitioner does not need a full time executive or manager. The director stated that the record does not establish that the beneficiary's "primary assignment has been or will be directing the management of the organization nor that the beneficiary has been or will be primarily directing or supervising a subordinate staff of professional, managerial, or supervisory personnel, who relieve [her] from performing nonqualifying duties." Consequently, the director denied the immigrant petition.

In an appeal filed on July 11, 2005, counsel contends that in her "managerial and executive position," the beneficiary would have "ultimate authority and decision making for directing the policies and objectives" of the corporation and supervising the work of subordinate employees. Counsel states that the beneficiary exercises discretionary authority over such daily activities of the company as its marketing, promotions, financials, business contracts, and customer service. Counsel provides the following outline of the beneficiary's proposed job duties:

- review the financial statements and reports to determine profitability and efficiency (30-40% of the time),
- oversee the sales department and staff (30-40% of the time),
- establish business contracts to ensure inventory build-up and maintenance (20-30% of the time),
- oversee customer service recommendations, suggestions, and complaints to ensure customer satisfaction and growth (10-20% of the time),
- responsible for the advertising and marketing of our products and services (5% of the time),
- manage the hiring and training of U.S. personnel, who will in turn be responsible for the marketing, sales, and development of the company's products,
- manage the training of U.S. personnel in the correct proprietary methodology needed for acquiring clients or merchandise to sell under the company's name, and
- act as a liaison between [the petitioning entity] and our customers here in the United States and with our parent company . . . in Venezuela.

Counsel again notes the job duties of the salesperson, the beneficiary's sole subordinate employee, stating that he would sell and market the company's products. Counsel claims the beneficiary "is in no way performing most of the day-to-day duties of the business," and states that "[her] role is essentially to oversee the U.S. company's operations" and negotiate sales agreements to ensure the proper receipt of inventory.

Counsel references the *Occupational Outlook Handbook* as clarification that "[i]n smaller organizations, such as independent retail stores or small manufacturers, a partner, owner, or general manager often is responsible for purchasing, hiring, training, quality control, and day-to-day supervisory duties." Counsel notes that under the beneficiary's supervision, the petitioner's gross sales have increased by approximately \$84,000 over the last two years.

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

The petitioner does not clarify whether it would employ the beneficiary in a primarily managerial capacity as defined under section 101(a)(44)(A) of the Act, or in an executive capacity, as defined under section 101(a)(44)(B) of the Act. The petitioner references the beneficiary's "specialized managerial position" in its December 17, 2003 letter, yet, on appeal, counsel notes that the beneficiary would occupy a "managerial and executive position." A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. As discussed below, the petitioner has not satisfied this requirement.

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 record indicates the beneficiary would primarily perform non-managerial and non-executive tasks of the organization, rather than the managerial or executive job duties outlined in sections 101(a)(44)(A) or (B) of the Act. Specifically, based on the petitioner's representations in its May 2, 2005 letter, the beneficiary would spend approximately 45 - 65 percent of her time executing business contracts, maintaining inventory, and handling customer service inquiries, plus an additional undocumented amount of time performing the company's advertising and marketing, and acting as a liaison with the petitioner's customers.<sup>1</sup> In addition, despite the claim that the beneficiary would also devote approximately 30 - 40 percent of her time to "reviewing" financial statements and reports, the record does not clarify whether the company's accountant would prepare these reports. In other words, due to the lack of documentation, it is reasonable to conclude that the beneficiary would also be personally responsible for maintaining financial records, such as daily sales ledgers, receipts, and wages, and performing the company's bookkeeping, thereby increasing the amount of time she would devote to non-qualifying functions of the petitioner's 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).

Although the director based his decision partially on the size of the enterprise and the number of staff, the director did not take into consideration the reasonable needs of the enterprise. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner was a two-year-old import and export company that claimed to have a gross annual income of approximately \$46,000. The firm employed the beneficiary as president, plus a salesperson. The AAO notes that the beneficiary would not be supervising the work of supervisory, managerial or professional employees. *See* § 101(a)(44)(A)(ii). While the petitioner noted that it employed a salesperson who would perform the actual day-to-day, non-managerial operations of the company, the

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<sup>1</sup> The AAO notes that the sum of the percentages provided by the petitioner exceeds 100 percent, thereby creating confusion and doubt as to the amount of time the beneficiary would spend on each named task. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

additional non-qualifying functions associated with maintaining a business, such as marketing, advertising, inventory, bookkeeping, payroll, customer service, and negotiations would be performed by the beneficiary. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president and a salesperson. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Counsel references the *Occupational Outlook Handbook* as evidence that the beneficiary's responsibility of negotiating and monitoring inventory contracts is a task customary to the position of president of a "small organization." The *Occupational Outlook Handbook* provides guidance in selecting a career and occupation by identifying working conditions, earnings, and relevant educational background. The information contained in the *Occupational Outlook Handbook*, however, does not diminish the statutory requirements for "managerial capacity" and "executive capacity," as well as well-established case law. The AAO recognizes that a manager or an executive may perform a portion of the non-qualifying functions of a petitioning business. However, a beneficiary who *primarily* performs the functions related to the production or sale of the petitioner's products, as is the case in the instant matter, is not considered to be employed in a primarily managerial or executive capacity.

Based on the foregoing discussion, 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.

Beyond the decision of the director, an additional issue is whether the beneficiary was employed abroad in a primarily managerial or executive capacity. The petitioner indicated in its May 2, 2005 letter submitted in response to the director's request for evidence that the beneficiary spent 60 percent of her time reviewing financial statements, negotiating business contracts, "handling customer service activities, and ensuring customer satisfaction." The record does not substantiate the claim that the beneficiary was responsible for "reviewing" the financial documents. Rather, as is the case in the beneficiary's employment in the United States, it appears that the beneficiary maintained the company's business and financial records, including bookkeeping, account ledgers, and payroll. While the petitioner noted that the remaining 40 percent of the beneficiary's time was devoted to directing the foreign company's sales, the limited job description does not detail any specific managerial or executive tasks performed by the beneficiary. Again, 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. at 604. 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). For this reason, the petition will be denied.

An additional issue is whether a qualifying relationship exists between the foreign and United States entities. The record contains inconsistencies in the purported qualifying relationship. The petitioner noted a parent-subsidary relationship, but failed to submit supporting documentation to establish the ownership of the

United States company. In addition, the submitted tax documentation indicates that the petitioning entity is a sole proprietorship owned by the beneficiary. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. First-preference immigrant status under section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C), requires that the beneficiary have a permanent employment offer from the petitioner. A petitioner who is a nonimmigrant temporary worker is not competent to offer permanent employment to an alien beneficiary for the purpose of obtaining an immigrant visa for the beneficiary under section 203(b)(1)(C) of the Act. *Matter of Thornhill*, 18 I&N Dec. 34 (Comm. 1981). For this additional reason, the petition will be denied.

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).

The AAO recognizes the beneficiary's previously approved L-1A nonimmigrant petition. It must be noted that many I-140 immigrant petitions are denied after CIS approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 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. Because CIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity). Furthermore, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. Based on the lack of evidence of eligibility in the current record, the director was justified in departing from the prior approvals and denying the immigrant petition.

The director is instructed to review the previous nonimmigrant approvals for possible revocation pursuant to the regulation at 8 C.F.R. § 214.2(l)(9).

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.