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FILE: WAC 02 242 50628 Office: CALIFORNIA SERVICE CENTER Date: **JUL 19 2005**

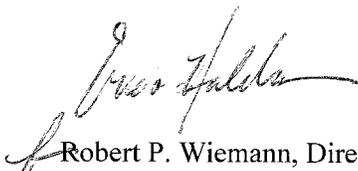
IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

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 limited liability company organized in the State of New York in February 1998. The petitioner claims to own a 60 percent membership interest in [REDACTED] which based on separate Internal Revenue Service (IRS) Forms 1065, U.S. Return of Partnership Income, is a separate entity. [REDACTED] is located in the State of California and claims to employ the beneficiary. However, the petitioner has also submitted evidence that [REDACTED] employed the beneficiary when the petition was filed. The petitioner in this matter manufactures and sells compact discs and seeks to employ the beneficiary as a mastering 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.

The director determined that the petitioner had not established that the beneficiary had been employed abroad in a managerial or executive capacity for one of the three years prior to entering the United States as a nonimmigrant. The director also 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 asserts that the director offered no analysis for classifying the beneficiary as a first-line supervisor. Counsel notes that the director, in his previous approvals of the petitioner's Forms I-129 petitions, found that the beneficiary is an L-1A 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.

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 first issue in this proceeding is whether the petitioner has demonstrated that the beneficiary had been employed in a managerial capacity for the foreign entity in one of the three years prior to entering the United States as a nonimmigrant. The petitioner does not claim that the beneficiary was employed in an 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. 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.

In a July 17, 2002 letter appended to the petition, the petitioner indicated that the beneficiary had been employed as the mastering manager for the foreign entity since 1998 and that in this position she supervised eight employees for the foreign entity. In addition, the petitioner stated that the beneficiary provided technical support, was responsible for setting and maintaining budgets and cost controls, analyzing production to control operating costs, maintaining inventory levels, and formulating the master schedule. The petitioner also noted that the beneficiary established production and quality control standards, ordered the modification

of equipment and machines, and analyzed the entire operation to ensure product quality and obtained the optimum production and utilization of human resources. The petitioner provided a copy of the foreign entity's organizational chart showing the "mastering" department under the foreign entity's operations department. The chart did not include names or titles of the positions in the mastering department but included the number "3" in the box identifying the mastering department, apparently to reflect three employees in the department.

On October 19, 2002, the director requested the foreign entity's organizational chart, requesting that it include the current names of all executives, managers, supervisors, and number of employees within each department or subdivision, and all employees under the beneficiary's supervision by name, job title, and brief job description.

The petitioner provided the foreign entity's organizational chart in its January 9, 2003 response to the director's request for evidence. The organizational chart showed the beneficiary in the position of mastering manager from 1998 to 2001. The chart depicted the beneficiary's position over seven departments including the graphics and printing department, the purchasing department, the packaging and warehouse department, production department, information system department, quality control department, and the mastering machine operator department. The chart showed that each department included a manager and designated approximately 25 employees under the supervision of the various "managers."

The petitioner, through counsel, also noted that the beneficiary had been responsible for the mastering and the production systems, providing technical support to the mastering machine operators, and supervising the mastering machine operators for quality control, as well as coordinating with the production department, graphics and printing department, purchasing department, quality control department and the packaging and warehouse department.

On February 26, 2003, the director again requested information regarding the beneficiary's duties as a manager or executive for the foreign entity. The director requested that the petitioner clearly identify the beneficiary's position on the foreign entity's organizational chart and list all employees under the beneficiary's supervision by name, job title, and brief description of job duties.

On May 19, 2003, the petitioner responded by providing a third organizational chart. The organizational chart in the record has been partially torn, such that the total number of employees under the beneficiary's supervision cannot be determined. The chart does depict four mastering machine operators and six ". . . operators" under the beneficiary's supervision. The petitioner, again through counsel, stated that the beneficiary had 16 employees under her supervision, including six shift managers, six line operators, and four mastering machine operators. Counsel also provided a brief description of the beneficiary's duties.

On November 22, 2004, the director denied the petition in a grammatically incorrect and poorly articulated decision. The director determined that the organizational charts submitted contradicted each other; that the descriptions of the beneficiary's job duties for the foreign entity contradicted each other; and that the beneficiary's job duties appeared to include primarily day-to-day operational tasks. The director concluded that the beneficiary's position for the foreign entity did not qualify as managerial because the beneficiary was not managing other managers or professional employees.

On appeal, counsel does not specifically address the director's determination regarding the beneficiary's position for the foreign entity. Instead, counsel seems to rely on the beneficiary's past approvals as an L-1A intracompany transferee. Counsel asserts that without a showing or claim of Citizenship and Immigration Services (CIS) error in its previous findings that the beneficiary was a manager, it is arbitrary and an abuse of discretion for CIS to now conclude that the beneficiary is not a manager.

