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FILE: WAC 01 254 54233 Office: CALIFORNIA SERVICE CENTER Date: FEB 28 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

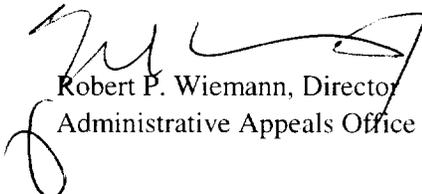
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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, 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 is a corporation organized in the State of California in March 1983. It distributes electronics products. It seeks to employ the beneficiary as its vice-president of marketing. 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 entity.

On appeal, counsel for the petitioner notes that the director has confused this file¹ with another and questions whether the director properly considered the facts of this matter. Counsel contends that the record clearly establishes that the beneficiary is a manager.

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.

¹ On January 8, 2004, the director requested that the petitioner submit a reconstructed Form I-140 petition (WAC 01 254 54233) along with copies of all supporting documentation. On March 29, 2004, the petitioner submitted a copy of the original Form I-140 and "as much of the prior material [submitted] that we could gather from our files." The petitioner noted that it believed that it had submitted copies of almost everything previously submitted.

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 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

- 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 a May 25, 2001 letter appended to the petition, the petitioner stated that due to changing business conditions in the United States it required the beneficiary's services permanently. The petitioner did not further detail the beneficiary's duties.

On February 20, 2002, in response to the director's request for further evidence in support of the petition, the petitioner provided its organizational chart and a description of the beneficiary's duties. The petitioner's organizational chart depicted the beneficiary in the position of vice-president of sales and marketing. The chart also showed four sales agents reporting directly to the beneficiary. The chart identified three of the sales agents as working in Mexico, and the fourth working in the United States.

The petitioner stated that the beneficiary "is in charge of developing the sales and the marketing strategies for all companies and products represented by [the petitioner] in the field of Electronic Consumer goods." The petitioner listed the beneficiary's main duties as:

To travel to Mexico City every month to coordinate the sales to main customers in the city like Sears Roebuck, Costco, Wal Mart, Office Max trough [sic] CPM of Mexico etc, due [sic] sales visits together with sales commissioners in the city and supervise all operations related with sales and services given by [the petitioner].

To travel to Tijuana BC every other day to coordinate the sales and marketing strategies in that territory.

To travel once per month to Calexico CA and Mexicali BC to visit main customer Coppel (170 Dept. stores all over Mexico) purchasing offices.

To coordinate all sales activities related with the US sales office and US companies represented and this takes about 60% of the time.

Participate in all sales staff meetings and with [the petitioner's] Operations Mgr [sic] and Adm. Mgr. [sic] [o]nce per week every Thursday from 10:00 AM to 12:30 PM.

Participate in board of directors meetings every month.

Have meetings periodically and also sales visit together with the persons representing the companies listed.

Assist to [sic] main shows in USA related with consumer goods.

The petitioner also noted that the United States-based sales agent under the beneficiary's supervision is in charge of sales to Mexican customers with U.S. purchase offices, and the three sales agents located in Mexico are in charge of sales in Tijuana, Baja California and in Mexico City, Mexico. The petitioner's California Form DE-6, Employer's Quarterly Wage and Withholding Report, confirmed the employment of the beneficiary and the United States sales agent, as well as 10 other employees not listed in the beneficiary's chain of command.

The director determined that petitioner did not possess the organizational complexity to warrant the beneficiary's position as an executive. The director observed that the beneficiary supervised sales agents and noted that the sales agent positions were not professional positions. The director concluded that the beneficiary was a first-line position over non-managers and non-professional employees.

On appeal, the petitioner reiterated that the beneficiary "is in charge of developing the sales and the marketing strategies for all companies and products represented by [the petitioner] in the field of Electronic Consumer goods." The petitioner indicated that it represented United States manufacturers of electronic products and was responsible for the presentation and marketing campaigns for those products in Mexico. The petitioner stated that the beneficiary coordinates campaigns and sales through the petitioner's affiliated Mexican company and that the actual sales are handled through employees of its Mexican affiliate.

The petitioner noted that the beneficiary coordinates sales campaigns and strategies amongst the three principal cities [in Mexico] where its major customers are located. The petitioner stated: "[the beneficiary] plans, establishes and coordinates the marketing campaigns for our American manufacturers, and he receives only general supervision from the company President to whom he reports. He has virtually complete discretion in planning and executing the sales campaigns." The petitioner concluded that the beneficiary's duties fit clearly with the statutory definition of executive capacity.

The petitioner'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). The petitioner does not clarify whether the beneficiary would 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 may not claim a beneficiary is to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

In this matter, the description of the beneficiary's job duties includes traveling and marketing the American manufacturers' products that the petitioner represents. The beneficiary is marketing products. 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). In addition, the beneficiary coordinates the sales campaigns amongst his four subordinate sales agents. This is the duty of a first-line supervisor. 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. See section 101(a)(44)(A)(iv) of the Act. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). In the instant matter, the petitioner has not, in fact, established that a bachelor's degree is necessary to perform the petitioner's sales activities.

The petitioner's paraphrasing of the definition of executive capacity and conclusion that the beneficiary's duties fit within this definition is not persuasive. 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Although the appeal will be dismissed, the AAO notes that the director based his decision, in part, on an improper standard. The director's comments are inappropriate. The director should not hold a petitioner to his undefined and unsupported view of "common business practice" or "standard business logic." The director should instead focus on applying the statute and regulations to the facts presented by the record of proceeding. Although Citizenship and Immigration Services (CIS) must consider the reasonable needs of the petitioning business if staffing levels are considered as a factor, the director must articulate some rational basis for finding a petitioner's staff or structure to be unreasonable. See section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). The fact that a petitioner is a small business or engaged in a particular industry will not preclude the beneficiary from qualifying for classification under section 203(b)(1)(C) of the Act. For this reason, the director's decision will be withdrawn, in part, as it relates to the reasonable needs of the petitioning business.

On review of the entirety of the record, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the petitioner comprise primarily executive or managerial duties.

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 petitioner states that the beneficiary had been "in charge of establishing sales and marketing strategies for electronic consumers products and 'telephony' products sold by the company" and had been "responsible for all sales negotiations between the company and the different brands of products and companies represented." It appears, based on this description, the beneficiary was previously employed primarily to promote, sell, and act as the petitioner's representative in sales negotiations concerning various third party products. 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 at 604. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

In addition, the petitioner has submitted confusing evidence regarding its affiliate relationship with the beneficiary's foreign employer.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In this matter, the petitioner submits three stock certificates and its April 12, 1983 minutes of the first meeting of the board of directors. These documents show that three individuals own equal shares in the petitioner. The petitioner also submits a summary translation of the foreign entity's general meeting of shareholders dated December 23, 1998. The translation of this document indicates that the petitioner's original three shareholders own equal shares in the foreign entity. However, other documentation in the record, including the petitioner's 1999 and 2000 Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return, indicates that the petitioner is owned by four (or more) shareholders and include an individual not originally identified as a shareholder. 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). Upon review of the inconsistent evidence in the record, the AAO cannot conclude that the petitioner has a qualifying relationship with the foreign entity.

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.

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.