Counsel's assertions are not persuasive. The AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant 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.

Moreover, it must be noted that many Form I-140 immigrant petitions are denied after CIS approves prior nonimmigrant Form I-129 L-1A 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). Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than Form 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).

Further, the AAO is not bound or estopped by the previous decisions of the service center director. The AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Finally, each petition is a separate record of proceeding and receives an independent review. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Because the approved nonimmigrant petitions are not part of the current immigrant visa record of proceeding, the AAO cannot determine whether the previous L-1A petitions were approved in error, or whether the beneficiary was originally eligible but the facts changed before the Form I-140 immigrant petition was filed.

The petitioner has not provided evidence sufficient to overcome the director's determination that the beneficiary had not been employed in a managerial or executive capacity abroad for one of the three years prior to entering the United States as a nonimmigrant.

The next issue in this proceeding is whether the beneficiary's position for the United States petitioner will be primarily managerial. The petitioner does not claim that the beneficiary's position will be an executive position.

The director in his November 22, 2004 decision recites the petitioner and counsel's descriptions of the beneficiary's duties for the United States entity. The AAO will not repeat the descriptions in their entirety in this decision.

In the petitioner's July 17, 2002 letter in support of the petition, the petitioner indicated that the beneficiary is and would be the petitioner's mastering manager "responsible for the daily management of the mastering department including staff recruitment and management, security, purchasing, shipping and maintenance." The petitioner also indicated that the beneficiary would coordinate all activities concerning production of "L&M Stampers" for optical disc products, utilizing knowledge of the product technology, production methods and procedures and the capabilities of machines and equipment, maintaining production and quality control standards, supervising employees on production and printing lines, organizing work schedules and formulating training manuals and procedures, implementing new procedures or operating methods to eliminate problems and improve product quality, and provide technical support.

The record contains the United States entity's organizational chart submitted in response to the director's October 2002 request for evidence. The organizational chart depicts the "mastering department" as one of seven departments within the petitioner's operations division. The petitioner indicates that the beneficiary supervises a night shift supervisor, three mastering machine operators, a graphics and printing manager, a packaging and warehouse manager, and a purchasing manager. The petitioner indicates that the beneficiary is responsible for: staff training, quality control, production of "stampers," maintenance, and analyzing mastering reports to identify problems; receipt and checking all masters sent by customers, correcting problematic masters if possible, preparing material for production runs, and organizing and maintaining materials; operation of the mastering system, shift production, coordinating production according to the plant schedule and priority, "stampers" quality, providing technical support and solutions, and developing the masters into "exa-tapes."

The record also contains the United States entity's organizational chart submitted in response to the director's February 2003 request for evidence. The second organizational chart depicts the beneficiary's position in the mastering department with five employees. The chart also shows the injection department directly beneath the mastering department and identifies the beneficiary as also being in this department with eleven employees. The petitioner identifies the employees in the mastering department by name and job title, which include a night shift equipment operator and supervisor, a night shift equipment operator, and three-day shift equipment operators. The petitioner also lists the job titles and names of employees in the production department, including an injection day shift supervisor, an injection night shift supervisor, and nine injection lines operators. The petitioner indicates that the beneficiary hires and trains staff, maintains the equipment for creating the masters, troubleshoots special equipment, provides technical support, fixes problematic medias, maintains quality control of the compact discs/digital video discs masters (stampers) and the final product, and keeps in contact with the client's authoring studios. The petitioner indicates that the beneficiary also organizes the work schedule for employees, formulates training manuals, plans, production activities and

establishes production priorities, supervises employees on the mastering equipment, looks for vendors, maintains inventory levels, and sets and maintains budgets and cost controls.

The director observed that the petitioner's organizational charts contained conflicting evidence regarding the number, title and positions of employees under the beneficiary's supervision. The director noted that the petitioner's organizational charts reflected that the beneficiary would be a first-line supervisor and that the petitioner had not shown that the positions subordinate to the beneficiary were professional positions. The director concluded that the evidence failed to establish that the beneficiary would be a manager or an executive for the petitioning entity.

On appeal, counsel for the petitioner asserts that the director offered no analysis or rational basis for classifying the beneficiary as a first-line supervisor. Counsel contends that even if the beneficiary could be classified as a first-line supervisor she would still qualify as a manager because she oversees two supervisory employees and fourteen subordinate employees. Counsel notes that the "injection supervisor" is responsible for supervising, planning, organizing and directing the injection department. Counsel claims that the beneficiary, as mastering manager, oversees both the mastering and injection departments. Counsel again asserts that prior approvals, when there has been no change in job title or duties and no claims of error, should require approval in this matter in the interest of consistency and public policy.

Counsel'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 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, both counsel and the petitioner portray the beneficiary as the individual responsible for maintaining production and quality control standards, for providing technical support and troubleshooting technical problems, for maintaining inventory levels and setting and maintaining budgets and costs controls, as well as, security, purchasing, shipping, and maintenance. These are duties that are typical of a position directly involved in the day-to-day operations of the petitioner. The petitioner does not explain how these duties encompass the high level responsibilities specified in the definition of managerial capacity. The petitioner and counsel also depict the beneficiary as directly involved in staff recruitment, staff training, supervising employees on production and printing lines, organizing work schedules and formulating training manuals and procedures. This description depicts an individual engaged in a supervisory role. If the beneficiary's duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

In this matter, the petitioner initially claimed that the beneficiary would supervise employees on the production and printing lines. In the petitioner's October 2002 response to the director's request for evidence, the petitioner expanded upon the type of job positions under the beneficiary's supervision by identifying the beneficiary's subordinates as a night shift supervisor, three mastering machine operators, a graphics and

printing manager, a packaging and warehouse manager, and a purchasing manager. The petitioner did not provide sufficient evidence to establish that any of these employees supervised subordinate staff members or managed a clearly defined department or function such that they could be classified as managers or supervisors.

In the petitioner's February 2003 response to the director's request for evidence, the petitioner identified the beneficiary's subordinates as a night shift equipment operator and supervisor, a night shift equipment operator, three-day shift equipment operators, an injection day shift supervisor, an injection night shift supervisor, and nine injection line operators. Although the petitioner labeled three of the beneficiary's subordinates' positions as supervisory positions, the petitioner offered no evidence or description sufficient to establish that the duties of the positions comprised primarily supervisory duties rather than the responsibility of a senior team member. 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 AAO acknowledges counsel's assertion on appeal that the day shift injection supervisor supervises nine employees, however, 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). Providing a title for a position is not sufficient to establish the duties of that position.

Moreover, the petitioner's initial iteration of the beneficiary's job duties limited the beneficiary's supervisory role to the production and printing lines. The petitioner's second iteration of the beneficiary's duties and the accompanying organizational chart showed that the beneficiary supervises seven individuals, four in the mastering department and three others involved in the graphics and printing department, the packaging and warehouse department, and the purchasing department. In the petitioner's third iteration of the beneficiary's duties and the accompanying organizational chart, the beneficiary supervises sixteen employees in only two departments, the mastering department and the production (or injection) department. 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). Further, 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). Whether the inconsistencies arise because the petitioner has expanded its number of employees on the production and printing lines or whether the petitioner has attempted to expand the beneficiary's responsibilities to more closely align with the definition of managerial capacity, the record does not substantiate that the beneficiary's primary duty at the time the petition was filed involved the supervision of managerial, supervisory, or professional employees.

Counsel's complaint that the director did not offer an analysis or rational basis for classifying the beneficiary as a first-line supervisor is not persuasive. Although the AAO acknowledges that the director's poor use of grammar made the decision difficult to read, the director clearly noted that the record contained contradictions both in the job descriptions provided and the disparate organizational charts submitted. The petitioner, thus,

had adequate notice that the record was inconsistent regarding the beneficiary's claimed managerial capacity. The AAO observes that the record in this matter, including the job descriptions provided by the petitioner and counsel and the accompanying organizational charts do not depict an individual engaged in a position that is primarily managerial. The petitioner and counsel's description of the beneficiary's position and the organizational charts show the beneficiary is engaged in providing the services and operational tasks of a supervisor. The actual duties themselves 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 evidence in the record is insufficient to establish that the beneficiary's subordinates' duties are primarily managerial, supervisory, or professional. As observed above, counsel's assertion on appeal that one of the beneficiary's subordinates supervises nine employees is not adequately supported in the record and contradicts prior iterations of the beneficiary's duties. On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the petitioner encompass primarily managerial duties.

Beyond the decision of the director, the AAO observes that Skura Intercontinental Trading Co., Inc. employed the beneficiary when the petition was filed. The petitioner has submitted a California Form DE-6, Employer's Quarterly Wage Return that identifies this entity as the beneficiary's employer. As observed above, the petitioner is a limited liability company organized in New York that claims to own a 60 percent membership interest in [REDACTED] which based on separate Internal Revenue Service (IRS) Forms 1065, U.S. Return of Partnership Income, is a separate entity. The petitioner has not sufficiently established its relationship with the beneficiary's actual employer. Although the companies appear related, the petitioner has not established that the beneficiary has been employed for at least one 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.

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.

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.